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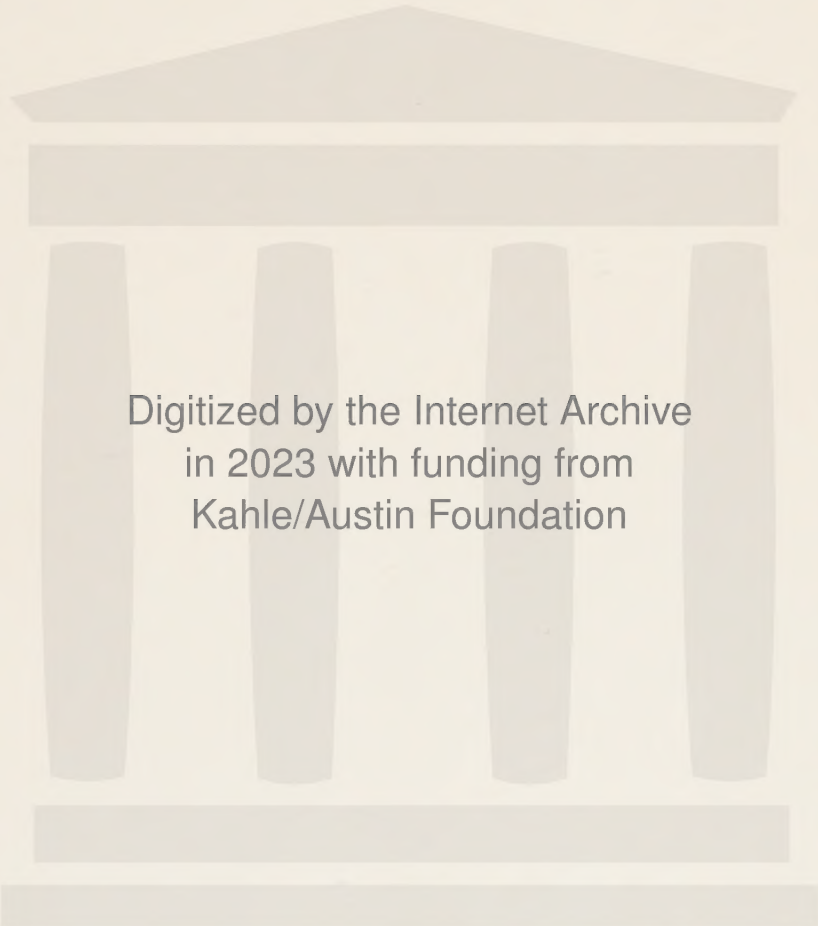
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CALIFORNIA RULES
RULES ON APPEAL FROM MUNICIPAL COURTS AND
INFERIOR COURTS IN CRIMINAL CASES
AMENDMENTS TO RULES * 3, 4, 6 AND 8

Effective January 6, 1947

Rules 3, 4, 6 and 8 of Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases were amended by the Judicial Council as follows. The amendments became effective on January 6, 1947.

Rule 3.

RECORD ON APPEAL.

(a) The record on an appeal to a Superior Court from a municipal or an inferior court in a criminal case shall consist of the following items, or so many thereof as may exist in the particular case:

1. The complaint;
2. The plea or pleas of the defendant;
3. All written instructions given, or requested and refused;
4. The verdict, or if a jury was waived, the entry of such waiver in the minutes or docket, and the finding of the court upon the issues;
5. Any written motion or notice of motion for new trial, in arrest of judgment or to dismiss or otherwise terminate the action, or the entry in the minutes or docket of any oral motion to the same effect, and the order of the court thereon;
6. Any demurrer to the complaint, and the order of the court thereon;
7. All other minutes of the court relating to the action;
8. The judgment, and the order appealed from, if the appeal is from an order;
9. The notice of appeal;
10. Any statement or transcript on appeal, or both, settled and certified by the trial judge as hereinafter provided for in Rules 4 and 7.

* See California Reporter 159-160 P.2d for Complete Rules.

11. All exhibits, instructions, orders, affidavits, papers and documents properly referred to and identified in such statement or transcript, as provided in Rule 4.

12. If the appeal is from an order made after judgment, items 2, 3, 4, 5, 6 and 7 may be omitted, and the record shall include any written motion and any written notice of motion, the denial or granting of which is the order appealed from, or the entry in the minutes or docket of any such oral motion, and all minutes of the court relating to such motion.

(b) The matters included in the foregoing items 1 to 9 inclusive, 11 and 12 of subdivision (a) of this rule, or so many of them as may be pertinent to the appeal taken, shall be prepared by the clerk of the trial court, or by the judge thereof if there is no clerk. The notice of appeal, matters appearing in the minutes or docket of the trial court and any other part of the record, the original of which it is not possible to transmit to the Superior Court, shall be copied and the copies made part of the record on appeal; but the originals of all other matters shall be included in the record. As soon as the statement on appeal, including the transcript, if any, has been settled and certified, or the right of the appellant to have a statement settled and certified shall have terminated, as elsewhere provided in these rules, the clerk of the trial court, or the judge thereof if there is no clerk, shall forthwith transmit the record on appeal, with his certificate that the parts thereof are originals or copies, as the case may be, to the clerk of the Superior Court to which the appeal is taken.

Rule 4.

STATEMENT OR TRANSCRIPT.

(a) Where a consideration of the evidence or any part thereof, or of any proceedings which do not otherwise constitute a part of the record on appeal as defined in Rule 3, is necessary to a determination of the appeal, the same must be set forth in a statement on appeal settled and certified as provided in these rules, and if not so set forth, it shall be presumed that they were such as to support the judgment or order appealed from. If all or any part of such evidence or other proceedings was reported by an official reporter, the appellant may give notice in his proposed statement that he intends to file a reporter's transcript of the evidence and proceedings so reported, and to make the same a part of the statement, and if he gives such notice he may omit any other statement of the evidence and proceedings so reported from his proposed statement.

(b) In every such statement the appellant shall specify the grounds on which he intends to rely upon appeal and set forth

so much of the evidence and other proceedings as are necessary for a decision upon said grounds. Said grounds of appeal shall be stated with sufficient particularity to apprise the court and the opposing party of the rulings or other matters of which the appellant intends to complain, but this may be done by any general description calling attention to the points to be made, without specifying each separate ruling or other matter to be complained of. If one of said grounds of appeal is insufficiency of the evidence, the particulars in which it is insufficient shall also be stated, unless a reporter's transcript containing the whole thereof is to be made a part of the statement. No ground of appeal not so specified shall be considered by the Superior Court unless it shall appear to the satisfaction of said Court that the record on appeal fairly and fully presents the evidence and other proceedings necessary for a decision thereon.

(c) It shall not be necessary in any such statement or transcript to copy any exhibit, instruction, order, affidavit, paper or document on file with the trial court, but the same may be merely referred to by any designation sufficient to identify it. If any point is to be made on appeal as to the giving, refusal or modification of instructions, it shall be necessary to show by said statement or transcript whether any oral instructions were given and, if so, what they were, and by whom requested, and if the written instructions included in the record under Rule 3 do not show by whom requested, or what modifications were made in instructions given as modified, these facts shall be set forth in the statement.

(d) If the appellant desires to have a statement settled, he shall, within five days after filing notice of appeal, serve on the respondent and file with the trial court a proposed statement on appeal. If in such proposed statement appellant gives notice that a reporter's transcript is to be filed and made a part thereof, as provided in subdivision (a) of this rule, he may file or cause to be filed, within fifteen days after the filing of his proposed statement, a transcript of the evidence or other proceedings reported by an official reporter, certified by that reporter to be correct, and shall within two days after such filing, notify the respondent thereof. Any such transcript, when settled and certified as provided in Rule 7, shall be deemed and become a part of the statement. If the transcript is not filed or notice is not given of its filing within the time limited by these rules or any lawful extension thereof, the appellant's right to have such transcript settled and certified as a part of his statement shall at once terminate and the trial court shall proceed upon the other parts of the proposed statement as provided in Rule 7. If the failure to file such transcript in time results from the refusal, failure or inability of the reporter to make all or any part of the transcript, the appellant may, within five days after

expiration of the time for filing such transcript, move the trial court for leave to file amendments to his statement to cover the matters originally proposed to be in such transcript. If the trial court grants such motion, the appellant shall serve and file such amendments within five days after the making of the order granting leave therefor, and such amendments and the original statement shall be settled and certified as provided in Rule 7. If the appellant fails to serve and file a proposed statement on appeal within the time limited by these rules, or any lawful extension thereof, his right to have such a statement settled and certified shall forthwith terminate.

Rule 6.

EXTENSIONS OF TIME AND RELIEF FROM DEFAULT.

(a) Extensions of Time. The court from which the appeal is taken, or a judge thereof, may for good cause shown by affidavit make an order granting not more than a total of fifteen days additional to the time limited in these rules for serving and filing the statement, or for filing the transcript and giving notice thereof, or for proposing amendments thereto, or for engrossing the statement or transcript, or both, and presenting the same for certification. The Superior Court to which an appeal is taken, or if the appeal is to be heard in an Appellate Department, the Presiding Judge thereof, may, for good cause shown by affidavit, further extend the time for doing any act required by these rules, except the time for filing the notice of appeal. Every such extension shall be made before the time extended, including any previous extensions thereof, has expired.

(b) Relief from Default. The Superior Court may for good cause relieve a party from a default occasioned by any failure to comply with these rules, except failure to give timely notice of appeal; provided that application for such relief must be made within thirty days after the default.

Rule 8.

ABANDONMENT OF APPEAL.

An appellant may at any time abandon his appeal by filing a written abandonment thereof. Such abandonment shall be filed in the trial court if the record has not yet been filed in the Superior Court, or in the Superior Court if the record has been filed in that court. Upon the filing of a written abandonment in the trial court the jurisdiction of that court shall thereby be restored and it shall at once take such proceedings as may be

necessary to enforce its judgment or order as if no such appeal had been taken. Upon the filing of such abandonment in the Superior Court, that court shall dismiss the appeal and issue its remittitur forthwith.

RULES ON APPEAL FROM MUNICIPAL COURTS IN CIVIL CASES

AMENDMENT TO RULE * 13

Effective January 6, 1947

Rule 13 of Rules on Appeal from Municipal Courts in Civil Cases was amended by the Judicial Council as follows. The amendment becomes effective on January 6, 1947.

Rule 13.

ABANDONMENT AND DISMISSAL.

(a) At any time before the filing of the record in the reviewing court, the appellant may file in the office of the clerk of the municipal court a written abandonment of the appeal; or the parties may file in said office a stipulation for abandonment. The filing of either document shall operate to dismiss the appeal and to restore the jurisdiction of the municipal court. Upon such a dismissal, the appellant shall be entitled to the return of that portion of any deposit in excess of the actual cost of preparation of the record on appeal up to that time.

(b) After the filing of the record in the reviewing court an appeal may be dismissed by that court on written request of the appellant or stipulation of the parties filed with the clerk of the reviewing court.

(c) If the appellant shall fail to perform any act necessary to procure the preparation or filing of the record on appeal or shall otherwise fail to prosecute his appeal with diligence, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed by the reviewing court on motion of the respondent or on its own motion.

(d) The clerk of the court in which an abandonment is filed shall immediately notify the adverse party of the filing thereof. The clerk of the reviewing court shall immediately notify the parties of any order of dismissal made by that court.

* See California Reporter 159-160 P.2d for Complete Rules.

CALIFORNIA REPORTER

171 PACIFIC REPORTER

SECOND SERIES

28 Cal.2d 657

PEOPLE v. TRIEBER.

Cr. 4699.

Supreme Court of California, in Bank.

July 30, 1946.

Rehearing Denied Aug. 26, 1946.

1. Indictment and information ⇨10

In prosecution under statute penalizing the making of an unauthorized connection with a telephone under control of telephone company, evidence before grand jury that the telephone lines involved were under the control of the telephone company and that defendant made an unauthorized connection gave trial court jurisdiction. Pen.Code, § 640.

2. Telegraphs and telephones ⇨79

Under statute penalizing any person making an unauthorized connection with telephone lines, the subscriber is punishable both for making connections himself without approval of the operator, or for permitting another to do so. Pen.Code, §§ 31, 591.

3. Statutes ⇨224

Statutes are to be construed so as to harmonize with one another.

4. Telegraphs and telephones ⇨79

The statute prohibiting "unauthorized" connections to telegraph or telephone wires, wire tapping, and unauthorized interception of private messages, must be read in the light of its context and the purpose of the statute and the provisions surrounding it, in order to determine what constitutes an unauthorized connection. Pen.Code, § 640.

5. Telegraphs and telephones ⇨79

The object of the statutes prohibiting unauthorized connections to telegraph or telephone wires, wire tapping, unauthorized interception of private messages, telephone or telegraph employees from using or ap-

propriating information derived from a private message addressed to another person, or bribing telegraph or telephone employees to disclose contents of a private message, is to prevent such employees from giving out to other than the addressee, or making a private use of, messages sent and received, and also to prevent persons, not employees, from getting possession of contents of messages and information not intended for and not delivered to them by wire tapping. Pen.Code, §§ 31, 591, 639-641.

6. Telegraphs and telephones ⇨79

Where defendant with assistance of a telephone employee, but without knowledge of the company, secured telephone extensions leading to defendant's apartment, which extensions were connected to telephones listed to other residents in the apartment building, extensions constituted an "unauthorized connection" within meaning of the statute penalizing unauthorized connections, notwithstanding the authorization of the telephone subscribers. Pen.Code, §§ 31, 591, 639-641.

See Words and Phrases, Permanent Edition, for all other definitions of "Unauthorized Connection".

7. Telegraphs and telephones ⇨79

The statute penalizing unauthorized connections with telephone lines under control of any telegraph or telephone company applies to wire tapping whether it be of the main or local switchboard or other instrument of any variety, or whether it be of a main trunk or smaller line, wire, or cable. Pen.Code, § 640.

8. Statutes ⇨205

A statute should be read and considered as a whole to determine the legislative intent.

9. Telegraphs and telephones ☞79

The statute penalizing any unauthorized connection with telephone lines under control of a telegraph or telephone company serves the purpose of protecting the secrecy of telegraphic and telephone messages, not by making the subscriber the sole judge as to when and whether a connection shall be made, but by strengthening, with criminal sanctions, the control of telegraph and telephone companies over their entire networks so that a company may more effectively supervise all connections. Pen. Code, § 640; Gen.Laws, Act 6386, § 14(b).

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Prosecution by the People of the State of California against Morris Trieber pursuant to an indictment charging the violation of law prohibiting tapping or making of any unauthorized connection with any telephone or telegraph wire, line, cable, or instrument under the control of any telegraph or telephone company. From an order dismissing the indictment, the People appeal.

Order reversed.

Prior opinion 163 P.2d 492.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and James F. Brennan, Chief Trial Atty., both of San Francisco, for appellant.

J. W. Ehrlich and Joseph A. Brown, both of San Francisco, for respondent.

TRAYLOR, Justice.

The People appeal from an order dismissing an indictment against defendant by the Grand Jury of the City and County of San Francisco. The indictment charged in separate counts two violations of section 640 of the Penal Code, which provides: "Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clan-

destinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company * * * is punishable as provided in section 639."¹

The testimony before the grand jury reveals that defendant, with the assistance of Thomas Dixon, an employee of the Pacific Telephone Company, but without the knowledge or authorization of the company, secured two telephone extensions, each of which led to an apartment maintained by defendant. Defendant, also without the knowledge or authorization of the telephone company, had previously secured a number of additional extensions leading to these apartments. The extensions in both apartments were connected to telephones listed to other residents of the apartment buildings. In exchange for the consent of these residents to the installation and use of the extensions, defendant paid their telephone bills. Defendant used the extensions in his bookmaking establishment.

The two extensions that are the basis for the two counts in the indictment were installed by Thomas Dixon at night, work for which defendant paid him substantial fees. Defendant was arrested at one of his apartments. When an investigation was later made of the other apartment, the extensions had been forcibly removed.

[1] Defendant, relying on *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713, contends that the trial court had no jurisdiction to try him for the offenses charged on the ground that there was no evidence before the grand jury that the telephone lines involved were "under the control of any telegraph or telephone company" or that defendant made an "unauthorized connection" within the meaning of section 640. In the present case, however, evidence was presented to the grand jury that defendant committed the offenses charged.

There was ample evidence that the telephone facilities were "under the control" of the Pacific Telephone Company. There

¹ Section 639 provides that punishment shall be "by imprisonment in the state prison not exceeding five years, or by imprisonment in the county jail not exceed-

ing one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

was testimony by the owner of the two apartment buildings in which defendant maintained his apartments that at defendant's request she had a telephone installed by the telephone company in a hall closet in one of the buildings, and that defendant paid the telephone bills for this station. Other witnesses testified that defendant paid the telephone bills issued by the telephone company to the subscribers to whose lines he made his connections. In addition, Herbert F. Schroeder, a supervisor and special agent for the Pacific Telephone Company, testified that it was his duty to investigate irregularities in wiring for this company and that in the performance of his duties he investigated the telephone lines allegedly tapped by defendant. Mr. Schroeder also testified that suspicion as to the wire tapping activities of Thomas Dixon was aroused by the irregular handling of an order to repair a tapped line that was received by the company, and that because of these activities the company discharged Mr. Dixon from its employ. Thomas Dixon testified that the telephone company had no knowledge of his wire tapping activities. Mr. Schroeder also described in detail the telephone equipment in defendant's apartments installed without company knowledge or authorization. His testimony revealed that he was instrumental in the investigation leading to and following defendant's arrest, and that he was present at the arrest.

Defendant bases his contention that the connections which were authorized by the subscribers, were not "unauthorized" within the meaning of section 640 on the ground that since section 591 of the Penal Code² protects the telephone company against unauthorized connections, and since statutes should be construed so as to give a special meaning to each, section 640 should be read as simply protecting the subscriber's right to privacy and therefore as requiring only the subscriber's authorization. The subscriber, however, cannot, without the ap-

proval of the telephone company, authorize a connection to a telephone wire, for in so doing he would subject himself to imprisonment and fine under section 591. This section protects telegraph and telephone facilities from physical injury by prescribing punishment for one who "takes down, removes, injures or obstructs" such facilities. It also safeguards communication and power systems from theft of services or of electric current by prescribing punishment for one who "makes any unauthorized connection" with telephone, telegraph or "other electric" lines or facilities.

[2, 3] A subscriber is therefore punishable under section 591 if he makes a connection to his telephone line without the approval of the operator of the line. See *Davis v. Pacific Telephone & Telegraph Co.*, 127 Cal. 312, 57 P. 764, 59 P. 698; 24 Cal.Jur. 507. A subscriber is also punishable thereunder if, instead of making the connection himself, he permits another to make it without the authority of the operator of the system, for by so enabling another to violate section 591 he becomes punishable himself under section 31 of the Penal Code as a principal to the crime. See *People v. Nolan*, 144 Cal. 75, 79, 77 P. 774; *People v. Ojeda*, 132 Cal.App. 593, 599, 23 P.2d 316. Statutes are to be construed so as to harmonize with one another (*Southern Pacific Co. v. Railroad Comm.*, 13 Cal.2d 89, 100, 87 P.2d 1055; *People v. Pryal*, 25 Cal.App. 779, 780, 147 P. 114, 115; see 23 Cal.Jur. 761), and it cannot be assumed that the Legislature refers in one section to an authorization that it declares punishable in another.

[4-6] It does not follow, however, that because a subscriber alone cannot authorize a connection within the meaning of section 640 that the prohibition of that section is merely a superfluous repetition of the provision in section 591 that prohibits an unauthorized connection. The term "unauthorized" in section 640 must be read in the

² "Every person who unlawfully and maliciously takes down, removes, injures or obstructs or makes any unauthorized connection with any line of telegraph or telephone, or any other line used to conduct electricity, or any part thereof, or appurtenances or apparatus connected there-

with, or severs any wire thereof, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year."

light not only of its context, but of the purpose of the section and the provisions surrounding it. Section 640, in addition to prohibiting wire tapping, forbids unauthorized interception of private messages. Section 639 forbids telegraph or telephone employees to use or appropriate information derived from a private message addressed to another person. Section 641 forbids bribing telephone or telegraph employees to disclose the contents of a private message. The object of these sections "is to prevent the employees of telegraph and telephone lines and offices from giving out to other than the addressee, or making a private use of, messages sent and received; and also to prevent persons not employees from getting possession of the contents of messages and information not intended for and not delivered to them; that is, by the means popularly known as 'wire tapping.'" Kerr's Cyc.Codes of Cal., comment by editor on § 640, p. 739; see, also, *People v. Kynette*, 15 Cal.2d 731, 745, 104 P.2d 794. In the light of this purpose, it is clear that a telephone company cannot authorize others to make a connection to a subscriber's individual station without his approval. It follows, therefore, that a connection to the station of an individual subscriber, such as was made by defendant, is an "unauthorized connection" under section 640 unless it was made with the authorization of the subscriber as well as the telephone company.

[7,8] That the authorization of an individual subscriber alone, however, does not make a connection to his station lawful within the meaning of section 640 is clearly indicated by the provisions of that section. These provisions relate only to connections to company controlled facilities, a limitation that indicates that they refer to the authorization of the company controlling the network involved. Moreover, the provisions prohibit not merely unauthorized connections to wires leading to stations of individual subscribers, but the tapping of "any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph

or telephone company." The section thus applies to tapping whether it be of a main or local switchboard or other instrument of any variety, or whether it be of a main trunk or smaller line, wire, or cable. An individual subscriber ordinarily has no interest in or control of the use of any wire, line, cable or instrument that transmits a number of messages from many sources at the same time. Furthermore, section 640 prohibits the tapping of any telegraph as well as of any telephone wire, line, cable, or instrument. There are ordinarily no "subscribers" using telegraph facilities controlled by a telegraph company that have lines leading to private stations to which they might attempt to authorize connections, and connections to telegraph apparatus also can be authorized only by a telegraph company. A statute should be read and considered as a whole to determine the legislative intent. *People v. Moroney*, 24 Cal.2d 638, 642, 150 P.2d 888; see 23 Cal.Jur. 760. Since in all these instances only the telegraph or telephone company can authorize a connection, it cannot be doubted that the section requires company authorization when a line leading to the station of an individual subscriber is tapped.

Even if the line to which the connection is made should lead only to his station it would not be reasonable to allow the subscriber alone to authorize connections unknown to the company for the additional reason that he does not have exclusive use of this line. Other persons communicating over the line from an outside telephone are also within the protection of section 640, but they would not be protected if the subscriber alone could authorize a connection.

[9] Section 640 serves the purpose of protecting the secrecy of telegraphic and telephonic messages, not by making any subscriber the sole judge as to when and whether a connection shall be made, but by strengthening with criminal sanctions the control of the telegraph and telephone companies over their entire networks, so that a company may more effectively supervise all connections.³ It is of

³ Pursuant to Act 6386, section 14(b), Public Utilities Act, Stats.1915, p. 115, as amended, 2 Deering's Gen.Laws, Act 6386, p. 2475, and rules and regulations

of the Railroad Commission thereunder (Utilities Gen. Order No. 96), the Pacific Telephone Company filed and received commission approval of Regulation No.

public concern that communication systems controlled by public utilities be supervised in such a manner that all persons using such facilities may be assured that their communications cannot be intercepted by means of connections made without the knowledge and direction of the company.

The order is reversed.

GIBSON, C. J., and SHENK, ED-MONDS, and SPENCE, JJ., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



28 Cal.2d 652

CARR v. WM. C. CROWELL CO. et al.
L. A. 19717.

Supreme Court of California, in Bank,
July 30, 1946.

1. Master and servant ⇨306

An employer is liable for willful and malicious torts of his employee committed in the scope of the employment.

2. Master and servant ⇨302(3)

If assault by general building contractor's employee on subcontractor's employee resulted from a dispute arising out of employment, general contractor would be liable for injuries sustained by subcontractor's employee, even though the assault did not further general contractor's interests as an employer and assaulting employee did not intend by his conduct to further such interests. Civ.Code, § 2338.

3. Master and servant ⇨302(3)

Under statute making principal liable for wrongful acts of agent committed in and as part of principal's business, it is not necessary, in order to impose liability on employer for injuries sustained when employee assaulted third person, that the assault should have been made as a means or for the purpose of performing the work which the employee was employed to do, but it is sufficient if the injury resulted from a dispute arising out of the employment. Civ.Code, § 2338.

4. Master and servant ⇨300

An employer's responsibility for tortious conduct of employee extends far beyond employer's actual or possible control over the conduct of the employee, and rests on the broader ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while acting in the scope of their employment. Civ.Code, § 2338.

5. Master and servant ⇨300

The risk that someone might be injured, arising out of necessity of employees' associating with third persons, is a risk of employment.

6. Master and servant ⇨306

An employer is not liable for injuries inflicted by employee out of personal malice not engendered by the employment. Civ. Code, § 2338.

7. Master and servant ⇨302(3)

A general building contractor was liable for injuries sustained when employee threw hammer at subcontractor's employee,

19 (Rev. Sheet C.R.C. No. 51362-T), dealing with "Ownership and Use of Instrumentalities on Subscribers' Premises":

"The Company shall own, furnish, and maintain all facilities, including instrumentalities, inside wiring, protective apparatus, and other equipment necessary to provide telephone service, except as may be otherwise specified in the rate schedules. All facilities provided shall conform to the established construction standards of the Company.

"All instrumentalities and equipment furnished by the Company in connection with a subscriber's service shall be care-

fully used and only duly authorized employees of the Company shall be allowed to connect, disconnect, move, change, or alter in any manner, any or all such instrumentalities and equipment.

"No apparatus or appliance not provided or authorized by the Company shall be attached to or used in connection with telephone equipment and facilities provided by the Company.

"The subscriber will be held responsible for loss of or damage to any equipment or apparatus furnished by the Company, unless such loss or damage is due to causes beyond his control."

notwithstanding that after the assault the contractor's employee did no further work on the premises, where contractor's employee threw the hammer while engaged in his employment, and as an immediate outgrowth thereof, and the altercation leading to the assault arose over performance of duties of general contractor's employee, who had no personal grudge against subcontractor's employee. Civ.Code, § 2338.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action for damages for injuries resulting from an assault, by Hubert L. Carr against William C. Crowell Company, R. A. Crowell, and others. From a judgment in favor of R. A. Crowell on a directed verdict, the plaintiff appeals.

Reversed.

Prior opinion, App., 166 P.2d 371.

Lasher B. Gallagher, of Los Angeles, for appellant.

Kenneth J. Murphy, of Los Angeles, for respondent.

TRAYNOR, Justice.

Defendant Crowell is a general building contractor. About 10 a.m. on February 2, 1944, Herman W. Enloe, one of defendant's employees, marked and tacked a 20-foot 2 x 4 plate temporarily in place on the second floor of a building under construction. This work ordinarily followed the laying of the hardwood floors and their oiling for protection from the weather. The floor on the second story of the building had not yet been oiled. Plaintiff, an employee of a subcontractor, was laying flooring between two stairways leading to the second floor. He observed Enloe's activities and remarked, "Take it easy, they (the hardwood floor men) are not through yet." Enloe replied, "I am taking it easy." Plaintiff then dislodged the plate and threw it onto the roof of a porch at a lower part of the building. Enloe remarked, "You think you have done something smart." Plaintiff then returned to his floorlaying. Enloe engaged in other work for about 15 minutes, then retrieved the plate and again began to tack it in place.

Plaintiff walked towards the plate and kicked it off the floor. Immediately thereafter, while he was standing about 15 feet from Enloe, the latter threw his carpenter's hammer at plaintiff, striking him on the head and seriously injuring him. Enloe left the building and went to defendant's office on the premises, where he remained for two hours. He did no more work on the building, and quit his employment with defendant on the following day. He resumed his employment with defendant in April 1944.

Plaintiff brought action against Enloe and defendant Crowell for damages. There is no dispute as to the facts; Enloe's testimony was substantially the same as plaintiff's. At the close of the testimony the trial court directed a verdict for defendant Crowell. The jury returned a verdict in plaintiff's favor against Enloe and judgment was entered accordingly. This appeal is solely from the judgment on the directed verdict.

[1] It is settled that an employer is liable for wilful and malicious torts of his employee committed in the scope of the employment. *Deevy v. Tassi*, 21 Cal.2d 109, 125, 130 P.2d 389; *Ruppe v. City of Los Angeles*, 186 Cal. 400, 402, 199 P. 496; *Johnson v. Monson*, 183 Cal. 149, 151, 190 P. 635; *Stansell v. Safeway Stores*, 44 Cal. App.2d 822, 826, 113 P.2d 264; *Transcontinental & W. Air, Inc., v. Bank of America*, 46 Cal.App.2d 708, 713, 116 P.2d 791; *Martin v. Leatham*, 22 Cal.App.2d 442, 444, 71 P.2d 336; *Hiroshima v. Pacific G. & E. Co.*, 18 Cal.App.2d 24, 28, 63 P.2d 340; *Muehlebach v. Paso Robles Springs Hotel*, 65 Cal.App. 634, 225 P. 19; *Korkman v. Hanlon Drydock etc. Co.*, 53 Cal.App. 147, 199 P. 880; see 35 Am.Jur. 995, 1007, n. 5; *Prosser on Torts*, 479; 17 Cal.L.Rev. 185; 12 So.Cal.L.Rev. 196; 45 Harv.L.Rev. 342. Language in *Wiersma v. City of Long Beach*, 41 Cal.App.2d 8, 13, 106 P.2d 45, that an employer is not responsible for such torts is contrary to the established rule in this state and is disapproved.

[2,3] Defendant contends that Enloe was not acting in the scope of his employment when he injured plaintiff, on the grounds that the throwing of the hammer

did not further defendant's interests as an employer and that Enloe could not have intended by his conduct to further such interests. It is sufficient, however, if the injury resulted from a dispute arising out of the employment. Under the provisions of section 2338 of the Civil Code a principal is liable for "wrongful acts" of his agent committed "in and as a part of" the principal's business. "It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he (the employee) was employed to do.'" *Hiroshima v. Pacific G. & E. Co.*, 18 Cal. App.2d 24, 28, 63 P.2d 340, 342; *Stansell v. Safeway Stores*, 44 Cal.App.2d 822, 824, 113 P.2d 264; see *Johnson v. Monson*, 183 Cal. 149, 152, 190 P. 635; *Gulf, C. & S. F. Ry. Co. v. Cobb*, Tex.Civ.App., 45 S.W.2d 323; *New Ellerslie Fish Club v. Stewart*, 123 Ky. 8, 13, 93 S.W. 598, 9 L.R.A., N.S., 475; *Richberger v. American Exp. Co.*, 73 Miss. 161, 169, 18 So. 922, 31 L.R.A. 390, 55 Am. St.Rep. 522; *Davis v. Merrill*, 133 Va. 69, 77, 112 S.E. 628; see 35 Am.Jur. 995; 2 Mechem, Agency, 2d Ed., §§ 1929, 1960, 1961; 45 Harv.L.Rev. 342, 344, n. 5; 44 Harv.L.Rev. 642. In *Stansell v. Safeway Stores*, supra, 44 Cal.App.2d 822, 113 P.2d 264, one of defendant's grocery store managers was held to be acting in the scope of his employment when he quarreled with a customer over an order, and after an exchange of opprobrious names, ran after and injured her. In *Hiroshima v. Pacific G. & E. Co.*, supra, 18 Cal.App.2d 24, 63 P.2d 340, it was held that the defendant's employee, whose duties were to collect power bills, was acting in the scope of his employment when he struck a customer in the course of a dispute as to whether the customer had received a notice that his electric service would be discontinued if he did not pay his bill.

[4, 5] The employer's responsibility for the tortious conduct of his employee "extends far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others" while acting in the scope of their

employment. *Chase v. New Haven Waste Material Corp.*, 111 Conn. 377, 379, 380, 150 A. 107, 68 A.L.R. 1497; *Wolf v. Sulik*, 93 Conn. 431, 436, 106 A. 443, 4 A.L.R. 356; see 35 Am.Jur. 974. Such injuries are one of the risks of the enterprise. See *Hiroshima v. Pacific G. & E. Co.*, supra, 18 Cal. App.2d 24, 28, 63 P.2d 340; *Stansell v. Safeway Stores*, supra, 44 Cal.App.2d 822, 824, 113 P.2d 264; *Johnson v. Monson*, supra, 183 Cal. 149, 151, 190 P. 635; *Martin v. Leatham*, supra, 22 Cal.App.2d 442, 445, 71 P.2d 336; *Yates v. Taft Lodge*, 6 Cal. App.2d 389, 390, 44 P.2d 409; *Round v. Delaware, etc., R. Co.*, 64 N.Y. 129, 134, 21 Am.Rep. 597; *Doyle v. Scott's Cleaning Co.*, 224 Mo.App. 1168, 31 S.W.2d 242, 245; *Chase v. New Haven Waste Material Corp.*, supra, 111 Conn. 377, 379-381, 150 A. 107, 68 A.L.R. 1497; *Higgins v. Watervliet Turnpike & R. Co.*, 46 N.Y. 23, 26, 7 Am. Rep. 293; *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 64 A.L.R. 293; *Stone v. William M. Eiser Co.*, 219 N.Y. 205, 114 N.E. 44, L.R.A. 1918B, 291; see Seavey, *Speculations as to "Respondeat Superior,"* Harv. Legal Essays, 433, 439, 445, 450; Wigmore, *Responsibility for Tortious Acts*, 7 Harv.L.Rev. 383, 392-399; Pound, *The Economic Interpretation of Torts*, 53 Harv.L.Rev. 365, 376, 377; 45 Harv.L.Rev. 342, 344, n. 5; 35 Am. Jur. 974, 1007, n. 5; 2 Mechem, Agency, 2d Ed., 1523; *Henderson v. Nolting First Mortg. Corp.*, 184 Ga. 724, 193 S.E. 347, 114 A.L.R. 1033; *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 A. 671, 55 A.L.R. 1197. In the present case, defendant's enterprise required an association of employees with third parties, attended by the risk that someone might be injured. "The risks of such associations and conditions were risks of the employment." Cardozo, J., in *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 472, 128 N.E. 711, 13 A.L.R. 522. Such associations "include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional

makeup. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. Work could not go on if men became automatons repressed in every natural expression. * * * These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment." *Hartford Acc. & Ind. Co. v. Cardillo*, 72 App.D.C. 52, 112 F.2d 11, 15; *Pacific Emp. Ins. Co. v. Industrial Acc. Comm.*, 26 Cal.2d 286, 291, 158 P.2d 9, 159 A.L.R. 313; *Leonbruno v. Champlain Silk Mills*, supra, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522; see 35 Am.Jur. 1007, n. 5; *Prosser on Torts*, 529, at n. 60. *Stephenson v. Southern Pacific Co.*, 93 Cal. 558, 562, 29 P. 234, 15 L.R.A. 475, 27 Am.St.Rep. 223, which was decided in 1892, is contrary to the course of decisions since that time and is therefore overruled.

[6,7] Defendant stresses the fact that Enloe did no further work on the premises after the incident. This fact is not significant, for Enloe threw the hammer while still engaged in his employment and as an immediate outgrowth thereof.

If an employee inflicts an injury out of personal malice, not engendered by the employment, the employer is not liable. *Yates v. Taft Lodge*, 6 Cal.App.2d 389, 390, 44 P.2d 409; *Miller v. Citizens Nat. T. & S. Bank*, 1 Cal.App.2d 470, 477, 36 P.2d 1088; *Figone v. Guisti*, 43 Cal.App. 606, 611, 185 P. 694; *Linck v. Matheson*, 63 Wash. 593, 596, 116 P. 282; *Keller v. Gunn Supply Co.*, 62 Utah 501, 505, 220 P. 1063, see 2 *Mechem, Agency*, supra, 1523; *Prosser on Torts*, 480; 114 A.L.R. 1034; 40 A.L.R. 1212. The evidence here presented indicates without conflict that the injury to plaintiff was an outgrowth of Enloe's employment. Not only did the altercation leading to the injury arise solely over the performance of Enloe's duties, but his entire association with plaintiff arose out of his employment on the building under construction. He had never seen plaintiff before the day preceding the accident, and had never conversed with him before the dispute over the plate.

He testified in addition that he was not angry with plaintiff before the dispute; that he had no personal grudge against him; and that he threw the hammer immediately, without "winding up," on seeing the plate "go past (his) face."

The judgment in favor of defendant Crowell is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concurred.



28 Cal.2d 460

**RESCUE ARMY et al. v. MUNICIPAL
COURT OF CITY OF LOS
ANGELES.
L. A. 18946.**

Supreme Court of California, in Bank.
June 26, 1946.

Rehearing Denied July 24, 1946.

1. Prohibition ⇐10(1)

The constitutionality of a statute or ordinance may be tested by prohibition on ground that invalidity of legislation goes to jurisdiction of court to proceed to try case. *Code Civ.Proc.* § 1102.

2. Judgment ⇐489

Prohibition is not unavailable as remedy to test constitutionality of statute or ordinance on ground that application of theory that constitutionality goes to jurisdiction might render otherwise final judgments subject to collateral attack. *Code Civ. Proc.* § 1102.

3. Certiorari ⇐28(1)

Prohibition ⇐10(1)

In certiorari and prohibition proceedings, term "jurisdiction" has a very broad meaning, and writ may be granted where court has no jurisdiction to act except in a particular manner, even though it has jurisdiction in the fundamental sense over subject matter and parties. *Code Civ.Proc.* § 1102.

4. Courts ⚡39

A court has jurisdiction to determine its own jurisdiction.

5. Prohibition ⚡17

Before remedy by prohibition is available it is necessary to challenge jurisdiction of trial court in that court by demurrer, motion, plea or other objection, and unless a party can show that a lower tribunal, after first determining that it has jurisdiction, is proceeding to exercise it, there is nothing for a higher court to prohibit. Code Civ.Proc. § 1102.

6. Constitutional law ⚡45

A trial court is not deprived of jurisdiction to determine constitutionality of a particular ordinance or statute because it may decide question erroneously.

7. Prohibition ⚡17

Where trial court has decided in favor of its own jurisdiction and is purporting to exercise it, a higher court will in an appropriate case restrain lower court from acting in excess of jurisdiction. Code Civ. Proc. § 1102.

8. Prohibition ⚡20

A petition for writ of prohibition should affirmatively allege that challenge to jurisdiction was raised in lower court. Code Civ.Proc. § 1102.

9. Prohibition ⚡3(1)

Prohibition is unavailable if there is a plain, speedy, and adequate remedy in the ordinary course of law.

10. Prohibition ⚡3(1)

The fact that petitioner, if convicted for violation of ordinance and imprisoned, could then resort to habeas corpus, did not preclude maintenance of prohibition proceeding to restrain court from trying petitioner on ground of unconstitutionality of ordinance.

11. Prohibition ⚡3(1)

A remedy is not "inadequate" merely because more time would be consumed by pursuing it through ordinary course of law than would be required in use of extraordinary writ of prohibition.

See Words and Phrases, Permanent Edition, for all other definitions of "Inadequate Remedy".

171 P.2d—1½

12. Courts ⚡209(2)

A reviewing court has discretion to determine whether circumstances justify use of prohibition to restrain a lower tribunal from acting without or in excess of its jurisdiction, and may consider desirability of prompt settlement of an important jurisdictional question. Code Civ.Proc. § 1102.

13. Prohibition ⚡3(4)

Where petitioner had been subjected to two trials for violation of municipal ordinance and had successfully prosecuted two appeals, and application for writ to restrain a third trial was denied by District Court of Appeal, Supreme Court would not refuse to determine jurisdictional question involved in proceeding to restrain a third trial of petitioner on ground that there was a plain, speedy, and adequate remedy by trial and appeal.

14. Constitutional law ⚡84, 274

A person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons. Const.Cal. art. 1, § 21; U.S.C.A. Const. Amends. 1, 14.

15. Constitutional law ⚡84, 274

The provision of ordinance regulating solicitation of funds for charity that no person should solicit contributions unless he exhibited an information card giving information with regard to purpose of solicitation does not deny religious liberty. Const.Cal. art. 1, § 21; U.S.C.A. Const. Amends. 1, 14.

16. Municipal corporations ⚡621

A provision of ordinance requiring persons soliciting charitable contributions by means of receptacles in certain specified publicly owned or controlled places to secure express written permission of board warrants denial of permit only if information furnished to board discloses fraud, or, if solicitation as planned, would interfere with public convenience and safety.

17. Constitutional law ⚡84, 274

A provision of ordinance requiring persons soliciting charitable contributions

by means of receptacles in certain specified public places to secure express written permission of board is valid if construed as warranting denial of permit only if solicitation is fraudulent or would interfere with public convenience and safety. Const.Cal. art. 1, § 21; U.S.C.A. Const.Amends. 1, 14.

18. Constitutional law ⚖84, 274

A provision of ordinance regulating solicitation of funds for charity that no person should solicit by means of a receptacle in certain public places without filing a notice of intention containing information as to purpose of solicitation is valid. Const.Cal. art. 1, § 21; U.S.C.A. Const. Amends. 1, 14.

19. Prohibition ⚖26

Where allegations in support of contention that ordinance was being unconstitutionally applied were denied by answer in prohibition proceeding, issues of fact thus presented would not be determined.

CARTER, SCHAUER, and EDMONDS JJ., dissenting

Prohibition proceeding by the Rescue Army and others against the Municipal Court of the City of Los Angeles to restrain the respondent from proceeding to try the petitioner Murdock for alleged violation of certain sections of an ordinance regulating the solicitation of contributions.

Alternative writ discharged and peremptory writ denied.

Robert H. Wallis, of Los Angeles, for petitioners.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

Victor Ford Collins, Francis D. R. Moote, and David Coleman, all of Los Angeles, amici curiae on behalf of respondent.

GIBSON, Chief Justice.

Petitioners seek a writ of prohibition to restrain the Municipal Court of the City of Los Angeles from proceeding to try peti-

tioner Murdock for the alleged violation of certain sections of an ordinance, regulating the solicitation of contributions, which it is claimed are in conflict with the federal Constitution, Amendments I and XIV, and the California Constitution, article I, section 21. It is alleged that Murdock has been twice convicted of a violation of the ordinance, that each time the conviction was reversed by the appellate department of the superior court, that a third trial has been ordered, and that the respondent court will proceed therewith unless restrained.

[1] The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case. See *Whitney v. Superior Court*, 182 Cal. 114, 187 P. 12; *Levy v. Superior Court*, 105 Cal. 600, 38 P. 965, 29 L.R.A. 811; *Arfsten v. Superior Court*, 20 Cal.App. 269, 275, 128 P. 949; cf. *Broady v. Jennings*, 70 Cal.App. 647, 234 P. 120. This rule is supported by the great weight of authority in other states. See cases collected in 113 A.L.R. 796, 800; 42 Am.Jur. 168. The same principle has been applied in cases where habeas corpus has been used to test the constitutionality of an ordinance. See *In re McCoy*, 10 Cal.App. 116, 124, 125, 101 P. 419; *In re Vitalie*, 117 Cal.App. 553, 557, 4 P.2d 171; cf. *Ex parte Kearny*, 55 Cal. 212; *Ferris, Extraordinary Remedies* (1926) 83; 1 *Bailey on Habeas Corpus* (1913) 91-93; 25 Am.Jur. 164. Although the right to discharge by habeas corpus is not limited to cases in which a court has exceeded its jurisdiction (see *Pen.Code*, §§ 1485, 1487; *Ex parte Bell*, 19 Cal.2d 488, 492-495, 122 P.2d 22; *Portnoy v. Superior Court*, 20 Cal.2d 375, 378, 125 P.2d 487), the writ has been traditionally used for that purpose. See *In re Vitalie*, 117 Cal.App. 553, 557, 4 P.2d 171.

[2] The view that constitutionality goes to jurisdiction has at times disturbed the courts because of the possibility that full application of the theory might render otherwise final judgments vulnerable to collateral attack, and confusion also has sometimes arisen because of a failure to understand that a court has jurisdiction to

determine its own jurisdiction in the first instance. The difficulties inherent in applying the term jurisdiction in cases involving unconstitutional statutes impelled the court in the Bell case to recognize that habeas corpus may be used in certain situations to test the constitutionality of a statute whether or not there is a want of jurisdiction. 19 Cal.2d at pages 492 et seq., 122 P.2d 22. In prohibition, however, we are limited by statute to proceedings without or in excess of jurisdiction (Code Civ.Proc. § 1102) and we are therefore squarely confronted with the problems referred to above.

[3] The fact that a trial court has no jurisdiction within the meaning of the term as used in certiorari and prohibition proceedings does not mean that a judgment based upon an unconstitutional statute is open to collateral attack. In *Chicot County D. Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329, a civil case, the court declared that broad statements to the effect that unconstitutional laws confer no rights whatsoever must be taken with qualifications and that a decree based upon an assumption of validity is res judicata. See, also, 136 A.L.R. 1032; (1942) 28 Va.L.Rev. 656-657; (1942) 27 Iowa L.Rev. 315-322 and (1942) 26 Minn. L.Rev. 658-661. In certiorari and prohibition proceedings the term jurisdiction has a very broad meaning, and a writ may be granted where the court has no jurisdiction to act except in a particular manner, even though it has jurisdiction, in the fundamental sense, over the subject matter and the parties. *Abelleira v. District Court of Appeals*, 17 Cal.2d 280, 287 et seq., 109 P.2d 942, 132 A.L.R. 715; *Hill v. Superior Court*, 16 Cal.2d 527, 106 P.2d 876; *Fortenbury v. Superior Court*, 16 Cal.2d 405, 106 P.2d 411. It does not follow, therefore, that to allow prohibition in such cases will result in opening the door to collateral attack.

[4,5] The Bell case correctly declares that the trial court has jurisdiction to determine whether the statute is constitutional, and the same is true as to any other jurisdictional defense. The mere assertion of a claim of unconstitutionality does not oust the trial court of jurisdiction, because

the very issue of constitutionality is one which the court has jurisdiction to determine. See discussion, *Ex parte Bell*, supra, 19 Cal.2d 488, 492, 122 P.2d 22. This proposition, however, is not inconsistent with the holding that prohibition lies to restrain a court from proceeding without or in excess of jurisdiction. See *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; *Hill v. Superior Court*, 16 Cal.2d 527, 106 P.2d 876. A court has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance. It is necessary, therefore, to challenge the jurisdiction of the trial court *in that court*, by demurrer, motion, plea or other objection of some kind, so that *that court* may preliminarily decide the question whether it has jurisdiction to proceed. And unless a party can show that a lower tribunal, *after first determining that it has jurisdiction, is proceeding to exercise it*, there is nothing for a higher court to prohibit. This obvious principle is one of the cornerstones of our system of lower and higher tribunals.

[6] The statement in *Portnoy v. Superior Court*, 20 Cal.2d 375, 378, 125 P.2d 487, that a trial court is not deprived of jurisdiction to determine the constitutionality of a particular ordinance or statute by virtue of the fact that it may decide the question erroneously, is properly applicable to this basic right of the trial court to decide the question of jurisdiction in the first instance.

[7,8] When, however, the trial court has heard and determined the jurisdictional challenge, and has decided in favor of its own jurisdiction, and then proceeds to *act*, that is, *to try* the cause on its merits, the situation is entirely different. It then may be properly claimed that a court without jurisdiction is purporting to *exercise it*. At this stage, jurisdiction to determine jurisdiction has been exercised, and the higher courts will, in an appropriate case, restrain the lower court from acting in excess of jurisdiction (see, e. g., *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713; *Abelleira v. District Court of Appeal*, 17

Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; *Jackson v. Superior Court*, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422. The petition should affirmatively allege that the challenge to jurisdiction was raised in the lower court.

Although the petition in the present case does not affirmatively allege that the jurisdiction of the municipal court was challenged by an appropriate motion, the parties do not assert such a challenge was not made, and since *Murdock* has been twice tried for the violation of an ordinance which from the outset he has claimed to be unconstitutional, and the case has been set for trial a third time, it is apparent that the court has decided in favor of its own jurisdiction and is proceeding to exercise it. Moreover, although the requirement that before applying for prohibition the claim of unconstitutionality must be made in the trial court has been generally observed in practice (see *Jackson v. Superior Court*, *supra*, and *Greenberg v. Superior Court*, *supra*) the requirement that the petition must affirmatively allege compliance with the condition has not been emphasized in previous decisions of this court. Under these circumstances we have determined that it is not in the interests of justice to refuse to entertain the application because of the absence of a more complete showing in the petition.

[9,10] It is not, of course, a proper case for prohibition if there is a plain, speedy, and adequate remedy in the ordinary course of law. As we have seen, the constitutional challenge may ordinarily be made by demurrer or motion in the trial court. In addition, habeas corpus may be used to test the constitutionality of a statute (*Ex parte Bell*, 19 Cal.2d 488, 122 P.2d 22), and the availability of that remedy has been held to be a complete bar to the issuance of prohibition. *Leach v. Superior Court*, 1932, 215 Cal. 531, 12 P.2d 1. But where, as here, the defendant cannot use habeas corpus because he is not being deprived of his liberty, he should not be refused prohibition, while awaiting trial, solely on the ground that habeas corpus would be available if he would submit to imprisonment.

[11] The next question, therefore, is whether trial and appeal are adequate remedies under the circumstances of this case. A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of the extraordinary writ of prohibition. *Bennett v. Superior Court*, 218 Cal. 153, 156, 21 P.2d 946; *Lindley v. Superior Court*, 141 Cal. 220, 74 P. 765; *Agassiz v. Superior Court*, 90 Cal. 101, 27 P. 49. Experience has shown that most of the meritorious defenses are sustained and most of the unsubstantial constitutional or other objections are weeded out at the proper time on the proper showing during the trial or on appeal. These remedies are therefore considered adequate in the usual situations. If this were not so, then whenever jurisdiction is challenged prohibition would lie and the trial of the case would be interrupted until the reviewing court passed upon the intermediate question and appellate courts in many cases would be converted into *nisi prius* courts. *Agassiz v. Superior Court*, 90 Cal. 101, 103, 27 P. 49.

It does not follow, however, that the remedies of trial and appeal must be considered adequate in all situations. It has been held in two recent cases that these remedies did not afford sufficient relief under the circumstances there presented. *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713; *Jackson v. Superior Court*, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422. In the *Jackson* case an attempt was made to retry the defendants on the identical charge for which they previously had been in jeopardy. In the *Greenberg* case there was an indictment of an individual against whom no evidence at all was presented to the grand jury. The issue of jurisdiction was first raised in both cases by motion or demurrer in the trial court and petitioners sought prohibition only after an adverse ruling below. The disregard of the fundamental rights of the defendants in these cases was so obvious and flagrant that this court felt that the expense, effort and delay of trial in the superior court would be an unfair burden on the petitioners.

[12] The fact that the remedies of trial and appeal were considered adequate in some cases and not in others does not mean that the application for the writ was arbitrarily granted in one and refused in another or that the decisions cannot be reconciled on principle. It is difficult, if not impossible, to lay down a hard and fast rule which will govern all situations, and it must be determined in each case, not only on the basis of precedent but from an examination of all the facts, whether there is an adequate remedy in the ordinary course of law. A reviewing court, in order to prevent a failure of justice, has discretion in accordance with established legal principles and practice, to determine the circumstances which justify the use of prohibition to restrain a lower tribunal from acting without or in excess of its jurisdiction. And in the exercise of that discretion it may take into consideration the desirability of the prompt settlement of an important jurisdictional question so that a multiplicity of void proceedings in other cases will be prevented.

[13] As heretofore pointed out, petitioner Murdock has been subjected to two trials and has successfully prosecuted two appeals from judgments of conviction. We granted a hearing in this matter after petitioners' application for a writ to restrain a third trial was denied by the district court of appeal, and, in order to secure uniformity of decision of related problems transferred to this court the appeal in *Gospel Army v. City of Los Angeles*, 27

Cal.2d 232, 163 P.2d 704, in which plaintiff sought to enjoin the enforcement of the same ordinance. We should not under these circumstances, in fairness to petitioner and respondent court, refuse to decide in this proceeding the jurisdictional question involved in the criminal charges, on the ground that there is a plain, speedy and adequate remedy by trial and appeal.

We come, therefore, to the question whether the sections of the Los Angeles Charities and Relief Ordinance under which Murdock is charged are unconstitutional. In the *Gospel Army* case, *supra*, 27 Cal.2d page 232, 163 P.2d 704, we examined this legislation and some of the basic problems here involved are answered by our decision in that case, but we did not have occasion to deal specifically with one of the sections of the ordinance under which Murdock is charged. A certain amount of repetition of our discussion in the *Gospel Army* case is unavoidable if we are to present in an orderly and understandable manner the issues raised by petitioners' contentions in this proceeding.

Insofar as pertinent here, the ordinance provides that no person shall solicit any contribution for any charitable purpose unless there shall be filed with the Department of Social Service written notice of intention to solicit, together with information concerning the character of the solicitation, how it is to be made, and the purpose for which the funds are to be used. § 44.05.¹ The department is authorized to investigate the statements made by the ap-

¹ Sec. 44.05. Charity Solicitation—Notice of Intention:

No person shall solicit, nor shall any officer or member of any association authorize any person to solicit, any contribution for any charitable purpose unless, within the fiscal year of the City in which such solicitation is made and at least ten (10) days prior to the beginning of such solicitation, there shall have been filed with the Department, on a form furnished by said Department, by such person or association upon whose behalf the solicitation is made, written Notice of Intention to solicit such contribution, which notice shall contain complete information as follows:

(a) The purpose of the solicitation and use of the contribution to be solicited;
(b) A specific statement, supported by

reasons and, if available, figures, showing the need for the contribution proposed to be solicited;

(c) The character of such solicitation and how it will be made or conducted;

(d) The expenses of the solicitation, including salaries and other items, if any, regardless of from what funds such expenses are payable;

(e) What portion of the contributions collected as a result of the solicitation will remain available for application to the specific purposes declared in the Notice of Intention as the object of the solicitation;

(f) A specific statement of all contributions collected or received by such person or association within the calendar year immediately preceding the filing of such Notice of Intention. The expenditures or use made of such contributions, togeth-

plicant and to issue information cards setting forth such facts as may be necessary to acquaint the public with the nature and worthiness of the purpose for which the solicitation is made. § 44.03.² The solicitor is required to exhibit the information card and read it to the person solicited, or present it for his perusal before accepting a contribution. § 44.12.³ It is incumbent upon persons soliciting contributions for charity by means of receptacles in certain specified publicly owned and controlled places to secure the express written permission of the Board of Social Service Commissioners, § 44.09(a)⁴; and anyone

making such solicitations by means of receptacles in certain other places open or accessible to the public is required to file a "notice of intention" as required by section 44.05. § 44.09(b).⁴

The ordinance is designed to protect the public from fraud and deception in the solicitation of funds for charity and to provide the public with information from which it may determine the nature and worthiness of the charitable purpose for which the collection is made. The regulatory provisions apply to all charitable solicitations, and though collections made solely for missionary, evangelical and other

er with the names and addresses of all persons or associations receiving salaries, wages, compensation, commissions or emoluments from such contributions, and the respective amounts thereof;

(g) The names and addresses of the officers and directors of any such association for which the solicitation is proposed to be made;

(h) A copy of the resolution, if any, of any such association authorizing such solicitation, certified to as a true and correct copy of the original of such resolution by the officer of such association having charge of the records thereof;

(i) A statement that the signers of such Notice have read and are familiar with the provisions of this Article and will require all solicitors engaged in such solicitation to read and be familiar with all sections of this Article prior to making any such solicitation.

² Sec. 44.03. Powers of Department:

The Department shall have the following powers:

(a) To investigate the allegations of Notice of Intention, or any statement or reports;

(b) To have access to and inspect and make copies of all books, records and papers of such person, by or on whose behalf any solicitation is made;

(c) To investigate at any time the methods of making or conducting any such solicitation;

(d) To issue to all solicitors Information Cards which cards shall show:

(1) That same is issued as information for the public and is not an endorsement;

(2) The Board may, pursuant to Ordinance No. 34982, omit above provision and state that they endorse such charitable association;

(3) The pertinent facts set forth in Notice of Intention required under Section 44.05 of this Article;

(4) Any additional information obtained

as shall in the opinion of the Board be of assistance to the public to determine the nature and worthiness of the purpose for which the solicitation is made;

(e) To charge a fee for supplying Information Cards, at the rate of four cents per card; provided that when more than twenty-five cards are issued at one time for the same solicitation, the fee for all such cards in excess of twenty-five shall be one cent per card.

³ Sec. 44.12. Solicitation—Information Card:

No person shall solicit any contributions unless he exhibits an Information Card provided for in Sec. 44.03 of this Article and reads it to the person solicited or presents it to said person for his perusal, allowing him sufficient opportunity to read same, before accepting any contribution so solicited.

⁴ Sec. 44.09. [As amended by Ordinance No. 84,121, approved Feb. 5, 1941.] Solicitation—Boxes—Receptacles.

(a) No person shall solicit any contribution for any purpose by means of any box or receptacle, upon any public street, sidewalk or way, or in any public park or in any publicly owned or controlled place, except by the express written permission of the Board.

(b) No person shall solicit any charitable contribution, or any contribution for any real or purported charitable purpose, by means of any box or receptacle in any place immediately abutting upon any public sidewalk or way, or in any place of business open to the public, or in any room, hallway, corridor, lobby or entranceway, or other place open to or accessible to the public, or in any place of public resort, without first filing with the Department a "notice of intention" as required by Sec. 44.05, and every person so soliciting must in all other respects comply with the provisions of this Article.

religious purposes are exempted therefrom, it is clear that the intent is to regulate charitable solicitations whether or not they are part of a religious program. In the Gospel Army case, supra, 27 Cal.2d page 232, 163 P.2d 704, we held that the prior restraint thus imposed does not contravene the liberties guaranteed by the First Amendment.

In *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244, Chief Justice Waite, in commenting upon a statement of Thomas Jefferson concerning the meaning of the First Amendment, to the effect "that the legislative powers of the government reach actions only, and not opinions," said: "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." Mr. Justice Roberts in *Cantwell v. Connecticut*, 310 U.S. 296, 303, 304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352, restated the rule in clear and simple language, as follows: "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

[14] There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective. *Gospel Army v. City of Los Angeles*, supra, 27 Cal.2d page 232, 163 P.2d 704.

Petitioners allege that Murdock was charged with having violated sections 44.09 and 44.12 of the Charities and Relief Ordinance.

[15] Section 44.12, requiring a solicitor to exhibit an information card to the person solicited, was approved in the *Gospel Army* case, supra, 27 Cal.2d page 232, 163

P.2d 704. We held in that case that information cards issue automatically upon the filing of the required information and the payment of the four cents for each card, and that the department is without authority to withhold such cards when the requirements are met. What we said there disposes of petitioners' contentions here with respect to the validity of the charge against Murdock based on this provision.

We had no occasion in the *Gospel Army* case, however, to give specific consideration to section 44.09 which underlies the other charge pending against Murdock. Subdivision (a) of this section makes it incumbent upon persons soliciting contributions for charitable purposes *by means of receptacles in certain specified publicly owned or controlled places* to secure the express written permission of the board. It is well known that religious and charitable organizations frequently use receptacles to collect money from individuals in public places. It is obvious that it would be exceedingly difficult to obtain contributions in congested areas if the solicitor had to present each person solicited with an information card. It is apparent also that it would be hard to enforce a requirement of that kind under such circumstances.

[16, 17] When section 44.09(a) is read in the light of these circumstances and difficulties which give rise to the necessity for the requirement of a permit when contributions are to be solicited by receptacles, sufficient standards for the issuance of such permit are inherent in and follow from the reasons requiring it. While persons solicited by means of an information card are thereby sufficiently advised to discern any unfair or fraudulent scheme, passers-by solicited by means of receptacles have no similar chance of protecting themselves. Hence, if fraud appears from the information secured from those seeking to solicit by means of receptacles, the board should decline to issue a permit. Otherwise, solicitation by this method would secure financial support that unquestionably would be denied if the solicitation were made by use of an information card which disclosed the fraud to the persons solicited. In addition to protection against fraud, the require-

ment of a permit to solicit charitable contributions in public places by means of receptacles, assures protection with respect to the maintenance of the public convenience and safety for it is conceivable that solicitation by this method under some conditions would interfere with the free flow of traffic. We conclude, therefore, that if subdivision (a) of section 44.09 is read, as it must be, in light of the purpose and context of the entire ordinance, on the one hand, and the peculiar circumstances attendant upon collections by means of receptacles in public places, on the other hand, that the denial of a permit is warranted only if the information furnished to the board discloses fraud or if the solicitation as planned would interfere with the public convenience and safety. So construed, the standards applicable to the granting of the permit are reasonable and the condition imposed by subdivision (a) does not prevent or unduly restrict the collection of funds. The requirement of the subdivision is not only reasonable but assures regulation without discrimination as to persons or causes. It may be added that the numerous other recognized methods of collecting funds are available to petitioner.

It is suggested that subdivision (a) imposes the same restraint as did the statute condemned in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352. That statute prohibited solicitation of money for religious, charitable or philanthropic causes without the approval of an administrative official. The ordinance challenged in this proceeding, however, is materially different from the statute involved in the *Cantwell* case. The statute there condemned empowered an administrative official to appraise the facts and to withhold permission to solicit if he determined the cause was not a religious one. The court held that to so limit the right of solicitation placed a forbidden burden upon the exercise of religious liberty.

It is clear, however, from what has been said before that the right to the permit required in subdivision (a) of section 44.09 does not depend upon a religious test. The board is not authorized or empowered to appraise the nature or worthiness of a religious cause or to deny a permit upon the

ground that the cause is not a religious one. As before stated, the authority of the board is limited to regulating the issuance of permits for the solicitation of funds in the designated publicly owned or controlled places *by means of receptacles* for the sole purpose of preventing fraudulent practices and protecting the safety and convenience of the public. It is held in the *Cantwell* case that "a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. * * *

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise." 310 U.S. 304, 305, 60 S.Ct. 903, 84 L.Ed. 1213, 128 A.L.R. 1352.

[18] Subdivision (b) of the section relates to the solicitation of charitable contributions by means of receptacles in certain specified places not included in subdivision (a). In such cases the solicitor is required to give the "notice of intention" provided for in section 44.05. That section was approved in the *Gospel Army* case and for the reasons there stated the requirements of section 44.12 are valid.

[19] Petitioners further contend that the ordinance is being unconstitutionally applied as to them. The allegations relied upon in support of this contention, however, are denied by the answer and the issues of fact thus presented will not be determined by us in this proceeding.

We conclude, therefore, that the provisions of the ordinance underlying the charges against *Murdock* are constitutional, and that in the absence of admitted or proven facts showing that the ordinance is being unconstitutionally applied, the al-

ternative writ must be discharged and the peremptory writ must be denied. It is so ordered.

SHENK, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I agree that the instant case is a proper one for review by a writ of prohibition but I cannot agree with the reasoning followed by the opinion of Chief Justice Gibson in arriving at that result.

It is fundamental that a court, whether it is a trial or appellate court, has the jurisdiction to determine its own jurisdiction. In *re* Grove Street, 61 Cal. 438; *Clary v. Hoagland*, 6 Cal. 685; *Cohen v. Barrett*, 5 Cal. 195; In *re* Meisner, 30 Cal.App.2d 290, 86 P.2d 124; In *re* Wyatt, 114 Cal.App. 557, 300 P. 132; *Fitzpatrick v. Sonoma County*, 97 Cal.App. 588, 276 P. 113; In *re* Tassey, 81 Cal.App. 287, 253 P. 948; *Dillon v. Dillon*, 45 Cal.App. 191, 187 P. 27; 21 C.J.S., Courts, § 113. The general rule is stated in 21 *Corpus Juris Secundum*, Courts, § 113. "Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction." And as a necessary corollary to that proposition it has jurisdiction to decide the jurisdictional question wrongly as well as rightly. *Portnoy v. Superior Court*, 20 Cal.2d 375, 125 P.2d 487; In *re* Bell, 19 Cal. 2d 488, 122 P.2d 22; *Truck Owners, etc., Inc. v. Superior Court*, 194 Cal. 146, 228 P. 19; *Morehouse v. Superior Court*, 124 Cal.App. 38, 12 P.2d 133. These things are conceded by the opinion of the chief justice but it goes on to say that once it has decided the question erroneously and is proceeding to exercise that jurisdiction it may be restrained by a higher court from exercising it; that at that stage jurisdiction to determine jurisdiction has been exercised, implying that *thereafter* the court does not have jurisdiction because it has decided erroneously, and hence one of the extraordinary writs for testing jurisdiction will lie. The fallacy in that rea-

soning lies in the assumption that at some stage in the proceeding the court suddenly steps from a possession of power to a lack of it when all of the time the basic question was present of whether or not it had jurisdiction. A court may determine its jurisdiction at any stage of the proceeding. It is always an issue before it. *Williams v. Sherman*, 36 Idaho 494, 212 P. 971. It is probably due to the thought that if a court has jurisdiction to decide its own jurisdiction correctly or incorrectly, its determination cannot be questioned by a jurisdictional writ, that leads to the idle distinction between power to determine power and the exercise of the power once a favorable determination is made. The issue need not be complicated in that fashion. It is simple. Of course a court has jurisdiction to decide its jurisdiction, and it may be right or wrong. In *either* event the jurisdictional writs lie to review its decision to ascertain whether the conclusion was correct. We are assuming that the court in making its decision is passing upon a question of *jurisdiction*. The question still remains one of *jurisdiction* after the decision as well as before and hence the jurisdictional writs are available to review it. The higher court entertaining the writ may conclude that the lower court was correct in its result and deny relief or the opposite conclusion may be reached and relief granted.

Perhaps the reasoning in the majority opinion was adopted to escape the untenable position taken by the majority of this court in *Portnoy v. Superior Court*, *supra*. It was there stated, after declaring that a court had jurisdiction to determine jurisdiction (the constitutionality of a statute) erroneously: "In the present case both the justice's court and the superior court on appeal have held that the ordinance is constitutional, and it cannot be said that in so holding they had exceeded their jurisdiction." [20 Cal.2d 375, 125 P.2d 489]. This statement is clearly contrary to the holding in the majority opinion in the case at bar. If, as conceded in the opinion of the chief justice, the issue of constitutionality goes to the *jurisdiction* of the court, then that issue is still present and the decision of the court on that issue was subject to

review by certiorari. The issue thus boils down to the simple proposition that whenever a lower court decides a jurisdictional question its decision is subject to review by certiorari, prohibition, habeas corpus or other appropriate writ. That must be so because the question involved goes to the jurisdiction of the court. This does not mean that the lower court will not be given the opportunity to first decide the jurisdictional question. That is a matter of procedure—a matter of whether and when the higher court deems it wise to intercede—all of which is involved in the problem of whether other remedies are adequate. It does not involve the controversy of whether a jurisdictional question is present.

This brings us to the question of whether such a question is involved in the instant case, remembering that we are not concerned with the accuracy of the lower court's decision or its power to pass upon it. The constitutionality of a statute under which a court is acting goes to the jurisdiction of the court (*Whitney v. Superior Court*, 182 Cal. 114, 187 P. 12; *Levy v. Superior Court*, 105 Cal. 600, 38 P. 965, 29 L.R.A. 811), and if it is unconstitutional, any order or judgment made or rendered pursuant thereto is void and subject to collateral attack. The situation is not different than if the crime charged had been committed outside the territorial limits of the area over which the court had jurisdiction or was a crime which was within the exclusive jurisdiction of another court. In either case the lower court would have no jurisdiction to proceed with a prosecution and a higher court could issue a prerogative writ to stay such prosecution at any point. *Antilla v. Justice's Court*, 209 Cal. 621, 290 P. 43.

The ordinance involved is clearly unconstitutional. I have set forth in my dissenting opinion in *Gospel Army v. City of Los Angeles*, 27 Cal.2d 232, 250, 163 P.2d 704, the reasons for that conclusion and I here repeat those views.

There are additional factors applying to the particular provision of the ordinance involved in the instant case, which render such provision invalid. The provision reads

§ 44.09(a): "No person shall solicit *any* contribution for *any purpose* by means of any box or receptacle, upon any public street, sidewalk or way, or in any public park or in any publicly owned or controlled place, except by express written permission of the Board." (Emphasis added.) The language is broad and comprehensive. Giving effect to all of its language as must be done in interpreting an ordinance, it clearly reaches solicitation on public property whether the receptacle is carried by the solicitor, and there is no obstruction of traffic, or is placed in or on the public place and is under the supervision of an attendant, or is left unattended. All three of those aspects of the solicitation are necessarily included in the wording and cannot be separated. If the provision is invalid as to one of them it is invalid as to all. Leaving aside for the instant the authority of the officials to give permission to solicit thereunder, that is, treating the clause as an absolute prohibition against soliciting on public property by use of a receptacle, it is clearly a violation of *Murdock's* right to freedom of religion. The solicitation of funds for the cause is a legitimate incident of the exercise of religious freedom. The exercise of that freedom even though receptacles are used cannot be wholly limited to places other than public property. In commenting on a statute stating that no child under certain ages shall sell any magazine or merchandise on any street or in any public place, the Supreme Court of the United States stated in *Prince v. Massachusetts*, 321 U.S. 158, 167, 64 S.Ct. 438, at page 443, 88 L.Ed. 645, 653: "Concededly a statute or ordinance identical in terms with Section 69, except that it is applicable to adults or all persons generally, would be invalid. *Kim-Young v. California*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; *Nichols v. Massachusetts*, 308 U.S. 147, 60 S.Ct. 146, 84 L. Ed. 155; *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669 [87 L.Ed. 869]; *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 81; *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313." And later: "Street preaching, whether oral or by handing out literature, is not the primary use of the

highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses."

The fact that solicitation may be made under section 44.09(a) by express permission of the public officials does not save it. Where a statute is void on its face, such as is true of subdivision (a), the mere fact that an official may give consent to the conduct does not cure it when, as far as appears, the discretion of the official is uncontrolled—is guided by no valid signposts and he may act arbitrarily. Nor need a permit be sought under such circumstances as a prerequisite to raising the constitutional question. See *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352; *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L. Ed. 155; *Hague v. C. I. O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L. Ed. 1423; *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L. Ed. 949; *Smith v. Calhoun*, 283 U.S. 553, 51 S.Ct. 582, 75 L. Ed. 1264; cf. *Cox v. New Hampshire*, 312 U.S. 569, 577, 578, 61 S.Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396.

There are no standards whatsoever which the enforcing officials must follow in determining whether the permit shall be issued. The legislative body has made no determination that traffic dangers are to be avoided or fraud prevented. The refusal of the permit is not conditioned on any traffic hazard or obstruction or that the solicitor is engaged in a fraudulent scheme. In *Hague v. C. I. O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L. Ed. 1423, the issue was the validity of an ordinance which denied use of the streets without a permit giving no standards to the officials. The court said, at page 516 of 307 U.S., at page 964 of 59 S.Ct., 83 L. Ed. 1423: "*It does not make comfort or convenience in the use of streets or parks the standard of official action.* It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'pre-

vent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." (Emphasis added.) In the instant case, we have freedom to exercise one's religion—a right in the same class as freedom of speech. Here the ordinance does not make convenience or use of public streets a test for the standard of official action. The permit may be denied on the "mere opinion" of the official that fraud or traffic hazards may occur.

The note in 128 A.L.R. 1361 is illuminating: "While there is a conflict among the state court decisions as to the validity under the Fourteenth Amendment to the Federal Constitution of statutes or ordinances regulating the solicitation of contribution for charitable, religious, or individual purposes by prohibiting such solicitation without a license and providing that the licensing officer or body shall issue such a license only where he deems the applicant a worthy person and his cause a worthy or bona fide cause, it is now settled by decisions of the Supreme Court of the United States that such a statute or ordinance is void, since it authorizes a previous restraint upon the free exercise of the freedoms guaranteed by the Fourteenth Amendment by a licensing officer or body having no fixed standard for determining whether a license must be issued." (Emphasis added.)

It is aptly said in *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 152, 84 L. Ed. 155: "It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house, and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's

discretion." (Emphasis added.) See, also, Hoyt Bros. Inc. v. Grand Rapids, 260 Mich. 447, 245 N.W. 509.

The only answer offered by the majority opinion to the lack of a standard for the issuance of permits is that as a test for the denial of permits there must be either fraud or an interference with the public safety or convenience. There is no mention whatsoever of those tests in section 44.09(a). The board is given unlimited power in passing upon an application for a permit. The majority opinion by judicial legislation places those standards in the ordinance. This attempt to unearth vague and uncertain standards *cannot stand in the face of this court's decision in* Re Porterfield, 168 P.2d 706. This court there struck down an ordinance requiring a license (permit) to solicit, and quoted with approval from American Law Reports as follows (168 P.2d page 718): "(A) statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business * * * in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses * * * according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any *definite* rule or *specified* conditions to which all similarly situated might knowingly conform,—is unconstitutional and void." (Emphasis added.) The court then went on to say (the ordinance there was much more explicit in its standards than in the instant case) that (168 P.2d page 719) "It is to be noted that section 4 of the ordinance requires that application for a license be made in writing 'upon such forms as may be provided by said city council, a copy of which shall at all times be attached to said license.' The ordinance is utterly silent as to what the content of the forms shall be." *No form whatsoever is provided in the case at bar.* Continuing in the Porterfield case: "Section 6 provides that at the hearing to be held by the council on each application for a license, evidence shall be received of the *good moral character* of the applicant and *whether or not he is likely to resort to*

force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation. 'If the city council is satisfied that said applicant is of good moral character and will not resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation, it shall direct the issuance of a license to said applicant for said purpose of solicitation upon payment of the license fee herein provided for.'" *In the case at bar there is no mention of moral character or character of a kind likely to indulge in violence, as a standard for issuing a permit. No standard whatever is set forth.* Commenting on the terms of the ordinance there involved it is said in the Porterfield case, 168 P.2d page 719: "We are of the opinion that on the face of the ordinance *the indefinite standards which it enunciates provide a mechanism for the deprivation of constitutional rights*, not only on the basis of the guaranties applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity. It is pointed out by petitioner that the council members in the exercise of their power might very conceivably conclude that because of an applicant's labor union affiliations or because of his attitude upon controversial labor issues he did not have the prescribed qualities. It is entirely possible that on occasion a majority of the council might be members of a rival labor union or they might be employers engaged in a controversy with the union represented by the applicant. Certainly the standard provided by section 6 of the Redding ordinance is entirely subjective. Each council member is left to determine in his own mind what is 'likely' to be the future conduct of the applicant. The character or extent of showing necessary to satisfy the council that the applicant is of good moral character and will not resort to the activities mentioned is not set forth. Satisfaction may be circumscribed by individual whim, caprice, or personal prejudice."

The ordinance in the case at bar cannot stand in the face of the tests applied in the Porterfield case. The ordinance involved in that case sought to place restrictions upon the constitutional right of freedom

of speech. The ordinance in the case at bar seeks to restrict the constitutional right of freedom of religion. The ordinance in each case reposes in a board uncontrolled discretion to exercise arbitrary power in acting upon applications for permits to exercise such constitutional rights. The ordinance in the Porterfield case was held unconstitutional on that ground. It follows that the ordinance in the case at bar should likewise be held unconstitutional insofar as it trenches upon the constitutional right of petitioner herein.

In my opinion the writ should issue as prayed.

SCHAUER, Justice.

I concur in the conclusion reached by Mr. Justice CARTER and in the discussion supporting his conclusion insofar as it relates to the constitutionality of the ordinance involved herein.

EDMONDS, Justice.

For the reasons stated by me in the Gospel Army case, I am of the opinion that section 44.09 of the Los Angeles ordinance, as well as the provisions which were considered in the prior proceeding, are unconstitutional. Accordingly, I join in the conclusion that the writ of prohibition should issue.



28 Cal.2d 481

LOCKHEED AIRCRAFT CORPORATION v.
SUPERIOR COURT OF LOS ANGELES COUNTY et al.
L. A. 19295.

Supreme Court of California, in Bank.
June 26, 1946.

Rehearing Denied July 24, 1946.

1. Prohibition ⇐9

A court will be restrained in prohibition from taking further proceedings in a civil suit in which the cause of action was created by a void statute.

2. Constitutional law ⇐46(3)

A corporate employer, sued by former employees who were allegedly wrongfully discharged pursuant to employer's rules controlling employees' political activities in violation of Labor Code, was permitted to question constitutionality of Labor Code in prohibition proceeding to restrain superior court from taking further proceeding in connection with taking of deposition of employer's president, where a present disposition of the constitutional question would serve to expedite the orderly processes of justice. Labor Code, § 1101.

3. Constitutional law ⇐48

All presumptions and intendments favor the validity of a statute, and mere doubt does not afford sufficient reason for a judicial declaration of invalidity.

4. Constitutional law ⇐48

Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.

5. Statutes ⇐47

A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating the provisions thereof, but cannot be held void for uncertainty if any reasonable and practical construction can be given to the language thereof.

6. Master and servant ⇐10½

The statute preventing employer from controlling or directing political activities or affiliations of employees was not intended to protect any individual or group advocating the overthrow of government by force or violence. Labor Code, § 1101.

7. Master and servant ⇐10½

The words "politics" and "political", in statute prohibiting employer from preventing employees from engaging in politics or from directing political activities of employees, implies orderly conduct of government and not revolution. Labor Code, § 1101.

See Words and Phrases, Permanent Edition, for all other definitions of "Political" and "Politics".

8. Master and servant ⇐10½

The test of "political activities or affiliations", within statute prohibiting em-

ployer from directing political activities or affiliations of employees, is not membership in or activities connected with any particular group or organization, but whether such activities are related to or connected with orderly conduct of government and peaceful organization, regulation, and administration of government. Labor Code, § 1101.

See Words and Phrases, Permanent Edition, for all other definitions of "Political Activities or Affiliations".

9. Master and servant ☞30(4)

The statute prohibiting employer from preventing employees from engaging in politics or from directing political activities of employees does not prevent an employer, engaged in producing vital war materials, from discharging employee who advocates overthrow of government by force or whose loyalty to United States has not been established to satisfaction of employer. Labor Code, § 1101.

10. Statutes ☞47

The statute prohibiting employer from enforcing rule or policy forbidding employees from engaging in politics is not unconstitutional as being uncertain in respect to whether the rule or policy is published or unpublished, since evidence of publication or lack of publication is material only insofar as it may tend to prove or disprove the existence of any such rule or policy. Labor Code, § 1101.

11. Constitutional law ☞89(1)

The right to contract is not absolute and unqualified, and reasonable restrictions are not prohibited by the constitution.

12. Constitutional law ☞48

In absence of showing that statute preventing employers from controlling political activities of employees imposed an unreasonable or unjustifiable restraint, court determining constitutionality of statute would presume that Legislature determined that statute was necessary for general welfare of people and for protection of rights connected with use of ballot. Labor Code, § 1101.

13. Constitutional law ☞70(3)

The wisdom of policy underlying a statute is a matter solely for the Legis-

lature, and courts will not interfere where the Legislature has determined that a restriction or regulation is necessary to protect a fundamental right, and the statute is reasonably designed to achieve such purpose.

14. Constitutional law ☞89(4)

Master and servant ☞11

The statute preventing employers from controlling political activities of employees is not unconstitutional as arbitrarily or unreasonably limiting the right to contract. Labor Code, § 1101.

15. Master and servant ☞3(2)

An employment contract is made in the light of and incorporates the provisions of existing law.

16. Master and servant ☞36

Upon violation of statute preventing employers from controlling political activities of employees, employees have a right of action for damages for breach of employment contract. Labor Code, §§ 1101, 1103, 1105.

17. Constitutional law ☞90

Master and servant ☞11

The statute prohibiting employer from preventing employees from engaging in politics or from directing political activities of employees is not unconstitutional as depriving employer of right of free speech and preventing employer from publishing his political beliefs or views among his employees. Labor Code, § 1101.

18. Prohibition ☞11

Prohibition cannot be used to prevent the enforcement of a subpoena duces tecum on the ground the affidavit is defective.

19. Prohibition ☞3(1, 3)

Where questions relating to sufficiency of affidavit in support of deposition are not properly disposed of by objections in the trial court, and contempt proceedings ensue, remedies of certiorari and habeas corpus are adequate.

Prohibition proceeding by the Lockheed Aircraft Corporation against the Superior Court of Los Angeles County and others, to restrain the Superior Court from taking

further proceedings in connection with or based upon a subpoena duces tecum issued in a pending action.

Writ denied.

Prior opinion, 153 P.2d 966.

H. C. Tallmadge and Roger B. Smith, both of Burbank, and Chase, Barnes & Chase, Stanley N. Barnes, Donn B. Downen, Jr., O'Melveny & Myers and Jackson W. Chance, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, and Katz, Gallagher & Margolis, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

The Lockheed Aircraft Corporation, hereinafter called defendant, was sued by eighteen of its former employees, hereinafter referred to as plaintiffs, claiming they had been wrongfully discharged pursuant to rules adopted and enforced by defendant regulating and controlling their political activities in violation of section 1101 of the Labor Code.

Defendant's demurrer to the complaint having been overruled, it answered denying the existence of the rules and regulations above referred to and alleged by way of affirmative defense that it was engaged in the manufacture of airplanes for the federal government under contracts which required it to protect its plants from entry by persons of unknown loyalty or suspected disloyalty to the United States, and that it did not have sufficient information and belief as to the respective plaintiffs to satisfy itself of their unquestioned patriotism and loyalty.

Defendant here seeks to prevent further proceedings in connection with the taking of the deposition of its president, contending that section 1101 of the Labor Code, which underlies plaintiffs' action, is unconstitutional and that therefore respondent court is without jurisdiction of the subject matter.

[1] In *Rescue Army v. Municipal Court*, 171 P.2d 8, we held that if the statute under which a defendant is charged with crime is unconstitutional a court purporting to act thereunder will be restrained

by prohibition in a proper case. Insofar as the jurisdictional question is concerned, there is no difference between the case of a criminal prosecution for a purported offense which does not exist because of the invalidity of the statute creating it and the case of a civil suit in which the cause of action was created by a void statute.

[2] Plaintiffs have not disputed defendant's contention that the cause of action is based entirely upon the statute, nor have they objected to the propriety of this application for prohibition on the ground that some other adequate remedy is available. And the District Court of Appeal, in its opinion, prior to our granting of a hearing, passed on the merits of the several challenges to the constitutionality of section 1101. Thus, the court below has assumed that prohibition was a proper remedy to raise the constitutional issues, and the parties now join in urging us to pass upon those issues. The proceedings in the respondent court were interrupted many months ago and to avoid further delay we make the same assumption, solely for the purpose of this opinion, for we are satisfied that under all the circumstances a present disposition of the constitutional questions will serve to expedite, rather than disturb, the orderly processes of justice. See *Rescue Army v. Municipal Court*, 171 P.2d 8. We therefore proceed to a consideration of the arguments advanced against the constitutionality of section 1101 of the Labor Code.

The section reads as follows: "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

[3-5] The first contention made by defendant is that section 1101 is so uncertain and ambiguous that it is unconstitutional.

All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitution-

ality clearly, positively and unmistakably appears. *Collins v. Riley*, 24 Cal.2d 912, 915, 152 P.2d 169; *People v. Superior Court*, 10 Cal.2d 288, 298, 73 P.2d 1221; See, also, *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 636, 91 P.2d 577, and cases cited.

A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in *Pacific Coast Dairy v. Police Court*, 214 Cal. 668, at page 676, 8 P.2d 140, 143, 80 A.L.R. 1217, "Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it."

Defendant asserts that it cannot determine whether subdivision (b) of the section, which prevents an employer from controlling or directing the political activities or affiliations of employees, prohibits an employer from discharging persons who advocate the overthrow of the government by force or violence, or whose loyalty to the United States has not been established to the satisfaction of the employer.

The Merriam Webster Dictionary, second edition, defines "political" as "Of or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests that seek to control the appointment or action of those who manage the affairs of state." The same authority defines "politics" as "The science and art of government; the science dealing with the organization, regulation, and administration of a state, in both its internal and external affairs; political science. * * * The theory or practice of managing or directing the affairs of public policy or of political parties; hence, political affairs, principles, convictions, opinions, sympathies, or the like. * * *"

[6-9] Whether the statute is read alone, or in conjunction with the quoted defini-

tions, there is no intimation or implication of any intent to protect any individual or group advocating the overthrow of the government by force or violence. On the contrary, the words "politics" and "political" imply orderly conduct of government, not revolution. Likewise, there is no intent to protect the members of any organization as such, regardless of the varying shades of political beliefs which may be asserted or alleged to be espoused by the group. In each case, the interference proscribed by the statute is interference with "political activities or affiliations," and the test is not membership in or activities connected with any particular group or organization, but whether those activities are related to or connected with the orderly conduct of government and the peaceful organization, regulation and administration of the government. We find nothing in the section which is intended to prevent an employer engaged in producing vital war materials from discharging an employee who advocates the overthrow of our government by force or whose loyalty to the United States has not been established to the satisfaction of the employer.

[10] The statute is also said to be uncertain because it "does not designate whether the prohibited rule, regulation or policy be a published rule, regulation or policy or an unpublished one." The matter of publication is a false issue. The statute provides that "No employer shall make, adopt, or enforce any rule, regulation, or policy," hence evidence of publication or lack of publication is material only insofar as it may tend to prove or disprove the existence of any such rule or policy. The word "policy" is defined as "A settled or definite course or method adopted and followed by a government, institution, body, or individual." Merriam Webster Dictionary, 2d Ed.

[11-14] Defendant next contends that section 1101 constitutes an unjustifiable and arbitrary limitation on the liberty of contract in violation of both the state and federal Constitutions. The right to contract is not absolute and unqualified, and reasonable restrictions are not prohibited by the constitutional provisions. Unless it

is shown that the restraint here involved is unreasonable or unjustifiable, it must be presumed that the Legislature determined that the measure was necessary for the general welfare of the people and for the protection of rights connected with the use of the ballot. The wisdom of the policy underlying the statute is a matter solely for the Legislature, and where it has determined that a restriction or regulation is necessary to protect a fundamental right and the statute is reasonably designed to achieve that purpose, the courts will not interfere. The right to ballot would be endangered if citizens were deprived of any incidents of that right or if they were hampered in their advocacy of or opposition to measures which may be placed upon the ballot. We cannot say that section 1101 is not properly designed to achieve the result intended by the Legislature or that there is an arbitrary or unreasonable limitation of the right to contract.

[15, 16] A violation of section 1101 is made a misdemeanor by section 1103, and defendant contends the statute is therefore penal in character and does not create any civil right of action. This argument ignores section 1105 which provides that "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter." The contract of employment must be held to have been made in the light of, and to have incorporated, the provisions of existing law. *Stockton Sav. & Loan Bank v. Massanet*, 18 Cal.2d 200, 206, 114 P.2d 592, 593; *In re Ounjuiian's Estate and Guardianship*, 4 Cal.2d 659, 661, 52 P.2d 220, 102 A.L.R. 1106; *Mott v. Cline*, 200 Cal. 434, 446, 253 P. 718. Hence, upon violation of the section, an employee has a right of action for damages for breach of his employment contract.

[17] Defendant also contends that section 1101 is unconstitutional because its

171 P.2d—2½

enforcement assertedly deprives an employer of the right of free speech and prevents him from publishing his political beliefs or views among his employees. There is nothing in the section which, expressly or by implication, has any such effect.

The facts and issues have not been sufficiently established or clarified to justify a present consideration of such matters as the possible effect of sections 2920-2928 of the Labor Code, or of various federal statutes governing the performance of contracts with the federal government relating to war materials. We do not deem it proper to consider those matters in this proceeding when the cause of discharge has not yet been established.

[18, 19] Defendant also seeks to restrain respondent court from enforcing compliance with a subpoena duces tecum issued on the taking of the deposition, asserting that the affidavit in support thereof is defective in that it does not sufficiently describe and identify the desired records. It is well established that prohibition cannot be used to prevent the enforcement of a subpoena duces tecum on the ground the affidavit is defective. *C. S. Smith Met. M. Co. v. Superior Court*, 16 Cal.2d 226, 105 P.2d 587. If the questions relating to the sufficiency of the affidavit are not properly disposed of by objections in the trial court, and contempt proceedings ensue, the remedies of certiorari and habeas corpus are considered adequate. *State Bd. of Equalization v. Superior Court*, 20 Cal. 2d 467, 471, 127 P.2d 4; *Wessels v. Superior Court*, 200 Cal. 403, 253 P. 135; *Commercial Bank v. Superior Court*, 192 Cal. 395, 397, 220 P. 422.

The alternative writ is discharged, and the application for a peremptory writ is denied.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

75 Cal.App.2d 394

**CITY OF PALOS VERDES ESTATES
v. WILLETT et al.
Civ. 15171.**

District Court of Appeal, Second District,
Division 3, California.

July 17, 1946.

Rehearing Denied Aug. 2, 1946.

1. Trusts ⇨203

Where trustee was empowered to improve, subdivide and sell trust property consisting of some 5400 lots and to do all things which in trustee's judgment might be necessary or expedient in performance of its manifold duties, and trustee was in possession of lot on which was situated sales office before and after trustee's conveyance of lot to non-profit corporation for park purposes, trustee's successor could maintain sales office on such lot so long as in its judgment lot might be necessary for performance of its duties as trustee.

2. Appeal and error ⇨931(1)

Where trustee in quiet title action claimed that trustee's deed to non-profit corporation conveying lot for park purposes was void because made without trustor's written consent, appellate court would assume in support of judgment and general findings against trustee that trial court believed trustor was mistaken when he testified that he had not given consent.

3. Trusts ⇨197

In city's action based on theory that trustee of large suburban development had conveyed a lot to non-profit corporation for park purposes, evidence sustained implied finding of trial court that trustor had given his consent to such conveyance.

4. Dedication ⇨19(2)

Where a lot in development area was only one of numerous parcels aggregating some 800 acres which were originally delineated upon maps as devoted to public use, and such lot with others was planted to trees, shrubs and flowers, conduct of trustor and original trustee, and improvement and use of property for park pur-

poses constituted a dedication of the lot for such purposes.

5. Trusts ⇨220

Where dedication of lot for park and recreation purposes had taken place some 12 years before trustee executed deed conveying lot to non-profit corporation for park purposes, such conveyance was not a "donation" or "dedication" by trustee within meaning of provision of trust authorizing trustee with trustor's consent to make donation or dedication of any part of trust property, and hence was not a conveyance requiring consent of trustor.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication" and "Donation".

6. Deeds ⇨212

Evidence sustained finding that condition of deed whereby lot was conveyed to non-profit corporation for park purposes, which required corporation to maintain shrubbery, etc., had not been breached, and hence title did not revert to grantor.

7. Deeds ⇨212

A reversion of title for breach of condition subsequent will not be decreed except upon clear and satisfactory evidence of violation of the condition.

8. Trusts ⇨197

Where trustee's deed to non-profit corporation authorized corporation to convey property for park or recreation purposes to a park commission or other body suitably constituted by law and corporation's deed to city imposed upon city obligation to maintain the property for park purposes and recited that conveyance was made pursuant to permission contained in trustee's deed, deed to city was not in violation of any condition or covenant of trustee's deed.

9. Trusts ⇨191(1)

Provision of deed which authorized non-profit corporation as trustee's grantee to convey property to city for park or recreation purposes without any further consent of trustee prevailed over general provision of contemporaneous agreement that property should not be conveyed without trustee's consent.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by the City of Palos Verdes Estates against Oscar L. Willett and others to quiet title to a lot. From a judgment for plaintiff the Bank of America National Trust & Savings Association, a national banking association, appeals.

Modified and as modified affirmed.

Benjamin S. Crow, of Los Angeles, for appellant.

Donald Armstrong, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff had judgment against Bank of America National Trust and Savings Association, as trustee, and others, quieting title to Lot N, Tract 6885, in the County of Los Angeles. Said tract is a part of a residential community known as Palos Verdes Estates, comprising more than 3,000 acres, or 5400 lots, located in the hills adjoining the coast line, between the cities of Redondo Beach and San Pedro. Lot N is a parcel 180 feet by 161 feet by 171 feet, containing some 15,000 square feet.

Defendant banking association holds title, as successor trustee, to the unsold land, under a subdivision trust of the entire property, executed in 1923. Extensive sales of the subdivided lands have been made and a large residential community has been developed. Under the subdivision plan many hundreds of acres were set apart for park and recreation uses, were landscaped and improved as such and so delineated upon maps which were used in the sale of the property. Lot N was so designated and improved and thenceforth has been a part of the park and recreation system and considered and used as such. Since 1923, or thereabouts, to the present time, a small building located on the property has been continuously used as a sales office by the selling force operating under the trust indenture in making original sales and resales. On June 4, 1936, Lot N and other parcels of land were conveyed by the trustee, without consideration, to Palos Verdes Homes Association, a non-profit corporation, and on the same day a

written agreement was entered into between the grantor and the grantee. It may be noted here that Palos Verdes Homes Association plays an important part in the development and management of the project and has the power under the trust indenture to levy assessments on the real property of Palos Verdes Estates, with certain exceptions, and to collect and to expend the same for many purposes, including the lighting, improvement and maintenance of streets, construction of sewer and storm water drains, and the purchase and operation of water systems; to keep all lots and plots in good order and condition; to issue building permits, inspect buildings and, generally, to do whatever may be "for the peace, health, comfort, safety and general welfare of the lot owners" etc. In brief, it functions for the public benefit and in aid of the trusteeship.

By the terms of the deed and of the agreement of June 4th, the several parcels were transferred to and accepted by the Homes Association to be maintained and used exclusively for park and recreation purposes. On the 10th day of April, 1942, the Homes Association conveyed to the City of Palos Verdes Estates, a city of the sixth class, 13 of said parcels, including Lot N, the deed reciting, "This conveyance is made pursuant to the permission contained in certain deeds to this Association to convey said property to a park commission or other body suitably constituted by law to take over, maintain and regulate public parks, the grantee City, as a city of the sixth class, being suitably constituted so to do." The deed bore the written approval of the Park and Recreation Board of Palos Verdes Homes Association. The trustee continued to use the building as headquarters for its sales force and it appears that some use was also made of it for meetings of the Homes Association. For some unexplained reason, a controversy arose respecting the use of the building by the trustee, which apparently also involved a disagreement as to responsibility for care of the premises. All parties concede that the land must and will be devoted to public use for park and recreation

purposes, and it is not contended that it has been used for any other purpose, except that of a sales headquarters.

The plaintiff is now contending that the trustee, in conveying the property to the Homes Association, gave up its right to maintain thereon its sales headquarters. The trustee has retaliated by disputing the title of the city, and seeks to have the court decree a reconveyance of the property to itself as trustee. It also claims that, in any event, in its deed to the Homes Association it reserved the right to continue to use the property, as it had been used in the past, as headquarters for its sales organization and the transaction of incidental business in connection with the administration of the trust.

While it would appear, from the conflicting claims upon the land, that the interests of the parties are antagonistic, such in reality is not the case. They are mutually interested in having the property maintained and used for the benefit and advantage of the owners of property in Palos Verdes Estates and their difficulties have arisen over a disagreement as to the use and care of the land which would best serve the public interest. We may as well state our conclusions at this point as to the legal rights of the city and the trustee. They are that Lot N belongs to plaintiff as a part of the city's park system, but that the trustee has the right to maintain its sales office in the building on the lot during the lifetime of the trust. Reasons for these conclusions are found in the terms of the trust indenture and, fortunately, without our having to delve too deeply into the intricacies of its 162 printed pages.

[1] We may consider first the matter of the trustee's claim of the right to maintain and use a sales office on the lot. The general powers and duties of the original trustee to improve, subdivide, and sell the trust property, and to do any and all things which in its judgment might be necessary or expedient in the performance of its manifold duties, undoubtedly gave it the right, which was exercised when the trustor and the original trustee were the only interested parties, to establish and maintain sales headquarters. It is scarcely necessary

to observe that it has been and still is important, in the promotion and management of the project and the sale of its some 5400 lots, to have sales headquarters located upon the land, which is far removed from all other centers of business activity. The trustee had title to Lot N and was in possession of the building thereon at all times before and after the conveyance to the Homes Association. The deed to the Association was made and accepted subject to "each and every provision, condition, restriction, reservation, lien, charge, easement and covenant" contained in the original basic protective restrictions which had been imposed upon the property, and certain other restrictions imposed by subsequent dedications, all of which were identified in the deed by references to books and pages where the same were recorded in the office of the County Recorder. Amendment No. 3 to Declaration No. 5, which was an instrument executed by the trustee and placed of record in June of 1924, within powers specifically granted to it by the trust indenture to restrict the property, contained the following: "The following clause is hereby added to paragraph G of Section 1: Provided, that the power and right is specifically reserved to Bank of America, its successors and assigns, to construct and maintain a real estate office on Lot N." In December, 1935, the trustee replied to a request of the Homes Association for a deed to some 32 parcels of land, including Lot N, and mentioned this lot as follows: "Since this parcel is now occupied by the sales office and it is the intention to continue its use for that purpose, we prefer to retain title until it is no longer required for sales purposes, at which time it will be conveyed to you." So far as shown by the record, this letter remained unanswered. The deed given thereafter was made subject to the reserved right to use the lot for sales headquarters, by reference to reservations appearing of record, and it clearly appears from the conduct of the parties, then and thereafter, that there was no misunderstanding, when the deed was given, as to the purpose or efficacy of the reservation. We conclude that the trustee has not parted with its right to maintain sales headquar-

ters on Lot N for such time as the same, in its judgment, may be necessary or expedient for the proper exercise of its powers and the performance of its duties as trustee.

The trustee in its answer alleged that its deed to the Homes Association was made without the written consent of the trustor, and contended that for that reason it was void. Plaintiff answers that such written consent was unnecessary and also contends that the evidence was insufficient to prove that the trustor had not given consent.

Under section 6 of Article III of the indenture, the trustee was authorized "by and with the consent and approval of the first party (trustor), first had in writing," to "A. Make donation or dedication of, or reserve, set aside, segregate or lease any part of the trust property, or any of the trust funds derived from subscriptions, for any of the following purposes: (1) Public or private parks or recreation places, roads, open ways or spaces for common or general use." Paragraph G of section 6 reads: "* * * Whenever donations or conveyances shall be made without consideration for any of the purposes named in this section, the deeds shall, unless the Trustee deem it inadvisable, contain by way of condition subsequent a limitation of the use of such property to the purpose for which it was granted." The indenture further provided, in Article III:

"Section 11. During the entire continuance and operation of this trust the Trustee shall have full power to do any and all of the following things which may, in its judgment, be necessary or expedient, and to do the same in such manner and at such time as to the Trustee may seem best:
* * *

"G. Execute deeds for any lot, parcel, part, strip, right of way, or portion of the said lands which may be necessary, convenient or required to settle, or adjust, any dispute or controversy with respect to boundary lines of the trust real property, or in order to convey, authorized donations of parcels, or parcels necessary or proper for public dedications of highways or other places, or for common or private uses, or

for any other purpose authorized or permitted by the provisions of this trust indenture. * * *

"I. Retain in its own name (but segregated from the general trust assets in such manner as it shall adopt) or, as provided in this trust indenture, convey to Palos Verdes Homes Association, or other organization or trusteeship exercising the functions of said Association, or to a public authority, such trust property, including reversionary rights, as may in its judgment be necessary or expedient to effectuate the purposes and objects of this trust. * * *

[2, 3] No finding was made that the trustor had or had not given written consent to the conveyance in question, nor do we find in the record any ruling evidencing the court's conclusion as to whether such consent was required under the trust indenture. Mr. Jay Lawyer, the original trustor, testified that he had not given written or oral consent to the conveyance of Lot N to the Homes Association dated June 4, 1936. It must be assumed, in support of the judgment and the general findings, that the court resolved the question of fact against the contention of the trustee and believed Mr. Lawyer to have been mistaken. His testimony, read as a whole, was less positive than the "No" which was his reply to the question whether he had given his consent to the deed in question, and is devoid of any suggested reason for his recalling that consent was not given. He did not testify that he had no knowledge of the making of the deed or that he would have refused his consent if it had been requested. The trial court, without questioning in the slightest Mr. Lawyer's entire sincerity, could well have considered the proof of nonconsent to be unsatisfactory. The development of the Palos Verdes community was a huge project, involving multifarious transactions and an enormous amount of detail. No witness other than Mr. Lawyer gave testimony as to whether Mr. Lawyer's consent had been given, there was no evidence that a search had been made of the trustee's records to ascertain whether the files contained such written consent, and there was no evidence that any files or records were kept which con-

tained the written consents that had been given by the trustor, or any notations with reference thereto. In fact, the record on appeal does not disclose that Mr. Lawyer, or any trustor who succeeded him, had ever been requested to execute, or had executed, a consent in writing to the transfer by the trustee to the Homes Association of any of the many parcels of land that were conveyed to the Association for park and recreation purposes. The trial court upon this evidence was not required to find that Mr. Lawyer did not give written consent to the conveyance of Lot N, and the implied finding that consent was given is sustained.

[4] Paragraph 13 of the findings reads as follows: "The court further finds that, by reason of lapse of time, defendants' assertion that the consent of J. Lawyer was necessary to permit the transfer of the property described in plaintiff's complaint to the Palos Verdes Homes Association comes too late. And in that behalf, the court further finds that said claim was asserted by defendants for the first time at the trial of the above entitled cause." Whether this be deemed a determination of a question of fact or only a conclusion of law, it has support in the record. Lot N was only one of numerous parcels, aggregating some 800 acres, which were originally set apart and delineated upon the maps as devoted to public use. With a great many other parcels, Lot N was planted to trees, shrubs and flowers and, according to the testimony, the extensive park system was an important factor in the sale of the property to the public. Upon the maps which were used, the park lands, including Lot N, were marked in green. As early as 1924 the literature used in offering the lands for sale referred to the golf course, a \$50,000 club house just opened, and stated: "This property, together with other playgrounds, school sites, parks and the entire coast line and bluffs, comprising in all more than 712 acres, is under the control of Palos Verdes Homes Association." The trustee had legal title to Lot N, but its title was qualified by the right of the property owners to prevent its use for any other than park and recreation purposes. To all intents and purposes it was public property and neither the trustee

nor the trustor had any present or future rights which could prevail over the rights of the property owners to have the property maintained for park and recreation purposes to the exclusion of all other purposes, except its use by the trustee, as heretofore stated. Neither the trustee nor the city seeks in this action to establish in itself a title which will be free from such public use. We are of the opinion that the conduct of the trustor and the original trustee, as described, and the improvement and use of the property for park purposes, were intended to and did constitute a dedication of the lot for such purposes.

[5] Inasmuch as the dedication had taken place 12 or more years before the deed was given to the Homes Association, that conveyance was not a donation or dedication by the trustee within the meaning of section 6 of Article III above quoted. It was therefore not a conveyance which required the written consent of the trustor. If the original trustor had not given written approval to the various maps which clearly designated all of the park areas (and there was no evidence that he had not given such approval), his acts and those of the several trustees expressed a consent which could not be recalled or denied. Twenty years was too long a time to wait to question the sufficiency of the dedication. The essentials of dedication by conduct and public use are stated in *Ball v. Stephens*, 68 Cal.App.2d 843, 158 P.2d 207, and cases therein cited.

We are further of the opinion that the deed to the Homes Association was a valid conveyance, for the reason that under Article III, section 11[G] the trustee had authority to convey parcels of land which had theretofore been donated and dedicated to use as park property and the conveyance of Lot N therefore did not require any separate or additional consent of the trustor. This construction is further borne out by the general provisions of section 11[I], Article III, quoted above, under which the trustee was empowered to convey property to the Homes Association in order to effectuate the objects and purposes of the trust. We place this construction upon the quoted provisions in the light of the evidence in the record, and because we be-

lieve it to be a construction which is supported by the evidence. We refer particularly to the absence of any evidence that the failure to obtain the written consent of the trustor to the transfer was the result of oversight or inadvertence, and to the absence of evidence that it had been the practice at any time to request the trustor's consent for the conveyance to the Homes Association of parcels which had been established, improved, advertised and represented as park property. In fact, from the record, the transfer of title to the Homes Association, without requesting the special consent of the trustor, could reasonably have been construed as an expression of the judgment of the trustee that consent of the trustor was unnecessary. This would seem to be a fair interpretation by the trustee of its powers, inasmuch as the trustor had long since surrendered the property to a public use and the holder of the legal title would have the burden of maintaining it. It would seem to have been in the interests of the trustor and other beneficiaries of the trust to have that duty assumed by the Homes Association or the city. We conclude that the deed to the Homes Association was executed within the powers of the trustee and was valid.

The trustee sought a decree that the Homes Association and the city have violated a condition subsequent in the deed to the Homes Association, and that by reason thereof title to the property has reverted to the trustee. The deed read in part:

"Provided, however, that this conveyance is made and accepted upon each of the following express conditions, provisions, restrictions and covenants hereinafter referred to as the 'conditions', which shall apply to and bind the lessees, grantees, successors and assigns of the respective parties, namely: * * * 3. That the said realty is to be used and administered forever for park and/or recreation purposes, for the benefit of the persons residing or living within the boundaries of the property known as Tracts 4400, 6881, 9302, and 9822, in the County of Los Angeles, State of California, said property being commonly known and referred to as 'Palos Verdes

Estates', under such regulations consistent with the other conditions set forth in this deed as may from time to time hereafter be established by the Park and Recreation Board of Palos Verdes Homes Association for the purpose of safeguarding said realty, and any vegetation and/or improvements thereon, from damage or deterioration, and for the further purpose of protecting the residents of said Palos Verdes Estates from any uses of or conditions in or upon the said realty which are, or may be, detrimental to the amenities of the neighborhood; * * * 5. That, except as provided in paragraph 3 hereof, no part of said realty shall be sold or conveyed by Palos Verdes Homes Association except subject to the terms and conditions hereof; provided, however, that said realty, or any portion thereof, may be conveyed by said Palos Verdes Homes Association, subject to the same conditions as herein contained with respect to the purposes for which said property may be used, to a Park Commission, or other body suitably constituted by law, to take, hold, maintain and regulate public parks; provided, further, that Palos Verdes Homes Association may dedicate to the public portions of said realty for parkway or street purposes. * * * Provided, that a breach of any of the provisions, conditions, restrictions, reservations, liens, charges and covenants hereinbefore referred to and/or contained herein, including those contained in said Declarations hereinbefore referred to, shall cause said realty to revert to the Grantor herein or its successors in interest, as owner of the reversionary rights herein provided for, and the owner of such reversionary rights shall have the right of immediate re-entry upon said realty in the event of any such breach, and, as to each lot and/or parcel owner of said property or other property described and/or referred to in said Declarations hereinbefore referred to, the said provisions, conditions, restrictions, reservations, liens, charges and covenants shall be covenants running with the land, and the breach of any thereof or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by the Grantor herein, or its successors in interest, or by such other lot or parcel own-

er, and/or by any other person or corporation designated in said Declarations hereinbefore referred to." The provisions aforesaid were stated to be for the benefit of each and every parcel of land in the several tracts named in the deed.

It was alleged in the answer of the trustee that on June 20, 1940, the Homes Association completely abandoned the premises and thereafter failed, neglected and refused to maintain the vegetation and plantings on said Lot N, and that the city likewise has failed to maintain said vegetation and plantings or to provide water therefor, and that by reason thereof the lawn dried up and died, the flower beds grew up in weeds, some trees died, and many of the shrubs and plantings were damaged or died and that by reason thereof, on July 19, 1941, the trustee gave notice to the Homes Association that the condition of the deed had thereby been violated and that title had reverted to the trustee. It was further alleged that the trustee thereafter entered upon the property, expended substantial sums in reseeded the lawn, reconditioning the planting on the lot, and that the Homes Association and the city have not reimbursed nor offered to reimburse the trustee for the expense so incurred. The court found that ever since June 4, 1936, the property has been used for park purposes and no other purposes. It was found that neither the city nor the Homes Association ever abandoned the property and that the trustee did not believe that it had been abandoned, and it was further found, by a general finding, that the allegations of the answer as to the neglect of the planting and its restoration and the expenditure of money therein by the trustee were untrue. The undisputed evidence was that the Homes Association did discontinue irrigation and cultivation of the lawn, flowers, shrubs and trees, and that by reason thereof the lawn, some of the flowers and shrubs, and one or two trees died; that the trustee reseeded the lawn, did some planting, and continued with the irrigation and care thereof. To this extent the finding is not borne out by the evidence. The general conclusion of law that plaintiff was entitled to judgment

embraces the implied conclusion that there was no abandonment and no reversion of title to the property.

[6,7] By the terms of paragraph 3 of the deed, discretion was vested in the Park and Recreation Board of Palos Verdes Homes Association with reference to "safeguarding said realty and any vegetation and/or improvements thereon from damage or deterioration" etc., and while it may appear that the neglect of the property was ill-advised and short-sighted, we think the trial court was not in error in holding that the condition of the deed had not been breached. The lawn and flowers were around the sales office, and it may be that the Park and Recreation Board and the directors of the Homes Association felt that the maintenance thereof was less in the interest of the public than it was beneficial to the trustee. Doubtless the trustee felt this way about it, since it assumed the expense of restoring the lawn and maintaining the shrubbery. It is well settled that a reversion of title for breach of a condition subsequent will not be decreed except upon clear and satisfactory evidence of a violation of the condition. *Whitaker v. Regents*, etc., 39 Cal.App. 111, 113, 178 P. 308.

[8,9] A further contention of the trustee is that the deed to the city was in violation of the terms of the deed to the Homes Association and in violation of the agreement between the trustee and the association entered into concurrently with the conveyance of title to the Association. The agreement provided that if any of the five parcels described therein, Lot N being included, should be sold during the life of the Palos Verdes trust, the proceeds of the sale should be immediately paid to the trustee; that if such sale be made after the termination of said trust, the proceeds should go to the Homes Association, and if the property or any part of it should be conveyed by the Association without consideration, "then Homes Association agrees to obtain an agreement from the Grantee, or Grantees, of said property, containing the same general provisions for the disposition and use of any proceeds derived from a sale or sales made by said Grantee or his successors in interest. 4. It is expressly under-

stood and agreed that during the life of this trust, the said Homes Association shall not sell, convey, dispose of or otherwise deal with the property herein described without first receiving the written consent of the first party and the Trustee under the said Palos Verdes Trust." (The trustee was named in the deed as "First Party".)

The trustee did not give specific written consent to the conveyance of Lot N by the Association to the city. It now contends that the Association took title to the property in trust, as expressed in the agreement, to be used and administered forever for park and/or recreation purposes for the benefit of the owners of property in Palos Verdes Estates and that the conveyance to the city was in violation of this trust. The construction of the agreement contended for is not consistent with the provisions of paragraph 5 of the deed, heretofore quoted, under which the Association was authorized to convey the property "subject to the same conditions as herein contained with respect to the purposes for which said property may be used, to a Park Commission, or other body suitably constituted by law, to take, hold, maintain and regulate public parks"; etc. The deed to the city by its terms imposed upon the city an obligation "insofar as any or all of said lands are for park purposes, to preserve and maintain said properties for such park purposes" and it recited, "This conveyance is made pursuant to the permission contained in certain deeds to this Association to convey said property to a park commission or other body suitably constituted by law to take over, maintain and regulate public parks, the grantee City, as a city of the sixth class, being suitably constituted so to do." The provisions of the deed above quoted evidence the understanding and intention of the parties that title to Lot N might ultimately be conveyed to the city or its Park Commission. The deed to the city was not in violation of any condition or covenant of the deed to the Homes Association but was

expressly authorized by the terms of that deed which we have quoted.

The provision of the agreement requiring the consent of the trustee to any conveyance of the property during the life of the Palos Verdes trust, read in connection with paragraph 5 of the deed heretofore quoted, must be construed as relating to conveyances other than those to a park commission, or other body suitably constituted by law, to take, hold, maintain and regulate public parks. The two contemporaneous documents should be read together for the proper interpretation of the agreement, and the provision of the deed which authorized such conveyances of property to the city without any further consent of the trustee must prevail over the general provision of the agreement that the property should not be conveyed without the trustee's consent. Under this construction, the conveyance to the city without specific consent of the trustee was not in violation of the agreement.

The city holds valid title to the lot in question, as park property. The decree declares that the trustee and the other defendants have no right, title or interest in or to said property, and they are enjoined from ever asserting any claim thereon adverse to the plaintiff. It should be modified to provide that the trustee under the trust indenture had the right to possess, maintain and use sales headquarters on Lot N for such time as the same, on the judgment of the trustee, may be necessary or expedient for the proper exercise of its powers and the performance of its duties as trustee, and that the title of the city is subject to any and all rights of the trustee reserved in its deed to Palos Verdes Homes Association, and subject to all rights reserved by Palos Verdes Homes Association in its deed to the city.

As thus modified, the judgment is affirmed; costs of appeal to appellant.

DESMOND, P. J., and WOOD, J., concur.

75 Cal.App.2d 638

DEL RUTH v. DEL RUTH.

Civ. 15268.

District Court of Appeal, Second District,
Division 3, California.

Aug. 1, 1946.

1. Divorce ⇨130, 150(2)

In wife's separate maintenance action on ground of extreme cruelty wherein husband filed a cross-complaint for divorce on same ground and allegations of the pleadings were specific, the finding as to alleged cruelty should have been specific, but evidence could not be held insufficient to support a general finding, if it were sufficient to prove any one of the charges of cruelty.

2. Divorce ⇨150(2)

In wife's separate maintenance action on ground of extreme cruelty wherein husband filed a cross-complaint for divorce on same ground and allegations of the pleading were specific, no special findings were requested and no objection was made to a proposed general finding, the only objection to such general finding which could be raised later was that it was insufficient to support the judgment.

3. Divorce ⇨179

In wife's separate maintenance action on ground of extreme cruelty wherein husband filed a cross-complaint for divorce on same ground and plaintiff did not object to general findings and demand special findings, and general findings were of ultimate facts and were sufficient to support judgment, plaintiff could not complain for first time on appeal that findings were insufficient because they failed to cover specific allegations of cruelty which were added by means of specifications made at trial court's request. Code Civ.Proc. § 634.

4. Trial ⇨393(1)

The purpose of statute requiring proposed findings of fact to be served and that no findings should be signed until expiration of five days after such service is to afford opposing party an opportunity to object to form or substance of the proposed findings and to propose other findings, and if not attacked by opposing parties, the

right to object is waived. Code Civ.Proc. § 634.

5. Divorce ⇨150(2)

In divorce cases, findings of fact may be waived by the parties.

6. Appeal and error ⇨181

A party cannot raise, for first time on appeal, objections which could have been obviated if made in the court below.

7. Divorce ⇨111, 184(12)

In wife's action for separate maintenance on ground of extreme cruelty wherein husband filed a cross-complaint for divorce on same ground, refusal to permit plaintiff to introduce in evidence a letter to defendant from his niece which disclosed that defendant was contemplating divorce and to testify as to her conversation with defendant concerning letter constituted prejudicial error.

8. Divorce ⇨51

Condonation is conditional and is revoked and original cause for divorce is revived when condonee commits acts constituting a like or other cause of divorce, or when condonee is guilty of great conjugal unkindness, not amounting to a cause for divorce, but sufficiently habitual and gross to show that conditions of condonation had not been accepted in good faith or not fulfilled. Civ.Code, § 121, subsds. 1, 2.

9. Divorce ⇨116, 184(12)

In wife's action for separate maintenance on ground of extreme cruelty wherein husband filed a cross-complaint for divorce on same ground, trial court's selecting the arbitrary date of January 1, 1941, and declining to hear evidence of alleged misconduct of either party prior to that date on theory that earlier acts had been condoned and forgiven constituted prejudicial error. Civ.Code, §§ 118, 121, subsds. 1, 2.

10. Husband and wife ⇨297

Remoteness of time of commission of acts of cruelty forming basis of wife's separate maintenance action was not of itself a sufficient ground for excluding evidence of such acts where questions of condonation and revocation thereof were required to be decided. Civ.Code, §§ 118, 121, subsds. 1, 2.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Olive Del Ruth against Thomas Leroy Del Ruth for separate maintenance, wherein the defendant filed a cross-complaint for divorce. From a judgment awarding defendant a divorce on his cross-complaint, the plaintiff appeals.

Reversed.

John W. Preston, of Los Angeles, for appellant.

Wright & Millikan and Herschel B. Green, all of Los Angeles, for respondent.

SHINN, Justice.

Appeal by plaintiff from a judgment which denied her separate maintenance and awarded defendant a divorce upon his cross-complaint. Plaintiff brought her action for separate maintenance, charging defendant with extreme cruelty. Defendant answered and filed a cross-complaint for divorce, charging plaintiff with extreme cruelty. The allegations of both parties were in general terms without specification of particular acts. The parties intermarried March 14, 1921, and have one child, a son, of the age of 21 years. They separated in July, 1944. Plaintiff is employed as a motion picture director at a salary of \$1,750 per week. The parties were possessed of community property of substantial value. Defendant was called as a witness under section 2055 of the Code of Civil Procedure on March 14, 1945. After he had been examined as to his property he was asked to state the particulars of the acts and conduct of plaintiff which were claimed to constitute her wrongful conduct. The court thereupon stated, "Not for 20 years, when did the marriage begin? * * * Well, I say there is no need to start out with the marriage and recite their squabbles for the past 24 years." Then occurred the following:

"Mr. Crump [one of plaintiff's attorneys]: It seems so to me, but if your Honor will indicate how far back we can go.

"The Court: Oh, two or three years.

"Mr. Crump: I suppose that applies to both sides?

"The Court: Oh, yes.

"Mr. Crump: Then we will start in say in 1941."

The record shows that although plaintiff's attorneys proceeded as the court directed, they declined to stipulate or consent to the ruling made shortly thereafter which excluded evidence of defendant's conduct prior to 1941. Defendant's counsel insisted that defendant should be allowed to prove plaintiff's conduct over a period of the last 12 to 15 years, his position being that there had been misconduct extending over that period, and the court stated: "It would seem to me many of those have been condoned by subsequent treatment." After discussion the court said further: "The Court wants to get this case in a place where we can try it in a reasonable time. There is no need of listening to acts of cruelty for twelve years on either side, all the detail of these things, we would be here for three weeks, and there are others waiting for the services of the Court. * * * I think we ought to get some pleadings." A plan was agreed upon for each side to specify the acts of cruelty relied upon, for in that manner, the court said, "We could work out some method by which we could take up some of the high lights and let the details be dissolved in the background." And later, "I want some allegations to which testimony may be directed." And further, "I need some statement of facts which you expect to prove. * * * A bill of particulars, just setting forth the particulars in which the cross-complainant complains, recite them, you can put it in as an amendment to your cross-complaint." The parties prepared specifications of the acts of cruelty which they proposed to prove. Plaintiff's specifications were fourteen in number. The court of its own motion selected five of these, as to which he would take evidence, and excluded the others, and likewise rejected about half of defendant's twenty-five specifications. The court further of its own motion made an order that all testimony relating to acts of cruelty on either side would be strictly limited to a period beginning January 1, 1941, and ending with the date of separation.

The five specifications of cruelty as to which plaintiff was allowed to offer evi-

dence were that defendant called her vile names; that he spent his evenings away from home and when home shut himself in a room and refused to have anything to do with plaintiff; that many times he repulsed plaintiff when she went to his room and attempted to be affectionate with him, and that in 1941 or 1942, in the presence of plaintiff's mother, he spat in her face. Among the allegations excluded were those of an association between defendant and an actress in 1929 which, plaintiff alleged, caused comment among their friends, and which resulted in a suit by the husband of the actress against defendant, charging alienation of affections, which suit was the subject of newspaper articles and gossip which came to plaintiff's attention. Also excluded were allegations that defendant purchased large quantities of liquor for plaintiff, urged her to drink, urged her to go out socially with men as well as women, and at the same time was employing detectives for the purpose of entrapping her in misconduct; that at a time when plaintiff was pregnant defendant struck her a hard blow on the abdomen with his fist; that in 1933 he hit her in the eye with his fist, giving her a black eye, and in 1933 or 1934, in the home, threw a glassful of water in plaintiff's face; that in 1940, in the home, defendant, while angry, threw a glassful of water at a mirror, breaking the glass and shattering it over the floor. Among the specifications of cruelty charged by defendant, the court retained those charging plaintiff with great extravagance, with the purchase on charge accounts of some \$800 worth of clothes on the date of the separation, which defendant paid for, and with the purchase a few days later of \$1,100 worth of merchandise, which had not been paid for; that plaintiff was possessed of a violent and ungovernable temper; that for nine years last past she had refused to maintain sexual relations with him; that for nine years and longer she had displayed no affection for him or interest in him; that she frequently addressed toward him vulgar and profane language; that she took telephone calls from his business associates and refused to give them to him, with the result that he had to rent an office where he could receive telephone calls and con-

duct his business; that she stayed in bed until late hours in the day, and at all times refused to do housework, even to making the beds when they could not be made by the servants; that she would habitually go shopping and not return for dinner until after defendant and his son had finished their dinner, and many times would not return for dinner at all; that she would not go to places of entertainment with defendant but would come home late at night, slam the doors, play the radio, turn on the lights, and that defendant was thereby compelled to take a separate bedroom, in which he had slept for the past nine or ten years; that plaintiff used intoxicating liquors to excess, criticized defendant's relatives, and that she cursed and abused defendant, and accused him of taking a picture of their son from her dressing table, although it had been taken by the son without defendant's knowledge. Excluded were allegations of the cross-complaint that plaintiff, between the years 1931 and 1936, associated with a male acquaintance at hotels, night clubs, Catalina Island, and the beaches, appearing with him in public at all times of the day and night, leaving her car parked in front of his apartment house, and further allegations that defendant upon returning from Palm Springs one night in 1931, went into the apartment of plaintiff's male friend and found the two there completely undressed. There were also allegations of an automobile accident suffered by plaintiff when she had been at a party with the same man and was driving her automobile while intoxicated, as a result of which accident she was confined to the hospital for several months. There were also allegations concerning her difficulties with the nurses, her infatuation for her doctor, and her attacking a maid in their home for making a mistake, in which attack it was alleged she broke the maid's glasses, causing her to lose the sight of her eye, for which defendant paid \$1,500 in settlement of the maid's claim for damages, which sum included his own attorney's fees. Other specifications of plaintiff's alleged misconduct which were rejected did not differ materially from those as to which evidence was received.

During the examination of defendant under section 2055, plaintiff's counsel produced a letter dated April 13, 1944, written to defendant by his niece. The letter said, in part: "Roy, I am so very happy over the grand news about you and ———. I am so anxious to meet her and I know I will love her, as she looks like such an understanding and gifted girl. She is what you should have had many years ago. I guess if we all could live our lives over again we sure would do differently, because that is the only way we can get a contrast, a little bitter with the sweet. I am looking forward to you, Mother and Dad and bring ——— with you some Sat. or Sunday for dinner," etc. The name in the letter was the same as that of the first name of the actress with whom defendant was alleged to have associated, as heretofore stated. Upon defendant's objection, the court excluded the letter from evidence upon the ground that it had a connection with the former association of defendant with the actress who had the same first name, and that evidence of such association and all matters connected with it had been excluded under the previous ruling. It was neither stated nor admitted that the woman named in the letter was the one who was involved in the earlier incidents. Plaintiff made an offer to prove that she found the letter in the mail box, opened it, placed it upon defendant's desk and questioned him about it, and that the incident was one that she could not get out of her mind; that it caused her grief and illness. The offer of proof was rejected by the court and no further evidence was received concerning the letter.

Evidence was received under the specifications of cruelty as limited by the court. The court made the following findings:

"III. It is not true that the defendant and cross-complainant has treated the plaintiff and cross-defendant in a cruel or inhuman manner or that he caused her to suffer great or any humiliation or embarrassment or mental anguish or that he caused her health to become impaired.

"IV. It is true and the Court finds that the cross-defendant, Olive Del Ruth, has wrongfully inflicted upon the cross-

complainant, Thomas Leroy Del Ruth, grievous mental suffering and because thereof, it is impossible for the parties to live together as husband and wife."

A decree of divorce was awarded defendant and a division of the community property was ordered, under which plaintiff would receive money and property of the value of about \$75,000 but no other support, and the defendant about one-third of that sum. It is contended by plaintiff that there was insufficient evidence to support the finding that she had wrongfully inflicted upon defendant grievous mental suffering. Although defendant's testimony as to all but a few instances of plaintiff's misconduct was without direct corroboration, it was corroborated with respect to plaintiff's extravagant habits and the use by her toward defendant of profane and vulgar language, the text of which may well be omitted. It is enough to say that we find no insufficiency of evidence to support the finding of cruelty on the part of plaintiff.

[1-6] The findings which we have quoted are claimed to be insufficient because they fail to cover the specific allegations of cruelty which were added by means of the specifications made at the request of the court. It is argued that these specifications amounted to amendments of the pleadings and that specific findings were required. If objection had been made by plaintiff to the general finding, or if she had requested specific findings as to her own conduct, and that of defendant, the point would be well taken. *Bilger v. Bilger*, 54 Cal.App.2d 739, 129 P.2d 752; *Franklin v. Franklin*, 140 Cal. 607, 74 P. 155; *Smith v. Smith*, 62 Cal. 466. From the finding that plaintiff had been guilty of cruelty, it cannot be determined what alleged conduct on her part had been proved, and what had not been proved. Nor can it be determined from the finding that defendant has not treated plaintiff in a cruel or inhuman manner, whether he was found guiltless of the acts charged or whether the court believed that such acts, if proved, were not wrongful, or did not cause plaintiff physical or mental suffering. Although the evidence cannot

be held insufficient to support a general finding if it was sufficient to prove any one of the charges of cruelty, in a contested case the findings as to alleged cruelty should be specific where the allegations of the pleadings are specific. If special findings are requested, it would be error for the court to refuse them, but if no special findings are requested and no objection is made to a proposed general finding, the only objection to such general finding which can be raised later is that it is insufficient to support the judgment. The findings criticized were not mere conclusions of law; they were findings of ultimate fact and were sufficient to support the judgment. *Ungemach v. Ungemach*, 61 Cal.App.2d 29, 40, 142 P.2d 99. Plaintiff had an opportunity to object to the general findings and to demand special findings. Section 634 of the Code of Civil Procedure requires that proposed findings be served and that no findings be signed until the expiration of five days after such service. The purpose of the requirement is to afford the opposing party an opportunity to object to the form or substance of the proposed findings and to propose other findings. The opportunity thus afforded gives rise to a duty to make objection, and if none be made, the right to object must be deemed to have been waived. Plaintiff's attorneys not only did not object to the proposed general findings, but they also signed a written waiver of the five-day period allowed for objection by section 634 and consented "that said findings may be signed forthwith." In divorce cases findings may be waived by the parties as in other cases. *Waldecker v. Waldecker*, 178 Cal. 566, 174 P. 36. If there may be a valid waiver of findings, there may be a valid waiver of special findings, and we think that here the findings of cruelty may not be questioned on appeal on the ground of error because they were not specific. The general rule is stated in 2 Cal.Jur. p. 248, section 74: "It is a well settled rule that a party cannot urge, for the first time on appeal, objections which could have been obviated if made in the court below. This doctrine is founded partly upon a sort of estoppel, for where the objection is one which could, if

made in the court below, have been obviated, it would be clearly unjust for a party to withhold his objection until his appeal, when it is too late to correct the defect." The rule is sustained by many authorities cited in support of the text.

[7-10] There were charges of serious misconduct on the part of defendant prior to January 1, 1941, and also charges of cruelty subsequent to that date, which were arbitrarily eliminated from the case by the rulings of the court. The implications in the letter from defendant's niece were calculated to seriously disturb plaintiff and to aggravate the dissension that already existed. They disclosed that defendant was contemplating divorcing plaintiff, which defendant in his testimony admitted to be the fact. They called for an explanation by defendant. The letter should have been received in evidence, plaintiff should have been allowed to testify as to her conversations with defendant concerning it, and also as to whether the incident had occasioned her any mental distress. In explaining his ruling, the trial judge said: "The thought in the mind of the Court at the time and now is that by that method we eliminate any possibility of some other woman in the case, so far as the defendant is concerned, and to eliminate that part of the case which related to some alleged indiscretion on the part of the plaintiff when she was followed by a detective and found naked in a room with this man ——. I thought it was in the interest of good morals and possibly simplifying this procedure not to have that sort of thing taken up by either side of the case. That was one of the purposes that I felt we had accomplished, and it was a very fair proposition, equally fair to each side, to eliminate those things that might embarrass them or might embarrass their son. I believe in so many cases of domestic difficulty, divorce or separate maintenance, innocent children are made to suffer for the sins of the parents, and I think that is one of the principal considerations we must have in mind in handling of these domestic problems." With due respect for the motives of the trial judge, we think he carried his sympathy and altruism too far for the good of the lawsuit. From a perusal of

the record as to the domestic life of these parties, which was a matter of daily observation by the 21 year old son, who resided with them, we feel that any effort made at the time of the trial to spare the parties or their son embarrassment came far too late. It was the duty of the judge to try the lawsuit, and nothing which would have aided him materially in arriving at the facts of the case should have been omitted in order to save the feelings of the parties. They made no complaint of embarrassment. A trial of this sort is not an arbitration; it is an inquiry for the determination of matters of fact. However distressing and regrettable it may be to have to take evidence as to charges of infidelity, disloyalty, acts of physical violence, name calling, and the use of profane, obscene and disgusting language, it is not within the discretion of the court to arbitrarily refuse to receive competent, relevant and material evidence. Here the court selected the arbitrary date of January 1, 1941, and declined to hear evidence of alleged misconduct of either party prior to that date. This was apparently upon the theory that earlier acts had been condoned and forgiven; but condonation is conditional and is revoked and the original cause for divorce is revived, "1. When the condonee commits acts constituting a like or other cause of divorce; or, 2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled." Sec. 121, Civil Code. The court could not know, without hearing evidence as to the conduct of the parties prior to January 1, 1941, that the ultimate conclusions as to the allegations of cruelty on either side would not have been materially influenced or controlled by such evidence. Furthermore, remoteness of the time of commission of acts of cruelty is not of itself a sufficient ground for excluding evidence of such acts where questions of condonation and the revocation thereof must be decided. Section 118 of the Civil Code provides: "Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from exces-

sive acts of ill-treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." The limitation of the evidence of cruelty to the period commencing with 1941 was ordered by the court upon the pure supposition that the acts charged, if committed, had been condoned and that the condonation, or condonations, if any, had not been revoked. These premature conclusions were material to the merits of the case and, having been arrived at without the receipt of any relevant evidence, were strictly non-judicial. Such charges as infidelity and associations which are indicative of infidelity, or of other conduct which tends to show that marital obligations have been held lightly, may not be disregarded for any of the reasons assigned by the trial judge. Plaintiff did not accuse defendant of infidelity, but she did allege facts which might reasonably have aroused suspicion in her mind and caused her great worry. Defendant, however, accused plaintiff of infidelity, and this charge was lightly brushed aside by the court. The limitations imposed by the rulings of the court, which were not requested or suggested by either of the parties, were such as to force the conclusion that the case was not fully tried. If under the rulings each of the parties was excused from defending against serious charges made by the other, which the judge stated was fair to both, then each was thereby deprived of an opportunity to prove serious charges of misconduct against the other. It is a fact that contested divorce cases often make extreme demands upon the time of the court, but this situation cannot be obviated by admitting only a part of the material evidence in the case.

Plaintiff urged on motion for new trial, and urges here, that she was prevented from having a fair trial by irregularities occurring during the course of the trial. After the trial had been under way for two or three days, and before any evidence had been received in support of the charges of cruelty, the trial judge communicated to

plaintiff at her home the fact that he wanted to talk to her about the case privately in chambers. The request became known to the attorneys in the case and, pursuant to the request, plaintiff attended upon the judge in chambers and the case was discussed without the hearing or presence of any other person.

Upon motion for new trial, affidavits were filed by plaintiff and by the judge, giving the substance of the discussion which took place at the meeting, as each remembered it. It is unnecessary to set out these affidavits, or to consider them at length. From the affidavit of the judge it appears that he inquired of plaintiff whether a reconciliation were possible, was assured by her that it was not possible, and that he then stated to her that he did not look with favor upon separate maintenance and that he thought most of the judges felt the same way about it. He suggested that plaintiff amend her complaint to pray for divorce, stating that if the decree should be in her favor there could be an allowance of alimony, but that if a divorce were granted to the husband, he would not be required to pay alimony. Immediately after his interview with plaintiff the judge made his ruling that evidence would be received as to some of the acts of alleged cruelty, but not as to others, and that the evidence would be limited to occurrences since January 1, 1941. It does not appear that at that time the judge had consciously, or otherwise, made up his mind not to award plaintiff separate maintenance, but it cannot be denied that he would have been reluctant to grant her that relief. Plaintiff had to proceed under the handicap of a preconceived and declared disinclination of the judge to award her the only

relief which she sought. It was therefore of vital importance that she make out the strongest possible case. She should have been afforded the fullest opportunity to convince the judge that she had a good case for separate maintenance. At the conclusion of the evidence, when plaintiff's counsel were still endeavoring to put in evidence the letter to defendant from his niece and to persuade the judge to hear the testimony of plaintiff as to the events which followed the discovery of the letter, the court, in sustaining the defendant's objection, stated: "Well, I think there is enough here on either side in the way of charges and counter charges, plenty of proof." But, although there was "plenty of proof" to establish the charges and counter charges, it developed that plaintiff's proof was not strong enough to convince the judge that she should have separate maintenance. In other words, she had not succeeded in overcoming the judge's reluctance to award separate maintenance. Considering the evidence of the judge's aversion to granting separate maintenance and his statement, in effect, that there was no insufficiency of evidence to warrant a judgment in favor of plaintiff, it is too clear for argument that the limitations placed upon her evidence constituted prejudicial error. We cannot speculate as to whether the result would have been the same if plaintiff had been permitted to present all her evidence. She was entitled to a full and fair trial, and under the circumstances was peculiarly in need of one.

The judgment is reversed.

DESMOND, P. J., and WOOD, J., concur.

75 Cal.App.2d 311

PEOPLE v. DUTRA.

Cr. 574.

District Court of Appeal, Fourth District,
California.

July 11, 1946.

Rehearing Denied July 22, 1946.

Hearing Denied Aug. 8, 1946.

1. Criminal law ⇨742(2)

In prosecution for violation of section 288a of the Penal Code, whether two witnesses against defendant were accomplices was properly left to the jury under the evidence. Pen.Code, § 288a.

2. Criminal law ⇨814(15), 829(10)

In prosecution for violation of section 288a of the Penal Code, refusal to give four requested instructions on accomplices was not prejudicial error where correct parts of instructions requested were fully covered by instructions given and parts of the instructions were not based on evidence in the case. Pen.Code, §§ 31, 288a.

3. Criminal law ⇨815(12)

In prosecution for violation of section 288a of the Penal Code, instruction that to aid and abet means being present either actually or constructively at the time and place of the offense and doing some act which renders aid to the perpetrator in the commission of the offense was not subject to criticism that it eliminated the element of conspiracy from the consideration of the jury. Pen.Code, §§ 31, 288a.

4. Criminal law ⇨757(4)

In prosecution for violation of section 288a of the Penal Code, an instruction that an accomplice is a person who was present either actually or constructively and who rendered aid to the perpetrator in the commission of the offense or advised and encouraged its commission was not subject to criticism that it took from jury the consideration of any possible agreement or conspiracy or prejudicially interfered with consideration of the essential element as to whether either of the witnesses had said or done anything to aid or encourage the commission of the act. Pen.Code, §§ 31, 288a.

5. Criminal law ⇨511(2)

Corroborative evidence need not of itself show the actual commission of the crime but it may be slight and is sufficient if it only tends to connect the defendant with the commission of the crime in question, and if from other evidence the defendant's connection with the commission of the crime may be fairly inferred the corroboration is sufficient. Pen.Code, § 31.

6. Infants ⇨20

Criminal law ⇨1172(1)

In prosecution for contributing to the delinquency of a minor, where there was evidence of different acts which might have so contributed and there was nothing to show that some of the jurors did not base their verdict on some of such acts and other jurors on other acts, and court gave an instruction that if jury found that the defendant committed any act or omitted the performance of any duty which in their opinion would tend or cause or encourage the minor to lead an idle, dissolute or immoral life, a verdict of guilty must be returned, it could not be said that error did not appear or that it was not prejudicial. Welfare and Institutions Code, § 700.

7. Criminal law ⇨814(15)

Where there was no evidence of any grant or promise of immunity or evidence of any other fact upon which instruction could properly be based, refusal to instruct that members of armed forces could be tried in civil courts for crimes committed in the state and that in passing on the credibility of any such person jury might consider whether or not he had been granted immunity was not erroneous.

Appeal from Superior Court, Kings County; Dan F. Conway, Judge.

Tom Dutra was convicted of a violation of Pen.Code, § 288a, and of contributing to the delinquency of a minor, and he appeals.

Judgment on first count affirmed and judgment on second count reversed.

Leo R. Friedman, of San Francisco, and John F. Pryor, of Hanford, for appellant.

Robert W. Kenny, Atty. Gen., John F. Hassler, Jr., Deputy Atty. Gen., and Roger R. Walch, Dist. Atty., of Hanford, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 288a of the Penal Code and, in a second count as a separate offense but connected in its commission with the first, with contributing to the delinquency of a minor. A jury found him guilty on both counts and he was sentenced to prison on the first count and to jail on the second count, the sentences to run concurrently. He has appealed, as to each count, from the judgment and from an order denying his motion for a new trial.

The appellant operated a rooming house in Hanford, known as the Valley Rooms, using several of the rooms as his living quarters. The incidents in question occurred on the evening of June 21, 1945, in these living quarters. In addition to Dutra, there were present three army officers named Nansel, Robinson and Fox, and a 17 year old boy named Silvas, who was a civilian employee at a nearby army base. The three officers arrived at 8 p.m. and were introduced to the appellant by Silvas who was already there. They all began drinking and talking, and in about an hour the conversation drifted into sex matters. During the next two hours a number of improper and lewd acts occurred, including the fondling of each other, and the putting on of women's garments, by at least two of the men. About 11 o'clock Nansel and Robinson went into an adjoining bedroom where they continued such fondling. The testimony is that "no sex occurred" while they were there, and there is no evidence that they violated section 288a or made any attempt to do so. After a few minutes Nansel asked Robinson to leave, and he returned to the living room where the others were. The appellant then entered this bedroom and shortly thereafter a violation of section 288a was committed by Dutra and Nansel. No other act of that nature was committed by any of these parties on this occasion.

Nansel admitted the essential facts in his testimony, and Robinson and Silvas

testified that they saw the consummation of the act in question through the partially open door. Fox had been transferred and was not available as a witness. There is no evidence that he took any active part in any of the proceedings on that evening. The evidence, if it may be accepted, was overwhelming as to the guilt of the appellant. It is contended, however, that Nansel, Robinson and Silvas were all accomplices and that there is no corroboration of their testimony. The court instructed the jury that Nansel was an accomplice but, with respect to Silvas and Robinson, left that matter to the jury, as a question of fact.

[1] The appellant first contends that both Silvas and Robinson were accomplices as a matter of law. With respect to Silvas it is argued that he admitted that he had previously engaged in acts of degeneracy with various persons, including one such act with Nansel; that he made the arrangements for this gathering; that he testified in reference to Dutra that "I knew that in case I brought any men up, he wanted to have sex with them"; that he admitted that he told Robinson that Dutra was a "character" or a "queer", a homosexual pervert; and that he took an active part in the indecent things which occurred in the living room, including the putting on of the costume of a spanish dancer. While Silvas testified that he knew that Dutra had such things in mind, in other words that he knew Dutra's nature and proclivities, there is no evidence that Dutra told him to bring these men for this purpose and none that any such message was conveyed to them. Silvas testified that he told Robinson that Dutra was a "character" or a "queer". In response to a question, he then said that by these words he meant that Dutra was "homosexual." There is no evidence that this meaning was communicated to Robinson or understood by him. Moreover, there is considerable contrary evidence on this issue, including evidence which strongly suggests that Silvas had two other reasons, more personal to himself, for inviting these officers on this occasion. The question as to whether Silvas was an accomplice was clearly one of fact and not one of law.

As to Robinson, it is contended that he was advised by Silvas, when invited to the party, that Dutra was a homosexual; that he admitted that he first attempted to do the thing denounced by section 288a upon Nansel, but was unable to arouse Nansel's interest; that Silvas testified that Robinson then agreed that Dutra should go into the room and "complete the act which Robinson had commenced"; and that Robinson participated in the general acts in the living room which preceded the act in question. Not only is there conflicting evidence on this issue, but the record does not bear out some of these contentions. Robinson did not admit that he attempted to do the act denounced by section 288a and there is no evidence that he did so. Silvas did not testify that Robinson agreed, when he came out of the bedroom, that Dutra should enter the room, or that he should "complete the act which Robinson had commenced" and there is no evidence that Robinson had commenced any such act. Robinson testified that Silvas had asked him several times to come and meet Dutra, telling him that Dutra was wealthy, had a large house, entertained a great deal and was a good host, and that Dutra wanted to meet him; that Silvas did not tell him anything else about Dutra made no reference to Dutra's moral or sexual inclinations, and did not tell him that Dutra was a queer character. Robinson further testified that he had known Silvas as an employee waiting on tables at the officers' club, that except for that he had had no contact with him, that he did not accept his previous invitations because he did not consider it proper to go alone with this civilian employee, and that he finally went because other officers were to go along. The most that can be said is that there is a conflict in the evidence and the question as to whether Robinson was an accomplice was one of fact and not one of law.

It is next contended that in passing on the accomplice issue, as a question of fact, the jury was not properly instructed in that the court refused to give four instructions requested by the appellant "to the effect that a conspirator was an accomplice." It is argued that the theory of appellant's de-

fense was that Silvas and Robinson were conspirators, and therefore accomplices, in the crime committed by Nansel and Dutra. In support of the contention that he was entitled to have the jury instructed on this theory of the case *People v. Williamson*, 6 Cal.App. 336, 92 P. 313, 314, is cited, wherein it is stated that "However incredible the testimony of the defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true." In this case the appellant did not testify and produced no evidence. In support of the contention that Silvas and Robinson were conspirators and therefore accomplices particular reliance is placed upon *People v. Lima*, 25 Cal.2d 573, 154 P.2d 698, and *People v. Jordan*, 24 Cal. App.2d 39, 74 P.2d 519. In the first of these cases a thief and the receiver of stolen property were held to be accomplices where both crimes were shown, without conflict, to have been committed in accordance with a prearranged plan to that end. Not only did the result appear as a matter of law, but the basic elements and circumstances were entirely dissimilar to those here appearing. In the *Jordan* case a large number of offenses were planned, a large number were committed, all or nearly all of those present being involved, and there was a wealth of evidence of agreement and plan which is entirely dissimilar and completely at variance with the evidence in this record.

The first of the four requested instructions began as follows: "Where two or more persons agree together, either expressly or tacitly, to the commission of a crime and all such persons are present at the time such alleged crime is committed and either actively participated in the commission of such crime, or aided or abetted such crime, or counseled, advised or instigated the commission of such crime, each of said persons is an accomplice of the others and no one of them can be convicted of such crime on the uncorroborated testimony of the others * * *."

In other instructions the court fully instructed the jury to the same effect and almost in that identical language, with the exception that they did not refer to an agreement. That instruction then went on

to state that if it was found that Silvas, Nansel and Robinson "agreed, either expressly or tacitly, that on or about the time set forth in the information the defendant (and Nansel) should commit the crime of violating section 288a of the Penal Code," then all of said parties were accomplices in the commission of said crime.

The second of these instructions stated that when two or more parties enter into a conspiracy to commit a crime of a certain class each conspirator is deemed guilty of every such crime committed in furtherance of the conspiracy by any of the conspirators, and each is an accomplice. It was then stated that if it was found that Nansel, Silvas, Robinson and Dutra met on this occasion pursuant to a prior understanding or agreement that they would so meet for the purpose of indulging in homosexual acts, or if there was no such prior agreement but after meeting they expressly or tacitly agreed "that they would then and there commit homosexual acts on with the other" then "all of said parties so agreeing" were conspirators, and each was an accomplice of the other parties to the agreement. It may be observed in passing that, while there is some evidence that would justify an inference that by their acts on this occasion some of these parties helped or encouraged the commission of the crime which occurred, there is no evidence sufficient to support a finding of an agreement looking toward the commission of such an offense. Moreover, this instruction is so drawn that, if other considerations are overlooked, it could apply only to Nansel and Dutra. The court instructed the jury that Nansel was an accomplice.

The third requested instruction is very similar to the second with the exception that it included Fox among the parties named. The fourth instruction repeats almost exactly the opening part of the first instruction which is above quoted. That is followed by the statement that if it should be found that Silvas, Nansel, Robinson, Fox and the defendant all agreed that at or about this time Dutra and Nansel should meet in the presence of the others and commit the crime of violating section 288a then all of said parties are accomplices in the commission of said crime. Again,

the correct part of this instruction was fully covered and there is an entire absence of any evidence to support a finding that these parties agreed that the two named should commit this offense in the presence of the others.

[2] Aside from certain legal defects in these refused instructions, and apart from evidentiary deficiencies which made portions of them inapplicable, the essential elements were sufficiently covered in the instructions which were given. The court gave all the usual instructions on this issue, including the provision of section 31 of the Penal Code, telling the jury that no person can be convicted upon the uncorroborated testimony of an accomplice, that there must be evidence in addition to the testimony of such accomplices tending to connect the defendant with the crime, and what was necessary to make anyone an accomplice. Among other things, the jury was told the following: That all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission, or no being present have advised and encouraged its commission, are principals; that "all persons concerned in the commission of a crime whether they directly commit the act constituting the offense, or aid or abet in its commission, or not being present have advised and encouraged its commission, are accomplices of all other persons concerned in the commission of such crime, whether such other persons directly committed the act constituting the offense or aided or abetted in its commission, or not being present have advised and encouraged its commission"; that the expression "to aid or abet" means being present, either actually or constructively, at the time and place of the offense and doing some act which renders aid to the perpetrator in the commission of the offense; that, in other words, the aiding and abetting of another person means to knowingly and with criminal intent actually aid, promote, encourage or instigate, by act or counsel, or by both act and counsel, the actual commission of the offense; that either Robinson or Silvas should be considered an accomplice if the evidence showed that he participated with the defendant in the act

charged or that he did "knowingly and with criminal intent aid, promote, encourage or instigate said act by either act or counsel, or by both act and counsel"; that to constitute a person an accomplice he must be properly liable to prosecution for the identical offense; that an accomplice is one who is present, either actually or constructively, and who rendered aid to the perpetrator in the commission of the offense or advised and encouraged its commission, and who was also subject to prosecution for the identical offense; that if it was found that Robinson and Silvas were present when this offense was committed but it was further found that they did not participate in the act nor encourage or aid in the commission of the act, then they were not accomplices; and that the testimony of one accomplice could not be considered as corroborating the testimony of another accomplice to the same crime. The court also fully instructed the jury as to the kind and character of evidence necessary under the law to corroborate the testimony of any accomplice.

The jury was clearly told that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission, or have advised or encouraged its commission, are principals in the crime so committed and are accomplices. Under the circumstances here appearing this was sufficient to cover any aid or assistance, even such as might arise from any agreement which might be inferred. It may be noted that the theory of agreement or conspiracy did not directly appear from the evidence, and was first raised by these offered instructions. The responsibility of those entering into an agreement or conspiracy arises from the fact that they do some act which brings them within section 31 of the Penal Code, making them liable as principals. The essential thing here was what was done, and if there was any aid, assistance or encouragement through an agreement, this was an act within the scope of section 31, and was covered by the instructions here given. To tell the jurors that if they found an express or tacit agreement here they should, under certain circumstances, consider the witnesses as

accomplices, would have added nothing, in practical effect, to the instructions that if they found that any acts of assistance or encouragement had been done, such a result followed. This is particularly true since any finding of an agreement here would necessarily rest upon inference and since, in the case of Robinson, it must be based upon an inference based upon another inference. The jury was repeatedly told that if either of the witnesses rendered any aid or assistance or encouragement to the two parties who committed the act, the one so doing was an accomplice. This was equally true whether or not such aid or assistance was the result of an agreement with others. Under the circumstances here appearing, there was no prejudicial error in failing to use the words "conspirator" or "agreement". Moreover, it is inconceivable that the result here could have been affected by the giving of these instructions.

[3, 4] It is next contended that the court erred in certain instructions relating to accomplices which were given. The first is one stating that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission, or not being present have advised and encouraged its commission, are accomplices of all other persons concerned in the commission of such crime. While it is admitted that this is correct as far as it goes, it is argued that it ignores the rule that conspirators are accomplices because they are principals. This instruction was offered by the appellant, no error appears, and the other element was elsewhere sufficiently covered. It is further argued that the element of conspiracy was eliminated from the consideration of the jury by an instruction which told the jury that the expression "to aid and abet" means being present, either actually or constructively, at the time and place of the offense and doing some act which renders aid to the perpetrator in the commission of the offense, and that, in other words, for one to be guilty of aiding or abetting another he would have to knowingly and with criminal intent actually aid, promote, encourage or instigate, by act or counsel, or by both act and counsel, the ac-

tual commission of the offense. Far from eliminating the element of conspiracy this told the jury that one was an accomplice if he aided or assisted the perpetrator of the crime in any way, even though it was only by counsel. This is broad enough to cover any such agreement as here appears. It is urged that another instruction, that an accomplice is a person who was present, either actually or constructively, and who rendered aid to the perpetrator in the commission of the offense, or advised and encouraged its commission, and that Robinson and Silvas were not accomplices, even though present at the time in question, unless it was found that they participated in the act, or encouraged or aided the commission of the act, was prejudicial because it told the jury that in order to be accomplices either of these witnesses must have been actually or constructively present, or must have actually participated in the criminal act, or encouraged or aided the commission of the act. If they were aiding or encouraging the act they may be considered constructively present, but this is immaterial here as it was conceded that they were actually present, and the essential question was what they did or had done. They were not accomplices unless in some way they participated in the commission of the offense or encouraged or aided in its commission. None of these instructions took from the jury the consideration of any possible agreement or conspiracy, or prejudicially interfered with the consideration of the essential question as to whether either of these witnesses had said or done anything to aid or encourage the commission of the act.

[5] A further consideration is that there was here some corroborative evidence which was not explained or denied by the appellant. It is well settled that such corroborative evidence need not, of itself, show the actual commission of the crime, that it may be slight under some circumstances, and that it need only tend to connect the defendant with the commission of the crime in question. If, from other evidence, the defendant's connection with the commission of the crime may be fairly inferred, the corroboration is sufficient. *People v. King*, 40 Cal.App.2d 137, 104 P.2d 521. Testimony

that the defendant had shown a pertinent photograph to the prosecutrix was held admissible in *People v. Bose*, 28 Cal.App. 743, 153 P. 965. The court there quoted with approval from another case: "The testimony is admitted as corroborative of the main charge and as tending to show the disposition of the accused and his proneness to commit the crime of the particular nature involved." Pictures and similar evidence have been held admissible as corroborative in other cases. *People v. Ah Leo*, 28 Cal.App. 164, 151 P. 748; *People v. Knowles*, 75 Cal.App. 229, 242 P. 508; *People v. Jensen*, 76 Cal.App. 558, 244 P. 1086; *People v. Scott*, 24 Cal.App. 440, 141 P. 945; *People v. Jordan*, 24 Cal.App.2d 39, 74 P.2d 519. In the instant case, several witnesses testified that during the evening in question the appellant produced, talked about, and used in a most suggestive manner an extremely lewd article, which is better left undescribed. At the trial, the sheriff testified that when he arrested the appellant in his living quarters in the Valley Rooms he found this article when the appellant opened a bureau drawer to get a shirt. The article was introduced in evidence and has been transmitted here. The less said about it the better, but to say the least it is much more forceful in showing "the disposition of the accused and his proneness to commit the crime of the particular nature involved" than would be any photograph or any set of pictures. It would certainly furnish as much corroboration as would burglar tools or abortion instruments found in possession of a defendant, which have been considered sufficient in other cases.

Also, several witnesses testified that at the party in question, while these persons were all assembled in the living room, the appellant told them that he had installed peep holes looking into various rooms in this rooming house; that when he rented a room to a man he made a practice of watching him through one of these holes; and that when he observed certain things which led him to believe that the opportunity was propitious he would enter the room, on the pretext of bringing towels or other articles, and would offer to satisfy the man. At the trial, the sheriff testified that at the time

he arrested the appellant he found four such holes in the walls of certain of these rooms, affording such a view of the interior as would be most likely to facilitate such a purpose.

[6] It is next contended that the appellant was improperly convicted on the second count because of the insufficiency of the information, coupled with an incomplete or erroneous instruction. The information charged the appellant with, on this occasion, inducing Silvas "to perform acts and to so live as would cause or manifestly tend to cause" him to come within the provisions of section 700 of the Welfare and Institutions Code. In this regard the court instructed the jurors that if they found that the appellant committed any act or omitted the performance of any duty which in their opinion would tend to cause or encourage Silvas to lead an idle, dissolute or immoral life a verdict of guilty on the second count must be returned. The information was somewhat deficient in that it alleged no particular acts. The respondent argues that it was sufficiently definite since it was alleged therein that this offense was connected in its commission with the charge set forth in the first count. Without going into this matter further, the instruction in this connection left the jury free to convict on this count although the jurors may not have been in agreement with respect to the commission of any particular act or omission, as being calculated to cause or tend to cause the result in question. There is evidence here of a number of different acts which might be responsible for such a result, and there is nothing to show that some of the jurors did not base their verdict on some of these acts and other jurors on other acts. Under such circumstances, it can neither be held that error does not appear nor that it was not prejudicial. *People v. Williams*, 133 Cal. 165, 65 P. 323; *People v. Hatch*, 13 Cal.App. 521, 109 P. 1097; *People v. Scofield*, 203 Cal. 703, 265 P. 914; *People v. Campridon*, 204 Cal. 701, 268 P. 372.

[7] Finally, it is argued that the court erred in refusing to give an instruction to

the effect that members of the armed forces could be tried in the civil courts for crimes committed in this state, and that in passing on the credibility of any such person, while testifying as a witness, the jury might consider whether or not he had been granted immunity. Aside from another consideration, which need not be mentioned, there is also no evidence in the record of any grant or promise of immunity, or evidence of any other fact upon which such an instruction could properly be based. Neither error nor prejudice appears.

The judgment and order on the first count are affirmed. As to the second count, the judgment and order denying a new trial are reversed.

MARKS, J., concurs.

Hearing denied; SCHAUER, J., dissenting.



75 Cal.App.2d 465

Ex parte FELTHOVEN.

Cr. 4041.

District Court of Appeal, Second District,
Division 3, California.

July 22, 1946.

1. Contempt ☞23

In order to punish for constructive contempt of court, it must appear that the order on which the contempt proceeding is based has been served on the accused, or that he was present when the order was made, or that he had knowledge of it.

2. Contempt ☞40

A contempt of court proceeding is not a civil action but is a separate proceeding of a criminal nature and summary character.

3. Contempt ☞54(2)

The affidavit in a contempt of court proceeding constitutes the complaint.

4. Contempt ~~☞~~66(7)

The affidavit, the order to show cause, the evidence, and findings in a contempt of court proceeding are to be strictly construed in favor of accused, and the presumption, in favor of regularity of the proceedings and judgment, does not apply in contempt matters.

5. Contempt ~~☞~~66(6)

A conviction for contempt should not be allowed to stand unless it appears from record beyond question that trial court found all the facts to exist which constituted the offense.

6. Divorce ~~☞~~269(8)

Where order directing petitioner to appear and show cause why he should not be adjudged guilty of contempt of court was based upon a pendente lite order in divorce action requiring petitioner to pay certain sum for support of wife and child, and it appeared that such order had not been served on petitioner, and that he had no knowledge of it, court did not have jurisdiction to adjudge petitioner guilty of contempt for failing to comply with interlocutory decree entered two days after the pendente lite order which had been served on petitioner, and which contained same provision for support of wife and child.

SHINN, J., dissenting.



Proceeding in the matter of the application of Henry Lee Felthoven for a writ of habeas corpus.

Petition granted, petitioner discharged, and his bail exonerated.

Bernard Lawler, of El Segundo, for petitioner.

WOOD, Justice.

Petition for a writ of habeas corpus. An order to show cause why petitioner should not be adjudged guilty of contempt of court for wilfully failing to comply with a pendente lite order of the superior court made on March 20, 1946, by which he was required to pay certain sums of money for the support of his wife and child, and for attorney's fees and costs, was duly issued

and served upon petitioner. The pendente lite order provided that the amount payable to the child should be paid through the court trustee, that the amount payable to the wife should be paid direct to her, and that the attorney's fees and costs should be paid direct to the attorney. The affidavit, upon which the order to show cause was based, stated in part that petitioner had not paid certain amounts which had accrued under the order of March 20, 1946, and that the order had been served on him by the sheriff on April 25, 1946.

At the hearing upon the order to show cause on June 13, 1946, it was established that the pendente lite order of March 20, 1946, was never served upon petitioner and that he was not present when said order was made. A reference to the sheriff's return shows that it was an interlocutory decree of divorce that was served on him, and not the pendente lite order. The court did not find that petitioner had been served with the order of March 20, 1946, or that he was present when that order was made, or that he had knowledge of that order.

An interlocutory decree of divorce, in favor of petitioner's wife, was made and entered on March 22, 1946. The decree included the following: "(a) Custody of minor child, Ronald Lee Felthoven, to plaintiff (b) One dollar, per month, for support of plaintiff, and Sixty Dollars each month for support of said minor child, payable as follows: \$30.50 on the 1st of April 1946, and \$30.50 on the 15th of April 1946, and every 1st and 15th of each month thereafter. (c) One Hundred Dollars attorney's fees, and fifteen dollars court costs, payable at the rate of \$15.00 on the 1st and 15th of each month beginning April 1st 1946." The amounts there recited were the same amounts as those which petitioner was ordered to pay under the pendente lite order. It was not expressly stated in the decree that petitioner was ordered to pay the amounts recited therein. The decree did not direct, as it was directed in the pendente lite order, that the money for the support of the child should be paid through the court trustee, or that the money for attorney's fees and costs should be paid direct to the attorney. A copy of the in-

terlocutory decree was served on him on April 25, 1946. At the hearing of the order to show cause, the petitioner's motion to dismiss the proceeding on the ground of lack of jurisdiction was denied.

Petitioner, according to the minute order of the court made upon the hearing of the order to show cause, was adjudged guilty of contempt of court in wilfully failing to comply with "the order," and was sentenced to imprisonment in the county jail for five days. The commitment recited that petitioner was guilty of contempt of court in wilfully failing to comply with the order of March 22, 1946, that that order was served upon him on April 25, 1946, that he had knowledge of that order, that he had been ordered to show cause on June 13, 1946, why he should not be punished for contempt of court in wilfully failing to comply with said order of court, that he had the ability to comply with the order, and that therefore he was sentenced to five days in the county jail.

It appears that the reference in the commitment to the order of March 22, 1946, was not made inadvertently. It had been established at the hearing that the order of March 20 had not been served on petitioner, and he had objected to the jurisdiction of the court. It also had been proved that the order of March 22 had been served on him.

It also appears that the order to show cause was not based inadvertently on the order of March 20. The affidavit in support thereof also recited, as above stated, that petitioner had not paid certain amounts of money which had accrued under the order of March 20.

Petitioner asserts that the court did not have jurisdiction, because the order of March 20, upon which the order to show cause was based, was not served on him, he was not present when the order was made, and he did not have knowledge of it. He also asserts that the court was without jurisdiction to make the commitment, because: (1) No order to show cause was served on him with reference to the order of March 22, 1946, upon which the commitment was based; (2) no affidavit was filed alleging any failure to comply with

the order of March 22, 1946; (3) no notice of any kind was given to him that he was to be held to answer for disobedience of the order of March 22, 1946; and (4) the order of March 22, 1946, for the alleged disobedience of which he was committed to jail, does not direct or require him to perform any acts.

The deputy district attorney, appearing in opposition to the petition, asserts that the court had jurisdiction for the reason that the affidavit upon which the order to show cause was based stated that the order of March 20, 1946, was served on petitioner. He argues in effect that the act of the court in proceeding with the hearing, after it was proved that the notice of March 20 had not been served, was only an irregularity which did not affect the jurisdiction of the court. It seems to be his position that if the affidavit, upon which a contempt proceeding is based, states that the order, upon which the proceeding is based, was served, the court acquires jurisdiction to deprive the accused of his liberty, even though the statement as to service is false, if at the hearing it appears from a consideration of all the evidence that contempt of court has been committed as to any similar order of court which has been served.

[1] In order to punish for constructive contempt of court, it must appear that the order upon which the contempt proceeding is based has been served on the accused, or that he was present when the order was made, or that he had knowledge of it. *Frowley v. Superior Court*, 158 Cal. 220, 224, 110 P. 817. The order of court of March 20, as to the violation of which petitioner was directed to appear and show cause why he should not be adjudged guilty of contempt of court, was not served on him, nor was he present when it was made. It was not shown that he had knowledge of it. He was not found guilty of contempt of court as to that order.

He was committed to jail for wilfully failing to comply with an order of a different date, namely, March 22. The order of March 22 had been served on him, but he had not been notified to appear and show cause why he should not be adjudged guilty

of contempt of court as to that order of March 22, and there was no affidavit upon which to base an order to show cause as to the order of March 22. In order to punish for constructive contempt of court, it must appear that the accused had proper notice of the particular charge against him (*Bryant v. Superior Court*, 30 Cal.App.2d 509, 86 P.2d 837), and that there was a sufficient affidavit upon which to base such notice or order to show cause. *Groves v. Superior Court*, 62 Cal.App.2d 559, 568, 145 P.2d 355.

As to the order of March 20, which was the basis for the order to show cause regarding contempt of court, petitioner had not been served with it, nor did he have knowledge of it. As to the order of March 22, which was the basis for committing petitioner to jail, petitioner had not been notified that he was charged with contempt of court as to that order, nor had any affidavit been made regarding that order.

Apparently it is the contention of the deputy district attorney that since the two orders are similar, and only a short interval of time elapsed between the dates when the orders were made, it is immaterial and of no significance that the order to show cause herein and the affidavit in support thereof referred to the order of March 20 which had not been served, and did not refer to the order of March 22, which had been served and which was the basis for committing the petitioner to jail. Although the amounts mentioned in the interlocutory decree of March 22 were the same amounts as those petitioner was ordered to pay under the pendente lite order of March 20, and although only a short interval of time elapsed between the dates of the orders, the orders were different and were made in different types of proceedings, and the petitioner was entitled to consider, by reason of the order to show cause and the affidavit which were served on him, that he was called upon to defend only as to the order of March 20. The similarity of orders of court and the shortness of time between the dates of making them do not justify relaxing the rules which afford the accused due process of law in contempt matters.

[2-4] A contempt of court proceeding is not a civil action, but is a separate proceeding of a criminal nature and summary character. *Hotaling v. Superior Court*, 191 Cal. 501, 504, 217 P. 73, 29 A.L.R. 127. The affidavit in such a proceeding constitutes the complaint. *Frowley v. Superior Court*, 158 Cal. 220, 222, 110 P. 817. The affidavit, the order to show cause, the evidence and the findings in a contempt of court proceeding are to be strictly construed in favor of the accused, and the presumption in favor of the regularity of the proceedings and the judgment does not apply in contempt matters. *Groves v. Superior Court*, 62 Cal.App.2d 559, 568, 145 P.2d 355. The petitioner was entitled to be clearly and fairly apprised of the particular accusation against him.

It might be that the petitioner would have defenses, upon the hearing of an order to show cause as to the interlocutory decree of March 22, different from those he would have upon the hearing of an order to show cause as to the pendente lite order of March 20. For example, as to the interlocutory decree, he might have asserted as a defense, at least in mitigation of punishment, that the order in the interlocutory decree allowing attorneys fees was void in that such fees were allowed after the legal services had been rendered. For a further example, if he had been cited to show cause as to the interlocutory decree, he might have asserted as a defense that it was not expressly stated therein that he was ordered to pay the amounts mentioned therein. Furthermore, the circumstances under which the interlocutory decree was rendered might have been such that he could have asserted that the whole decree was void.

[5] Apparently the order to show cause was obtained as to the pendente lite order because the matter of attorneys fees was properly included therein, and because the attorneys for the wife believed that the pendente lite order had been served. The fact that they had so proceeded and later ascertained at the hearing that the pendente lite order had not been served did not justify the substitution of a contempt proceed-

ing as to the interlocutory decree which had been served. As stated in *Groves v. Superior Court*, supra, 62 Cal.App.2d at page 569, 145 P.2d at page 360: "We do not think that any conviction of contempt should be allowed to stand unless it appears from the record beyond question that the trial court found all the facts to exist which constituted the offense."

[6] The court did not have jurisdiction to punish for contempt of court as to the order of March 20, because that order was not served on petitioner and he did not have knowledge of it. The court did not have jurisdiction to commit the petitioner to jail for contempt of court as to the order of March 22, because he had not been ordered to show cause as to it, and because no affidavit in support of such an order to show cause had been made.

The writ of habeas corpus is granted and the petitioner is discharged and his bail is exonerated.

DESMOND, P. J., concurs.

SHINN, Justice (dissenting).

I dissent. The attack upon the judgment of contempt is not based upon any defect in the proceedings which were essential to confer jurisdiction. Petitioner had been ordered to pay money to his wife, he had actual knowledge of the order, he had the ability to pay and refused to pay, he was cited for willfully refusing to pay and was found guilty, upon evidence which is not before us, and which must therefore be deemed sufficient. All these facts were recited in the judgment. There was no lack of due process of law. The facts constituting the contempt, namely, the making of the order and the wilful disobedience of it, were presented to the court by affidavit (Code of Civ.Proc. sec. 1211), the citation was issued and served, and petitioner appeared and defended against the charge.

All that is urged in support of the claim of no jurisdiction and no due process is that the affidavit and order to show cause recited the date of the order instead of the date of the decree, but the substance of the order

and the decree was the same. A statement of the date of the order or decree alleged to have been disobeyed was wholly unnecessary. If the affidavit and order to show cause had misstated the name of the judge who made the order, or the department in which it was made, such errors would not have deprived the court of jurisdiction. The mistake my associates are making is in allowing themselves to be persuaded that the matter of the date when the order was made enters into the substance of what petitioner had been ordered to do and had failed to do. Petitioner knew that some two months before he was cited the court had ordered him to pay certain sums of money to his wife, and he knew he was accused of failing to pay the money. He complains of want of due process as if he had been charged with one crime and convicted of another. This is far from being the case. What happened, and all that happened, is that when petitioner was cited for failure to pay money as ordered by the decree, which had been served upon him weeks before, he discovered that an order had been made two days before the decree was rendered, which directed him to pay substantially the same sums of money. If petitioner had been prosecuted for contempt as a misdemeanor, an erroneous recital in the complaint of the date of the order for payment would not have amounted to a material variance, much less have deprived the court of jurisdiction.

Jurisdiction cannot be defeated by the failure to take a step, or the taking of a misstep, with respect to a wholly nonessential detail in the proceedings to confer jurisdiction. Mere irregularities, even as to essential steps, do not render void a contempt judgment where the accused has been brought before the court and has been proven guilty. *Ex parte Ah Men*, 77 Cal. 198, 19 P. 380, 11 Am.St.Rep. 263; *In re Simoniello*, 6 Cal.App.2d 425, 44 P.2d 402; *In re Risner*, 67 Cal.App.2d 806, 155 P.2d 667. Petitioner is not entitled to be released. He should spend the remainder of the allotted five days in jail, and in meditation.

75 Cal.App.2d 372

**NELSON v. SUPERIOR COURT IN AND
FOR RIVERSIDE COUNTY.**

Civ. 3623.

District Court of Appeal, Fourth District,
California.

July 15, 1946.

1. Prohibition ⇨28

In divorce action by wife, allowance of \$10,000 attorney's fees and \$2,000 for costs, out of husband's property worth \$17,500 held by a receiver, was seemingly unconscionable, but could not be reviewed in proceeding for writ of prohibition to prevent court from taking further action in the divorce action until court obtained jurisdiction over the petitioner's person.

2. Appearance ⇨9(2)

Where a defendant wishes to rely upon a jurisdictional point such as that the court does not have jurisdiction over his person, defendant must especially appear for that purpose only, and he must strictly refrain from raising or presenting other issues or arguing the merits of the action.

3. Divorce ⇨65

Where defendant in divorce suit filed special appearance but his attorneys moved for vacation of order appointing receiver and order to show cause, presenting the matter in a manner which went beyond the jurisdictional issue and involved what should be done by the court, such conduct constituted a "general appearance" and subjected defendant to court's jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance".

Application for writ of prohibition by James M. Nelson, III, against the Superior Court of the State of California in and for the County of Riverside to restrain court, its officers and agents, from taking further steps in a divorce action until jurisdiction over the person of the petitioner is obtained.

Petition denied and alternative writ discharged.

Adams & Duque and A. Andrew Hauk, all of Los Angeles, for petitioner.

Earl Redwine, Co. Counsel, of Riverside, Frank P. Doherty, William R. Gallagher, Frank W. Doherty, and James A. Doherty, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition restraining the respondent court, its officers and agents, from taking further steps in a divorce action until such time as jurisdiction over the person of the petitioner is obtained.

The action in question was brought on May 9, 1946, in Riverside County. Among other things, the complaint alleged that this petitioner was then outside of the State of California; that he intended to and would continue to so remain for the purpose of defeating and evading the orders and process of the court; that he had separate property within this state consisting of a half interest in certain United States bonds with a maturity value of \$35,000; that his interest therein was the sum of \$17,500; that he had previously filed an action for divorce in St. Louis, Missouri containing numerous false allegations with respect to the plaintiff; that he had also filed two actions against the plaintiff in the federal court at Los Angeles, one upon an unfounded cause of action and the other seeking to deprive the plaintiff of any interest in the bonds above referred to; that these actions were filed in an attempt to wrongfully deprive the plaintiff of her property rights; and that the appointment of a receiver to take possession of said bonds was necessary in order to protect the plaintiff's interest therein, and in order to provide security for any orders for support and maintenance, attorney's fees and costs that might be made.

On the same day, May 9, the respondent court made an ex parte order appointing a receiver and directing him to take possession of these bonds. This the receiver did on May 13. On May 14, the respondent court issued an order directing this petitioner to appear on May 27, and show cause

why the order appointing a receiver should not be confirmed; why a permanent receiver should not be appointed to take possession of and safely keep all community property of the parties and all separate property of this petitioner; why this petitioner should not be required to pay \$10,000 as an allowance on account of attorney's fees and \$2000 for costs; and why any allowance of attorney's fees and costs should not be paid out of the proceeds of the bonds then in the hands of the receiver. It was further ordered that service be made by delivering a copy of the order, together with a copy of the complaint and summons, to the law firm of Adams & Duque, which was representing this petitioner in the two actions in the federal court, and by mailing similar copies to him in care of said law firm, and also in care of another law firm in St. Louis which was representing him in the divorce action there pending.

On May 22, 1946, Adams & Duque filed a special appearance objecting to the jurisdiction of the court over the person of this petitioner, with notice of a motion to vacate and quash service of the summons and complaint and the order to show cause. The matter came on for hearing on May 27, 1946, and these attorneys moved to vacate and quash the order appointing a receiver and the order to show cause, on the ground that the court was without jurisdiction over the person of this petitioner. An affidavit in support of the motion was filed. The court reserved its ruling on the motion thus made and, after the attorneys for this petitioner had withdrawn, proceeded to a hearing on the order to show cause. An order was then entered allowing \$10,000 attorney's fees and \$2000 costs, and ordering the receiver to pay these amounts out of the proceeds of the bonds then in his hands. Shortly thereafter this proceeding was commenced and an alternative writ was issued. An answer was filed and after a hearing the matter was submitted.

[1] While an allowance of \$12,000 out of property worth \$17,500 being held by a receiver seems unconscionable, and a perversion of the end and purpose for which the appointment of a receiver is author-

ized and justified, that phase of the matter is not subject to review in this proceeding.

[2] While the appearance thus made was denominated a special appearance, and although it was repeatedly stated that appearance was made solely for the purpose of attacking the jurisdiction of the court, the respondent contends that the matter presented by the affidavit filed and the argument made went beyond this issue, that it went to the merits and that it constituted a general appearance. We think this contention must be sustained. It is well settled that where a defendant wishes to rely upon such a jurisdictional point he must especially appear for that purpose only, and he must strictly refrain from raising or presenting other issues or arguing the merits of the action. *Olcese v. Justice's Court*, of the First Judicial Tp. of Contra Costa County, 156 Cal. 82, 103 P. 317; *Raps v. Raps*, 20 Cal.2d 382, 125 P.2d 826; *MacPherson v. Superior Court*, of Los Angeles County 22 Cal.App.2d 425, 71 P.2d 91.

[3] In the affidavit filed and at the hearing the attorneys for this petitioner contended that the divorce action in St. Louis had been commenced in good faith and not for the purpose of defrauding the plaintiff in the Riverside action out of any of her rights; that the federal court actions were initiated in good faith for the purpose of determining the rights of the parties and without any intent or purpose of sequestering or concealing the property, or fraudulently depriving the wife of her rights therein; that the absence of this petitioner from the State of California was for good and proper purposes and not for any purpose of defeating or evading the orders and process of the court; that it was not for the purpose of fraudulently depriving the wife of any of her rights; that the plaintiff in the Riverside action is not in indigent circumstances, that she has plenty of property and that she can pay for her own attorneys; and that the equities are in favor of this petitioner since no harm would be done if the orders should be dissolved and the federal court permitted to determine the ownership of the bonds and since, if the matter is left to the federal court, the bonds will be preserved and kept

safe. While some of these matters were somewhat incidental to the jurisdictional question, it seems clear that the matter was presented in a manner which went beyond that issue, and involved what should be done by the court. This must be held sufficient to constitute a general appearance.

The petition is denied and the alternative writ is discharged.

MARKS, J., concurs.



75 Cal.App.2d 672

PEOPLE v. PEPPERS.

Cr. 642.

District Court of Appeal, Fourth District,
California.

Aug. 3, 1946.

1. Forgery ☞44(2)

Evidence that defendant wrote out checks, that his companion signed the name of complaining witness thereto and that witness had remarked in defendant's presence that he did not believe companion had authority to sign the name of complaining witness to the checks authorized conviction of forgery.

2. Criminal law ☞1202(5)

Where defendant is charged with felony and with a prior conviction and pleads the general issue of "not guilty" and jury finds defendant guilty as charged but fails to find specifically upon issue of prior conviction, verdict, although erroneous in not finding upon that special issue, should be treated as a finding against defendant upon crime charged and in his favor upon question of prior conviction.

3. Witnesses ☞350

Question as to whether defendant had been previously convicted of felony, propounded on cross-examination of defendant for purpose of impeaching his testimony,

was allowable for such purpose regardless of whether defendant had previously admitted prior conviction.

4. Criminal law ☞1175

Defendant cannot complain of that part of verdict favorable to him.

5. Criminal law ☞633(2)

Where a defendant charged with a prior conviction admits the prior conviction at time of his arraignment, that part of the indictment or information charging the prior conviction should not be read to jury by clerk. Pen.Code, § 1093, subd. 1.

6. Criminal law ☞792(2)

In forgery prosecution where there was evidence that codefendant, who signed the checks, was drunk or had been drinking to excess for several weeks and that defendant procured liquor for her and participated with her in drinking it, instruction was authorized that all persons who by fraud, contrivance or force occasioned the drunkenness of another for the purpose of causing him to commit any crime, are principals.

7. Criminal law ☞829(18)

Refusal of defendant's requested instruction on the doctrine of reasonable doubt was not error where instruction adequately covering the subject, requested by the people, was given.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Clint M. Peppers was convicted of forgery. From the judgment of conviction and from an order denying a new trial, he appeals.

Affirmed.

Carl T. Rimbaugh, of San Bernardino, for appellant.

Robert W. Kenny, Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

GRIFFIN, Justice.

Defendant and appellant Peppers was charged jointly with one Nellie Taylor on five counts of forgery, to which each pleaded "not guilty". Defendant Peppers had

a separate trial and was also charged with a prior conviction of a felony and that he served time therefor in a State prison.

C. F. McDaniel, the witness whose name was forged to five different checks drawn on his account in a bank in San Bernardino, testified that he knew Nellie Taylor; that he left San Bernardino in 1945, went to San Luis Obispo, and remained there until September 1945; that on his return he received his bank statement and found the five forged checks; that he gave no one authority to sign his name thereto; that Nellie Taylor, on occasions, had deposited monies in his account at his request; that he had met defendant Peppers on one occasion when he asked him to testify for his brother over an accident case.

The checks were paid by the bank and charged against McDaniel's account. They were passed on local stores. Witnesses testified that they were passed by defendant Peppers who was known to them, and he endorsed his name and address thereto. Defendant admitted the endorsements.

Nellie Taylor, who testified for the prosecution, stated that she signed McDaniel's name to the five checks involved; that Peppers wrote out the body of them and that she signed the checks "C. F. McDaniel"; that she was intoxicated at the time the five checks were signed by her; that with those checks wine and beer were purchased by Peppers and "we were all drinking up there on one continuous party"; that she had no "authority" to sign his name to checks but that there was a mutual agreement between her and McDaniel, made in San Bernardino, one time when the two of them were drinking, that she could sign his name thereto; that she did not tell Peppers that she had no authority to sign McDaniel's name; and that Peppers did not question her about them nor the signature.

Peppers testified that he did not know McDaniel; that he knew Nellie Taylor; that she had an injured hand and asked him to write out the checks for her; that she told him she had money in the bank and that she placed money in the bank in McDaniel's name and that he had given her

the privilege of writing checks on the account; that he did not know at any time that the checks were forgeries; and that he made purchases of food and liquor for her with the money. He admitted on cross-examination that he had been previously convicted of a felony and served a term in prison for the offense of receiving stolen property.

Nellie Taylor forged two other checks on this same account in favor of two other individuals. Prosecution on those checks are still pending against her.

One witness, who had a similar forged check signed by Nellie Taylor, which was unhonored at the bank, testified that he met the defendant Peppers about September 15, 1945, and that in Peppers' presence he remarked that "Nell Taylor did not have any authority to sign the name C. F. McDaniel to those checks" and that he felt someone was going to get into trouble.

The checks in issue were dated September 25 and 26, 1945, and October 6 and 7, 1945, and were cashed about the dates indicated on their face. Peppers denied hearing such a conversation.

The jury convicted the defendant on all five counts. His appeal is from the judgment and order denying a new trial.

As we interpret the argument of counsel for defendant, his main contention is that the evidence is insufficient to support the judgment in this, that there is no evidence that Peppers knew the checks to be forged and that he intended to defraud no one, citing *People v. Maioli*, 135 Cal. App. 205, 26 P.2d 871, and that under the instruction given, i. e., "If the evidence is susceptible of two reasonable interpretations, one favoring guilt and the other innocence", the jury was bound to follow that interpretation which favors innocence.

[1] A review of the evidence clearly establishes the fact that the checks were forged by Nellie Taylor. The jury had the right to believe the testimony of the witness that he remarked in defendant's presence that he did not believe that she had authority to sign McDaniel's name to checks. The evidence discloses that this conversation was had about September 15th. The checks in issue were not signed

and passed until later. This should have been notice to the defendant of the lack of authority of Nellie Taylor to sign McDaniel's name. The fact that she signed some other person's name, rather than her own, to a check, would, in itself, cast considerable suspicion on the transaction to the average person, particularly where the signer was and had been under the influence of liquor for several weeks, and to defendant's own knowledge. There was ample evidence, if believed by the jury, to hold that the defendant had knowledge of the forged instruments at the time they were passed, that he intended to defraud the recipients of the checks, and that he aided and abetted Nellie Taylor in forging and passing them.

The next complaint is that the prosecution, during the trial, referred to defendant's conviction of a felony, after he had admitted the prior conviction charged in the information, citing *People v. Oliver*, 7 Cal.App. 601, 95 P. 172.

[2-5] We have examined the record and find no evidence of the fact that the defendant did previously admit the prior conviction. The only record before us indicates that the defendant entered a plea of not guilty to the information as read, which includes the charge of the prior conviction. The question presented under a charge of previous conviction of a felony is whether the defendant "has suffered such previous conviction". It has been held that where a defendant pleaded the general issue of "not guilty" under like circumstances as in this case, and the jury found the defendant guilty as charged but failed to find specifically upon the issue of prior conviction, the verdict is erroneous in not finding upon that special issue but should be treated as a finding against the defendant upon the crime charged and in his favor upon the question of prior conviction. *People v. Eppinger*, 109 Cal. 294, 41 P. 1037. Under these circumstances defendant cannot be heard to complain. The only reference to the prior conviction that we have been able to find is the admission of the defendant on cross-examination that he had been so convicted and served time in the State prison for the offense of re-

ceiving stolen property. This question was propounded for the purpose of impeaching his testimony and was allowable for such purpose. The record indicates that the clerk of the court read the entire information to the jury, including the charge of previous conviction, and the record recites that defendant plead "not guilty" thereto. If the defendant did admit the prior conviction at the time of his arraignment, although the record does not so indicate, that portion should not have been read to the jury by the clerk. Penal Code, sec. 1093, subd. 1. The defendant became a witness in his own behalf. He therefore waived the privilege given him by that section, and he could be thereafter interrogated in reference thereto for the purpose of impeachment. We find no prejudicial error attributable to the claimed misconduct of the district attorney in referring to the previous conviction.

[6] Defendant next complains of an instruction that was given to the effect that "All persons * * * who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime * * * are principals." It is defendant's argument that there was no evidence tending to establish that defendant procured Nellie Taylor to become drunk, or that she was drunk, and that the instruction as given was prejudicially erroneous. There is considerable evidence to the effect that Nellie Taylor was drunk or had been drinking to excess over a period of several weeks and that the defendant procured liquor for her and participated with her in drinking it. There was sufficient evidence to warrant the court in giving the instruction.

[7] Defendant next complains because the trial court disallowed two proposed instructions on the doctrine of reasonable doubt in reference to circumstantial evidence to the effect that in order to convict the defendant on that kind of evidence, it is necessary not only that all of the circumstances concur to show that the crime charged was committed, but such circumstances must be inconsistent with any other reasonable conclusion. At the request of the People, the court did give an instruc-

tion on this subject that was proper and adequately covered the instructions offered by defendant.

We have examined the other instructions complained of but find no merit to defendant's contention. No prejudicial error appears in the record.

Judgment and order affirmed.

BARNARD, P. J., concurs.



75 Cal.App.2d 142

BELLETICH v. POLLOCK.

Civ. 15186.

District Court of Appeal, Second District,
Division 1, California.

June 26, 1946.

1. Limitation of actions ⇨46(5)

Where payment for continuing services is to be made at death of promisor, statute of limitations does not begin to run against claim for reasonable value of services until termination of services on promisor's death. Code Civ.Proc. § 339, subd. 1.

2. Frauds, statute of ⇨138(4)
Limitation of actions ⇨50(2)

When continuous personal services are performed under an express agreement for compensation upon termination thereof, and the agreement is unenforceable because it is not in writing, the reasonable value of services may be recovered, and the statute of limitations does not commence to run until termination of services which is usually upon death of promisor. Code Civ. Proc. § 339, subd. 1.

3. Limitation of actions ⇨50(2)

The word "continuously", as used in rule that limitation period does not commence until termination of services rendered continuously to another at other's special instance and request upon an oral agreement that payment is to be made at termination of services, means with con-

tinuity or continuation, unbrokenly, uninterruptedly, without intermission or cessation, without intervening time, implying an unbroken sequence. Code Civ.Proc. § 339, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuously".

4. Executors and administrators ⇨451(3)

Where plaintiff's complaint against executor was definitely predicated upon allegation that services had been rendered to decedent at his special instance and request "continuously" during a specified period, and evidence indicated that there had been interruptions in the continuity of such services, refusal to instruct that, if services were intermittent and if interruptions were not caused by wrongful act of decedent, plaintiff was not entitled to recover on theory of a contract to pay at death was error. Code Civ.Proc. § 339, subd. 1.

5. Work and labor ⇨7(1)

Where services are rendered between members of a household or between those most closely related by blood the law will ordinarily presume that they were prompted by motives of love, friendship and kindness rather than the desire to gain.

6. Trial ⇨295(4)

The giving of contradictory instructions resulting in a confused and misleading picture is prejudicial error which cannot be overcome by the assertion that the charge must be read as a whole.

7. Trial ⇨206

In action against executor to recover for services rendered to decedent upon his alleged promise to pay at death, refusal of requested instructions to the effect that evidence of the admissions of decedent should be viewed with caution was error. Code Civ.Proc. § 2061, subd. 4.

8. Appeal and error ⇨931(1), 1010(1)

On appeal an appellate court will view evidence in light most favorable to respondent, will not weigh evidence, will indulge all intendments which favor the finding of trier of fact, and will not disturb the finding if there is substantial evidence in the record in support thereof.

9. Appeal and error ⇨989

Rule that an appellate court will not interfere with judgment entered by fact-finding body when there exists a substantial conflict in evidence does not relieve appellate court of its duty of analyzing evidence in light of reason and human experience and giving consideration to motives and propensities which tend to influence or prompt human action in an effort to solve question as to whether judgment is sustained by evidence.

10. Trial ⇨311

The rule that, in action against executor for services rendered decedent in his lifetime, trier of fact may fix value without evidence if trier of fact possesses the common knowledge of the value of such services does not apply where services are spread over many years and it is beyond reason to expect that jurors would know value of services throughout such period without some evidence to aid them.

11. Trial ⇨311

Where plaintiff sought to recover from executor on a claim for nursing, personal care and attention, lodging and other services furnished to decedent over a period of fifteen years, jury did not possess the common knowledge of value of such services to fix value without evidence.

12. Appeal and error ⇨1026

Where reviewing court is in serious doubt as to sufficiency of evidence to support judgment court must carefully consider errors complained of and order a retrial if such errors probably prejudiced the case of appellant.

13. Appeal and error ⇨1170(1)

Constitutional provision that a cause shall not be reversed except for error resulting in a miscarriage of justice does not apply where reviewing court is in serious doubt as to sufficiency of evidence to support judgment and errors probably prejudiced case of party against whom they were committed unless the justice of cause preponderates so heavily on side of prevailing party that none of the errors could have resulted in any miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Mary Belletich against Julius Pollock, as executor of the last will and testament of Joe Lister, deceased, to recover an alleged balance due on account for nursing and personal care of decedent, the claim for which executor had rejected. Judgment for plaintiff and defendant appeals.

Reversed.

Harry A. Franklin and Ernest C. Griffith, both of Los Angeles, for appellant.

F. M. Andreani, of Los Angeles, for respondent.

DORAN, Justice.

The action herein was instituted after plaintiff's claim for \$6,500, "balance on account of and for nursing, personal care and attention, aliment and lodging from January 1, 1929, to April 22nd, 1944", of plaintiff's uncle, Joe Lister, had been rejected by the appellant executor. The case went to trial before a jury which returned a verdict in favor of the plaintiff Mary Belletich, in the sum of \$5,000. The defendant's motion for a new trial was denied but the trial court modified the judgment to the effect that the same was to be paid during the course of administration.

The complaint, setting forth three causes of action substantially the same, was, in the language of Count I, for "work, labor and services performed by said Plaintiff for said deceased at his special instance and request", continuously during said fifteen year period, "pursuant to an oral agreement that payment therefor was to be made upon the termination thereof, to-wit: Upon the death of said Joe Lister; that said work, labor and services were reasonably worth the said sum". The other two counts merely give a more elaborate description of the work claimed to have been performed. A general and special demurrer was interposed to the complaint, raising, among other points, the two year statute of limitations. The demurrer was overruled and an answer filed by the executor, denying any liability and pleading Section 339 (1) of the Code of Civil Procedure, the two year statute

of limitations applying to actions upon contracts "not founded upon an instrument in writing." A bill of particulars was furnished by plaintiff claiming \$7,400 less a credit of \$900, "consisting of cash payments of ten dollars per month from January 1, 1931, to July 1, 1938", made by the deceased to the plaintiff, leaving a balance of \$6,500.

The appellant's initial contention that the evidence is insufficient to support the judgment, necessitates a brief analysis of the testimony. It appears that Joe Listar died testate on April 22, 1944, his closest relatives being a sister, Dora Sambol, and a brother Mike Listar. The will left all of the testator's property to Nick Listar, a son of Mike Listar. Mary Belletich, plaintiff, is the daughter of Dora Sambol and therefore a niece of the deceased. The record discloses that in 1929, Joe Listar, a steel worker, apparently in good health, came to live at plaintiff's home; that in September, 1929, Listar married one Mary Jasyn from whom he was divorced on December 4, 1935, and that for four years during such marriage Listar and said wife lived together at a place other than the plaintiff's home. Plaintiff's husband testified that the deceased gave the plaintiff certain ten dollars payments per month covering board and room for "pretty near two years" during 1936-37; that in 1937 Listar purchased a house and went there to live, continuing to live there until Listar's death in 1944 except that on occasions of sickness and injury when deceased stayed at the plaintiff's home. It further appeared that plaintiff, from time to time, rendered certain other services such as cleaning, laundry work, etc.

Proof of the oral contract to pay for plaintiff's services, alleged in the complaint, rests upon statements made by the deceased, testified to by several witnesses including plaintiff's husband, daughter and mother. Appellant's brief comments on the fact that "The remarkable part of this case is that every witness that testified for the plaintiff used practically the very same words that the deceased stated 'I will pay you after I am dead'." An examination of the record discloses that the witnesses were indefinite as to when such statements were made, and the exact time and extent of plaintiff's services except as to a two year period in 1936-

37 when plaintiff was paid \$10 per month for board and room. There was no testimony as to the value of the alleged services.

[1,2] One of appellant's primary contentions is that under the provisions of C. C. P. Section 339(1) prescribing a two year statute of limitations in actions on contracts "not founded upon an instrument in writing", the trial court "should have limited the jury to deciding the value of services rendered during the last two years of the deceased's life". The court overruled a motion to so limit the jury and refused to give appellant's proposed instructions on this subject. In answer to this contention the respondent relies upon *Reeves v. Vallow*, 16 Cal.2d 95, 104 P.2d 1017, the syllabus of which states the rule as follows: "When a plaintiff has performed continuing services for another at the latter's special instance and request, upon an oral agreement that payment is to be made at the termination of the services, as at death, recovery may be had for the reasonable value of such services, as distinguished from the contract price therefor; and when payment is to be made at the death of the promisor the statute of limitations does not begin to run until the termination of the services by death, and the plaintiff is not limited to a recovery of the value of the services rendered during the two years prior to such death." And in the later case of *Winder v. Winder*, 18 Cal.2d 123, 127, 114 P.2d 347, 350, 144 A.L.R. 935, the court said that "It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination thereof * * * unenforceable because not in writing * * * the reasonable value of the services may be recovered, and the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor", citing *Long v. Rumsey*, 12 Cal.2d 334, 84 P.2d 146, and other cases. That such is the rule, cannot be doubted.

Commenting on this rule, the appellant calls attention to the fact that in order to escape the application of the two year

statute of limitations, the cases require that there must be *continuous* services rendered, and that the evidence in the present case shows that any services rendered by plaintiff were far from continuous, being interrupted for a period of four years during the married life of the deceased, and thereafter when the deceased went to live in his own house as hereinbefore mentioned. In reference to this matter the trial court refused to give appellant's Instruction V, reading as follows: "If you find from the evidence that plaintiff's services were not continuous, but were intermittent, and that such interruption was not through the wrongful act of the decedent, Joe Listar, such interruptions of services will destroy the continuity of the services which the law requires, and the plaintiff cannot recover anything on the theory of a contract to pay at death". Upon the question of serious interruptions in the rendition of services, respondent quotes from Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281, 283, holding that interruptions "caused by the wrongful temporary discharge by [decedent]" would not destroy the continuity required by the law. However, there appears to be no claim of any wrongful discharge by decedent in the present case, and the citation is not helpful.

[3, 4] The word "continuously", as defined in 13 C.J. 209, means, "With continuity or continuation, unbrokenly, uninterruptedly; without intermission or cessation; without intervening time, implying an unbroken sequence." See also 17 C.J.S., Continuously, P. 286. The statute of limitation is certainly as important in an action on a claim against an estate, as it is in an action between living persons; to eliminate or disregard the term "continuous" or "continuing", in respect to plaintiff's services, as used in Winder v. Winder, 18 Cal.2d 123, 114 P.2d 347, 144 A.L.R. 935; Reeves v. Vallow, 16 Cal.2d 95, 104 P.2d 1017; Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146, previously referred to, and other cases, would open a broad avenue to designing claimants seeking unauthorized personal gain at the expense of a decedent's estate. Plaintiff's complaint was definitely predicated upon the allegation that the services had been rendered "continuously during

said period of time" (between Jan. 1, 1929 and April 22, 1944). Viewing the evidence in the light most favorable to the respondent and considering the interruptions hereinbefore mentioned, there can be no doubt that this question was a vital issue in the case, and that the failure of the trial court to submit such issue to the jury amounted to prejudicial error.

[5, 6] After properly instructing the jury in Instruction XXI, that "Where there is a blood relationship between the parties, it may be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected", the jury was further told in Instruction XXII that "The fact that the plaintiff and the decedent, Joe Listar, were niece and uncle should be considered in connection with the rule, that where one performs for another with the other's knowledge useful services, the law implies that such services shall be paid for." In the latter instruction there is an apparent if not an actual contradiction of the previous instruction, and the jury may well have understood from it that because of the relationship between the parties, "the law implies that such services rendered shall be paid for". Such, of course, is not the law, and as said in 27 Cal.Jur. page 204, "Where services are rendered between members of a household or between those most closely related by blood, the law will ordinarily presume that they were prompted by motives of love, friendship and kindness, rather than the desire to gain". Since the obvious purposes of instructions is to clarify the law for the jury, the giving of contradictory instructions resulting in a confused and misleading picture, can hardly be other than prejudicial error. In such a situation, respondent's assertion that "The charge to the jury must be read as a whole", is not a sufficient answer.

[7] The appellant requested instructions to the effect that evidence of the admissions of the deceased, should be viewed with caution, and these the trial court refused to give. In this connection it will be remembered that plaintiff's proof of the alleged contract, consisted of statements by the deceased that "I will pay you after I

am dead", or words to that effect. This matter has received attention in various cases, and in *Herbert v. Lankershim*, 9 Cal.2d 409, 472, 71 P.2d 220, 251, the court said: "The rule in cases such as the one before us is that the court must view the transaction with the 'most scrutinizing jealousy.' This means, of course, any court in which the issue may be raised. Oral evidence, of which there is no satisfactory independent corroboration, is the weakest kind of evidence known to the law. In *Smellie v. Southern Pac. Co.* 212 Cal. 540, 299 P. 529, 537, this court, * * * said: 'Evidence of the declarations or oral admissions of a party are always received with caution. Code Civ.Proc. § 2061, subd. 4. * * * A third inherent weakness * * * is that it purports to give the statements or declarations of a deceased person. * * * In *Mattingly v. Pennie*, 105 Cal. 514, 39 P. 200, 45 Am.St.Rep. 87, this court in bank said, "No weaker kind of testimony could be produced." Again in bank, *Austin v. Wilcoxson*, 149 Cal. 24, 84 P. 417, this court has said: "It is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory.'" In *re Estate of Emerson*, 175 Cal. 724, 727, 167 P. 149, 151." In the instant case the cautionary instructions requested were clearly applicable to the situation presented by the evidence, and under the rule announced in the above cases, should have been given.

[8, 9] The appellant argues that the evidence is insufficient to support the judgment, and that "A reading of the transcript of plaintiff's witnesses shows both on direct and cross examination, a complete failure to state times and places with any degree of certainty, so that the work of the plaintiff if any, could be analyzed in the light of evidentiary value. * * * No testimony was introduced as to the value of the services". Respondent relies upon the well known principle stated in *Re Estate of Isenberg*, 63 Cal.App.2d 214, 216, 146 P.2d 424, 425 "that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence (c) indulge all intentions which favor the finding of the trier

of fact, and (d) not disturb the finding * * * if there is substantial evidence in the record in support thereof." However, as said in *Herbert v. Lankershim*, 9 Cal.2d 409, 71 P.2d 220, 251, this rule of non-interference "does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence."

[10, 11] In reference to appellant's contention that there was no evidence of the value of plaintiff's services, respondent cites the rule stated in *Lundberg v. Katz*, 44 Cal.App.2d 38, 111 P.2d 917, and approved in *Ferrari v. Mambretti*, 58 Cal.App. 2d 318, 136 P.2d 326, 331, that "the court or jury [may] fix such value without [evidence] * * * if the trier of the facts possesses the common knowledge of the value of such services." It may be noted, however, that in the *Lundberg* case, the plaintiff moved into the home of deceased and rendered domestic services *continuously* until the death of the deceased; a factual situation quite different from that disclosed by the record in the instant case. In the *Ferrari* case plaintiff sought recovery under an oral contract to leave plaintiff one-half of the estate in return for work in decedent's store in the evenings and on Sundays. Commenting on the rule as stated in *Lundberg v. Katz*, above referred to, the *Ferrari* opinion reviews the various cases dealing with this question and concludes that "It would be beyond reason to expect twelve jurors to possess the common knowledge of the value of services here sued for without any evidence of the time occupied, or the perquisites, or accommodations received in the nature of living expenses. It would be beyond reason to expect these jurors to know the value of these services in 1921, and for nineteen years thereafter, without some evidence to aid them." In view of the fifteen year period during which plaintiff's services are alleged to have been rendered, the latter quotation is not inapplicable to the present situation.

[12, 13] As said in *Herbert v. Lankershim*, 9 Cal.2d 409, 476, 71 P.2d 220, 253, "In the state of the evidence in this case it is a very serious question whether, as a matter of law, the evidence adduced by the plaintiff is sufficiently substantial to support the judgment. In cases in which a serious doubt is created in the mind of the reviewing court * * * it becomes the duty of the court to consider carefully the errors complained of, and if it should appear upon such consideration that the errors committed probably prejudiced the case * * * it is the duty of the court to order a retrial of the cause. In such cases the provisions of article 6, § 4½ of the Constitution cannot be invoked in aid of the affirmance of the judgment unless it can be said that the justice of the cause preponderated so heavily on the side of the prevailing party that none of such errors did or could have contributed to or resulted in a miscarriage of justice." The above quotation is particularly pertinent in view of the lack of definite evidence showing the amount of work performed by the plaintiff, the hours, days, weeks or months consumed therein, or in fact, the exact time when the services were performed. In this state of the record, again quoting from the *Herbert* case, "a serious doubt is created in the mind of the reviewing court" as to the evaluation used by the jury in arriving at its verdict of \$5,000, and the sufficiency of the evidence of value, or any concrete basis upon which the jury could so find. This situation is the more apparent when the intermittent nature of the services covering a period of some fifteen years, is considered, and the possible application of the statute of limitations. During this period plaintiff, a married woman with two children, took care of her own home and kept boarders and roomers; it is not unreasonable to suppose that a large portion of plaintiff's time must therefore have been consumed in the discharge of general household duties. Likewise, during some four years of this period the deceased was married and living with his wife, and for many other years thereafter resided on his own property. Further, according to the bill of particulars, plaintiff had been paid the sum of \$900, at

the rate of \$10 per month for board and room furnished to the deceased between 1931 and 1938.

In view of the state of the record hereinbefore referred to the errors commented upon must be deemed prejudicial. The attempted appeal from the order denying a new trial is dismissed. The judgment is therefore reversed and the cause remanded for a new trial.

YORK, P. J., and WHITE, J., concur.



75 Cal.App.2d 360

PEOPLE v. WHEELER.

Cr. 1962.

District Court of Appeal, Third District,
California.

July 15, 1946.

1. Criminal law ⇨260(11)

Conclusion of trial court on evidence is binding upon reviewing court on appeal from a conviction.

2. Assault and battery ⇨92

Evidence supported conviction of an assault with a deadly weapon.

3. Criminal law ⇨822(14)

Use of word "must", in instruction on subject of credibility of witnesses which stated that, upon being convinced that witness had stated what was untrue willfully and was designed to deceive, jury "must" treat all of witness' testimony with suspicion and reject all unless convinced, notwithstanding base character of witness, that witness has in other particulars sworn to the truth, did not render instruction improper, in view of qualification of the word "must" by words following it.

4. Criminal law ⇨834(2)

Defendant was not entitled to have his own particular phrasing of law adopted by trial court or given to jury, but it was sufficient if the substance of the law ap-

plicable was set forth by trial court correctly in its instructions.

5. Assault and battery ☞96(3)

In prosecution for assault, defendant's proposed instruction on subject of self-defense was properly refused as defective, in that it left to defendant to determine whether danger of great bodily injury existed, without requiring that defendant, as a reasonable person, had sufficient grounds for his belief.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

James Louis Wheeler was convicted of an assault with a deadly weapon, and he appeals.

Affirmed.

Albert M. King and King & Savage, all of Oroville, for appellant.

Robt. W. Kenny, Atty. Gen., Jas. O. Reavis, Deputy Atty. Gen., and Richard H. Fuidge, Dist. Atty., of Marysville, for respondent.

ADAMS, Presiding Justice.

Defendant was convicted of an assault with a deadly weapon, and has appealed from the judgment and an order denying his motion for a new trial.

The victim of the alleged assault, Duane Poteski, was a soldier twenty years of age, who was stationed at Camp Beale. He testified that he went to Marysville on October 18, 1945, walked around the streets for a while, then went to a place called the Palm Saloon. Just outside this saloon he met a young woman by the name of Mrs. Reese, and together they walked across the street to a rooming house called the St. Elmo, and went upstairs where they stopped in the hallway and talked. While they were so engaged defendant came up to them "in a mean way," whereupon Poteski told defendant that he would not let him hit a woman. Defendant kept on walking toward Mrs. Reese and raised his hand as he did so. Mrs. Reese entered her room and defendant started in after her, whereupon Poteski followed and again told defendant not to hit the woman. Defendant then had his back

toward Poteski, but turned around and cut Poteski with a razor, whereupon the latter left and went to the Military Police Station. Poteski testified also that while he had had a few drinks that night he was not drunk; that he had no weapon; that before defendant appeared in the hallway of the St. Elmo Mrs. Reese had told him that defendant had been hitting her and that she was afraid of him; that all he told defendant was that he would not allow him to hit the woman; that he did not touch defendant and that he had no scissors in his hand and did not see any there.

After Poteski sustained his injuries he was taken to Camp Beale. He was attended by Col. Brockhart of the Medical Section. This officer testified that Poteski's injuries consisted of a severe and extensive laceration of the right shoulder, right upper chest and left wrist and forearm; that the lacerations must have been made with a sharp bladed instrument; that it required an hour and forty-five minutes to repair the extensive wounds; that muscles were severed in the right shoulder and down the front side of the body; that the right shoulder joint was laid open, and that the wounds resulted in permanent injury to his right shoulder and upper arm, limiting extension about 25%.

Officer Kibbe, an officer of the Marysville Police Department, testified that on the night of the affray he was passing the St. Elmo in a prowler car when he was accosted by military police who wanted to borrow a flashlight, and stated that there was a man back of the building; that he accompanied them to a roadway upon the levee behind the St. Elmo, and flashing his light down the bank discovered defendant on the ground; that defendant would not get up when called, whereupon Kibbe went after him and brought him to the top of the embankment; that defendant had blood on the front of his shirt and on his sleeve, but a search revealed no weapon; that defendant attempted to break away from him, but the military police held him, and he was taken to the police station by officers Kibbe and Wemple. Chief of Police Stein testified that on the day after the fracas he talked to defendant who said he had run at Poteski with a razor, and had afterwards thrown it over the

levee; the latter statement he changed and told Chief Stein that he had put the razor up over a door in Mrs. Reese's apartment, at which place it was later found; that he had used the razor because Poteski had come at him with a pair of scissors. Mrs. Reese, called for the defense, testified that she operated the St. Elmo rooming house; that Wheeler lived there and they had been going together for a year, and were engaged to be married; that she and Wheeler had been shopping for Christmas presents the evening of October 18th, but she had left him down town and gone to a cafe for something to eat; that on her return to her apartment she found Poteski at her office door and he asked for a room but was told she had none; that while she was talking with Poteski Wheeler phoned her and said he would be right up; that she told Poteski that her fiance was coming up, and that he should go on; that Poteski started playing with her terrier dog but that nothing was said about Wheeler; that when Wheeler appeared Poteski said, "You are not going to beat this woman up," and started to push Wheeler around; that she told Poteski to leave but he refused and told Wheeler to come downstairs and fight; that he kept crowding Wheeler into the room and the latter backed up against a dresser; that they were "scuffling with their hands" when she saw Wheeler hit Poteski, whereupon the soldier walked out the door; that she then saw blood on the floor where he had been standing, and that a pair of scissors, which had been on the table, were lying on the floor by the blood; that defendant went out the back door without saying anything, and she did not see him again; that Wheeler had had a razor which was on the dresser in her room. On cross-examination she contradicted her original statement in some details; also previous statements at variance with her testimony were read for impeachment purposes.

Wheeler, testifying on his own behalf, stated that he had been living at the St. Elmo, and keeping company with Mrs. Reese, and that he was going to marry her when her divorce became final; that he took his meals with her and kept some of his clothes in her apartment; that in the late afternoon of October 18, 1945, he and Mrs.

Reese went down town together, and had a few drinks at various places; that they became separated about 11:30, and later he telephoned to her and told her he would be right up; that when he arrived at the door of Mrs. Reese's apartment she was standing in the door and Poteski was standing looking in her door and talking to her; that he (Wheeler) started into the apartment when the soldier said, "What is this?" and also said, "You are not going to beat up on this woman"; that Poteski said, "I will break your little neck," and started pushing him around; that defendant went into Mrs. Reese's room and shut the door, and heard Mrs. Reese tell Poteski to go; that he then opened the door and Poteski came in with his fists doubled up and said, "Come out you yellow rat and fight"; that he (defendant) said he did not want to fight, but Poteski came on toward him and, as he reached a table, picked up the scissors and backed defendant up against the dresser; that the witness then picked up the razor and cut Poteski on the hand—that is, he struck at his hand but did not know he cut him; that he tried to grab Poteski's hand and pushed him back, and that Poteski then went out the door without saying a word; that he thought Poteski was going to hit him as he "was awfully mad about something" and "acted like he was drunk or crazy or something"; that after Poteski left, he saw blood on the floor, and ordered Mrs. Reese to wipe it up and then to "call the M. P's"; that he then went out through the kitchen, put the razor where Chief Stein later found it, went down the bank and crawled under and lay down where he was later found; that he could not tell why he ran away.

[1,2] On this appeal appellant in his opening brief raised three grounds for reversal: First, that the trial court failed to give the statutory admonition to the jury prior to its recesses; second, that the court erred in instructing the jury; and, third, that the evidence is insufficient to support the verdict. After augmentation of the record the first of these contentions was abandoned. Regarding the third it is apparent from the foregoing recital of the evidence that it presented a conflict which the jury has resolved against defendant.

Its conclusion is binding upon this court. *People v. Alcalde*, 24 Cal.2d 177, 184, 148 P.2d 627; *People v. Totten*, 63 Cal.App.2d 768, 771, 148 P.2d 97; *People v. Frank*, 60 Cal.App.2d 802, 805, 141 P.2d 780; *People v. Coley*, 61 Cal.App.2d 810, 813, 143 P.2d 755; *People v. Lewis*, 18 Cal.App. 359, 123 P. 232.

Appellant relies upon *People v. Flores*, 58 Cal.App.2d 764, 137 P.2d 767, and *People v. Nichols*, 52 Cal.App.2d 31, 125 P.2d 513, 516, as furnishing authority for reversal. We do not agree. In the *Flores* case the evidence against defendant was circumstantial only, and the court, in reversing the judgment, held that the circumstances particularly relied upon by the prosecution were not inconsistent with a rational conclusion that defendant was not guilty of the theft as charged, and there was, therefore, a failure of proof of guilt. The instant case is not comparable thereto. In the *Nichols* case the judgment of conviction was reversed because, as the court said, "the prosecution introduced no positive, direct or affirmative evidence on any material issue. The most that can be said of such evidence is that it was highly circumstantial and negative in character, consisting in the main of testimony by witnesses to the effect that they had never seen the allegedly stolen personal property upon the premises of appellant's place of business." A comparison of the evidence in that case with the evidence in the instant case compels the conclusion that it furnishes no precedent for reversal herein.

[3] As for appellant's contentions that the trial court erred in its instructions to the jury, the first appertains to the subject of credibility of witnesses, regarding which the court said:

"The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the facts as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to

the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, his apparent desire to speak the truth, the tenacity, or lack of tenacity of his memory, his opportunity to know the things about which he testifies, and any and all things affecting his credibility, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

"A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of a testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as result of mistake or inadvertence, but wilfully and with the design to deceive, *must* treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth." (Italics added.)

Appellant's particular objection to this instruction is the court's use of the italicized word "must," which, he asserts, compelled the jury to reject all of the testimony of a witness whom it suspected of falsity in one portion of his testimony; and that it was clearly prejudicial to the defendant.

Appellant relies upon *People v. Hicks*, 53 Cal. 354, where the court instructed the jury that "a witness false in one part of his testimony is to be distrusted in others," and refused to give a requested instruction "that if they believed any witness had, upon the stand, wilfully sworn falsely in respect to any matter material to the issue on trial, that they should disregard his testimony altogether." There the court said, citing

People v. Sprague, 53 Cal. 491, that "the correct interpretation of subd. 3 of sec. 2061 of the Code of Civil Procedure is, that a witness *wilfully* false in one part of his testimony is to be distrusted in others. Assuming this to be the correct construction, the effect of this provision is that if a witness is wilfully false in one portion of his testimony he 'is to be distrusted in others'; and not that his whole testimony is to be absolutely rejected."

However, in the instruction given in the case before us, the word must was qualified by the words which follow it. Its language finds approval in People v. Sprague, supra, where the court said, 53 Cal. at page 494:

"The rule is that the jury *may* reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; that is to say, the jury, being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all his testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth. The third subdivision of sec. 2061 of the Code of Civil Procedure is but declaratory of the rule above considered, and by requiring a jury to distrust, necessarily authorizes them to reject all the testimony of such a witness, in a proper case."

Also see Prickett v. Whapples, 10 Cal. App.2d 701, 704, 52 P.2d 972; People v. Sloper, 198 Cal. 238, 251, 244 P. 362. Further, it may be well said that the instruction complained of, even if it were erroneous, would not necessarily have been prejudicial to defendant. Its language was applicable, not to the testimony of defendant and Mrs. Reese alone, but to that of Poteski whose testimony appellant contends was "improbable" and "incredible."

Appellant also complains that the trial court failed to instruct the jury sufficiently on the subject of self-defense, and particularly that it failed to give the instruction on this subject proposed by defendant. Instructions given are as follows:

"A person may repel force by force in the defense of person, property, or life,

against one who manifestly intends by violence or surprise to commit a known misdemeanor or felony, or either, to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be real or apparent; and the jury is not to consider whether the defendant was in actual peril of his life and property, but only whether the indications were such as to induce a reasonable man to believe that he was in such peril of person or property, and *if he so believed*, and had sufficient cause so to believe by the conduct of Poteski, and committed the act complained of under such beliefs then you should acquit the defendant."

"Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury and there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, stand his ground; and where the attack is sudden and the danger is imminent, he may be justified in slaying his aggressor, even though it may be proved that he might more easily have gained his safety by flight."

"You are instructed that if you believe from the evidence that at the time of the cutting of Poteski, the defendant Wheeler had ordered Poteski to leave the room and that the said Poteski thereupon refused so to do, then the said defendant Wheeler had a right to exclude Poteski therefrom in defending his habitation and to use all such force as reasonably necessary to eject the said Poteski from the said room.

"You are further instructed that if you should find from the evidence that Poteski was the aggressor and threatened defendant with physical violence at said time, it is the law that a person assailed in his own house is not bound to retreat from the house to avoid violence, even though a retreat may safely be made. If an intruder resists ejection and assaults the lawful occupant, the latter need not retreat, but in protecting his person, he may, if necessary, intentionally take the intruder's life if he has reason to believe that his own life is in danger or that he is in danger of receiving great bodily harm."

The proposed instruction not given reads:

"You are instructed that the cutting of Poteski by the defendant would be justified if from all circumstances in evidence you find that Poteski manifestly intended and endeavored in a violent riotous and tumultuous manner to enter the habitation where he had no legal right to be and gave evidence that he intended to do great bodily harm to persons therein; and that in the protection of Mrs. Reese and himself the defendant found it necessary to defend himself, then under these circumstances you must acquit the defendant."

[4, 5] The instructions given were ample to cover the situation. A defendant is not entitled to have his own particular phrasing of the law adopted by the court or given to the jury. It is sufficient if the substance of the law applicable to the case is set forth by the court correctly in its instructions. *People v. MacDonald*, 24 Cal.App.2d 702, 76 P.2d 121; *People v. Parchen*, 37 Cal.App.2d 215, 223, 98 P.2d 1045; *People v. Vest*, 65 Cal.App.2d 774, 781, 151 P.2d 666. Furthermore, the instruction proposed by defendant and refused by the court was defective in that it left it to defendant to determine whether the danger of great bodily injury existed, while the rule as stated in 13 Cal.Jur., p. 638, sec. 42, is: "It is not enough that there should exist in the mind of the defendant a belief that he is in actual peril. It must appear not only that he believed himself in such peril, but that, *as a reasonable person*, he had sufficient grounds for his belief." (Italics added.) Also there is no evidence that Poteski "intended and endeavored in a violent riotous and tumultuous manner to enter the habitation * * * [or] gave evidence that he intended to do great bodily harm to persons therein. * * *" There was no violence until after Poteski, Mrs. Reese and defendant had entered the room.

Appellant stresses the fact that the testimony of Poteski was uncorroborated, while his own testimony was corroborated by Mrs. Reese. While it is true that Mrs. Reese's testimony did, to considerable ex-

tent, parallel that of defendant, nevertheless the jury may well have considered such testimony on her part as unworthy of much weight in view of the intimacy that apparently existed between her and defendant, the fact that her statements at the trial did not conform in several respects to those made by her prior thereto, and her admissions that she had talked the matter over with defendant subsequent to his arrest, that she loved defendant and intended to marry him, and that she "would do anything to avert any harm coming to him."

We find no reversible error in the record, and the judgment and order denying a new trial are affirmed.

THOMPSON and PEEK, JJ., concur,



75 Cal.App.2d 682

NATHE v. FRED W. GRAY CO.

Civ. 15193.

District Court of Appeal, Second District,
Division 1, California.

Aug. 5, 1946.

Rehearing Denied Aug. 22, 1946.

1. Estoppel ⇐72

An element of negligence is necessary to render applicable the maxim that where one of two innocent persons must suffer by the act of a third, the loss must fall upon the one making the act possible. Civil Code, § 3543.

2. Estoppel ⇐72

One is not bound to anticipate or take precautions against commission of a crime by which another may be deceived and where such a wrong is accomplished through the instrumentality of a criminal act, the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible has no application. Civil Code, § 3543.

3. Estoppel

Automobile owner was not estopped from asserting forgery of his signature by room-mate as ground for cancellation of note, chattel mortgage and certificate of ownership of automobile in favor of mortgagee by fact that during unexpected absence from state, owner gave roommate keys and limited authority to move automobile to parking lot if necessary and left bill of sale among personal effects in room, particularly where mortgagee relied on bill of sale presented by room-mate posing as owner and required no other identification or reference before making loan. Civil Code, §§ 3524, 3543.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Robert T. Nathe against Fred W. Gray Company to quiet title to an automobile and for cancellation of a promissory note, chattel mortgage and certificate of ownership. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Macfarlane, Schaefer & Haun and Henry Schaefer Jr., all of Los Angeles, for appellant.

Joslyn & Hollopeter, of Pasadena, for respondent.

YORK, Presiding Justice.

This is an action to quiet title to an automobile and for the cancellation of a promissory note, chattel mortgage and certificate of ownership in favor of, and given to secure a loan made by the defendant upon plaintiff's automobile. During the plaintiff's absence from the State, his roommate and friend, Jack Charlesbois, took plaintiff's automobile without his permission to defendant's place of business for the purpose of negotiating a loan. The automobile was registered in Minnesota and bore license plates issued in that state. Charlesbois representing himself to be the plaintiff, and without authority to do so, procured from defendant a loan of \$100 by presenting a bill of sale to the said automobile issued in Minnesota, and by executing the note, chattel mortgage and other papers neces-

sary to register the automobile under California law.

The trial court rendered judgment in favor of plaintiff and ordered the said note, chattel mortgage and certificate of ownership to be cancelled.

Defendant prosecutes this appeal from such judgment urging that it "is contrary to the law and evidence for the following reason: The plaintiff, by his negligence, made it possible for Jack Charlesbois to procure the loan and is now estopped from asserting forgery."

The only testimony presented at the trial herein was that of respondent Nathe and appellant Fred W. Gray, from which it appears that respondent had known Jack Charlesbois for six or seven years, having met him in high school in Minneapolis, where they visited in each other's home; that they came to California together in respondent's Buick convertible car about a month after respondent purchased the same; that they roomed together at the Y.M.C.A. in Pasadena, and attended a dramatic school. Respondent testified that he was 22 years of age and believed that Charlesbois was under 21 years; that Charlesbois had driven the witness' car in Minneapolis and they took turns driving out to Pasadena; that after they reached the latter place respondent did the driving; that before leaving home respondent loaned Charlesbois \$100, but took nothing back from him to evidence such loan; that Charlesbois worked at the Empire Cafe in Minneapolis and was a member of the Bartenders' Union. The two boys arrived in California early in September of 1944; that respondent had in his possession the bill of sale for the car issued to him in Minnesota and the car bore license plates from that state; that two days after their arrival in Pasadena, respondent was recalled to Minneapolis by the death of his father, and he remained away from California from September 8 to October 6 or 7, 1944. When leaving Pasadena, respondent's car was parked in front of the Y.M.C.A., and he gave his keys to Charlesbois and authorized him to move the car "around the corner to the filling station parking lot", if there were any complaints

from the police department. Respondent also left in his room at the Y.M.C.A. his personal effects and papers, including the bill of sale to the car.

There is no dispute that Jack Charlesbois representing himself as respondent borrowed \$100 from appellant. This was accomplished by his appearing in person at appellant's place of business, driving respondent's car and presenting the bill of sale therefor. On September 23, 1944, said Charlesbois signed respondent's name to all of the documents required by appellant to consummate the loan, and as well an application for registration of the car under California law. Appellant Gray admitted that he did not ask Charlesbois for any identification; that it was his usual policy to grant loans without identification "where they have the title"; and that he made no effort to determine his credit or responsibility, but relied entirely on the fact that he had the bill of sale.

When respondent received the California registration certificate on October 23rd, he noticed appellant's name shown thereon as the legal owner of his car. Respondent testified that he asked Charlesbois what that meant. "I said according to that the car was not mine and he said yes it was, that there had been a mistake. He said that once while I had been gone he had driven it to L. A. and the lights were bad, and while he was there the mechanic told him that he needed a California license plate and he told Jack (Charlesbois) if he would leave the money and the ownership card he would get the license plate for him, and he (Charlesbois) said immediately that he would call the Fred W. Gray Company and get it straightened out." Instead, Charlesbois disappeared two days after this conversation. About December 19, 1944, respondent telephoned to appellant for an explanation of a notice received by him to the effect that he owed said company \$130, and on December 29, 1944, he filed the instant suit.

Among other things the court found "that the said Jack Charlesbois took the car belonging to plaintiff to the office of the defendant company without any actual

or constructive authority from the plaintiff and did on or about the 22nd day of September, 1944, make application for a change in registration from Minnesota to California on said car and did at said time and place make application for a chattel mortgage and did forge the signature of the plaintiff to the application for change of registration, the application for a loan, the note and the chattel mortgage and did represent and hold himself out to be the plaintiff, Robert T. Nathe. It is further a true fact that the defendant company, acting upon such forged instruments did make a loan to said Jack Charlesbois of One Hundred Dollars (\$100.00), plus financing costs and cost of insurance;

"(14) It is further a fact that the said finance company through its employees, and more particularly through its owner, Fred W. Gray, talked to the said Jack Charlesbois and at no time asked the said Jack Charlesbois for any references or identification or for his place of business or for anything else which would have shown whether or not he actually was the plaintiff, Robert T. Nathe. It is further a fact that the said Robert T. Nathe at no time until the 19th day of December, 1944, had any knowledge of said transactions and of the existence of the chattel mortgage on his car and that the said Robert T. Nathe never at any time received the money secured by the said Jack Charlesbois or any part of it."

It is appellant's contention that section 3543 of the Civil Code is applicable to the situation herein, to-wit: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." It is urged that it would have been an easy matter for respondent to have taken the bill of sale with him, "to have moved the car onto the parking lot and have taken the keys with him", and that under the facts "it is more just and equitable that the plaintiff suffer than the defendant."

In the case of *Davis v. Davis*, 26 Cal. 23, 44, 85 Am.Dec. 157, in which an assignment of error was taken because of the refusal of the trial court to give an in-

struction substantially in the language of section 3543, *supra*, the Supreme Court said: "But great caution should be exercised in applying this principle, and the Court should be satisfied that the case is one calling for its application, before the question is submitted to the jury, as to which of the parties is entirely in delicto. * * * In legal contemplation the person who causes a loss to another is not innocent, and it would have been improper for the Court to have charged the jury that, both parties being innocent, one of them could be found guilty of a wrong to the other."

[1] Under the language used in the code section, "it would seem that an element of negligence must be present in order to render the maxim applicable, and the wording of the rule in many cases bears out this assumption." 10 Cal.Jur. 506, § 48, citing *MacDonald v. Cool*, 134 Cal. 502, 504, 66 P. 727; *Walsh v. Hunt*, 120 Cal. 46, 52, 52 P. 115, 117, 39 L.R.A. 697. In the last cited case, defendant authorized one Hughes, a real estate dealer and notary public, to negotiate a loan of five hundred dollars on certain premises with which to pay off an existing mortgage. Thereafter Hughes presented for defendant's signature a note and mortgage which she executed before Hughes as notary and left the same with him for delivery to the plaintiff. In both documents the principal sum wherever expressed and the rate of interest were written in pencil by Hughes at the time he prepared them; and after defendant left his office, said Hughes erased the pencil words and figures and wrote in lieu thereof with pen and ink twelve hundred dollars and raised the rate of interest from nine to ten per cent. Thereafter, having obtained the twelve hundred dollars from plaintiff, Hughes paid off the prior mortgage of \$500 and retained the balance of \$700. Both parties to the action were ignorant of the alteration until about a year later, when Hughes absconded and they met for the first time. The lower court gave judgment to plaintiff foreclosing her mortgage for the full amount of the note as expressed therein after the alteration, apparently based upon the theory that de-

fendant was guilty of such negligence in executing the documents partly written in pencil, thus enabling Hughes to perpetrate his fraud, that she was estopped to set up such fraud as a defense.

[2] In reversing the judgment, the Supreme Court stated: "But, if it were conceded that the finding established carelessness or negligence by defendant, which might in some degree have contributed to the successful execution of the fraud by which plaintiff was deceived into parting with her money, it would not then constitute an estoppel. This is upon the principle that a party is not bound in transactions of this character either to anticipate or take precaution against the commission of a crime by which another may be deceived; that where it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime, and not the negligent act, which is the proximate cause of injury; and in such a case the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible, has no application." See, also, *Miller v. Citizens' Nat. Trust, etc., Bk.*, 1 Cal.App.2d 470, 477, 36 P.2d 1088.

[3] Likewise in the case under consideration, respondent gave Charlesbois the limited authority to move his car to a parking lot in the event it became necessary during respondent's absence. He neither authorized nor anticipated that Charlesbois would purloin the bill of sale from his personal effects, or that Charlesbois would forge respondent's signature in order to negotiate a loan of money for his own use. On the other hand, it cannot be said that appellant exercised ordinary care and prudence. Mr. Gray admitted that he relied entirely upon the bill of sale presented to him by Charlesbois and made no inquiry as to the truth of Charlesbois' statements, although a full week intervened between the date of the application for the loan and the time when Charlesbois received the money, owing to the fact that Charlesbois did not reach the age of 21 years until the latter date.

Under the circumstances, neither section 3543 nor section 3524 of the Civil Code is

applicable to the facts presented by the instant litigation.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



75 Cal.App.2d 521

PEOPLE v. SAMSON.

Cr. 3996.

District Court of Appeal, Second District,
Division 1, California.

July 25, 1946.

1. Assault and battery ☞95

Criminal law ☞1159(1)

In prosecution for assault with a deadly weapon accused's guilt was for jury, and it is not within province of appellate tribunal to disturb the judgment based on the verdict.

2. Criminal law ☞1158(1)

The appellate court cannot retry the case, but is limited to deciding only whether upon the face of the evidence it can justly be held that sufficient facts could not have been found to warrant the inference of guilt.

3. Criminal law ☞1159(2)

The appellate court is not warranted in reversing a conviction on ground of insufficiency of evidence unless the court can say that upon no hypothesis is there sufficient substantial evidence to support a conviction.

4. Assault and battery ☞92

Evidence sustained conviction of assault with a deadly weapon.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Martha Samson was convicted of assault with a deadly weapon, and she appeals.

Affirmed.

Ray L. Smith, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

As a result of a jury trial, defendant was found guilty of the crime of assault with a deadly weapon, as charged in the information filed herein. She appeals from the judgment of conviction, asserting that the evidence adduced at said trial is insufficient to support such judgment.

The assault occurred under the following circumstances: Mrs. Lou Nell Fullerton, the person assaulted, in company with her husband and a Mr. Smith drove up to the curb of a Los Angeles city street about 9 o'clock in the evening of September 12, 1945, and alighted from an automobile. Mrs. Fullerton testified that "We were just stepping out of the car, my husband and Mr. Smith, they just stepped out of the car, and we were starting to walk down the street when the marine came up. * * * we were sightseeing and were looking for something to eat, some shrimps * * * while we were waiting for Mr. Smith to come from locking the car, this marine stepped up and he put his arm around my waist and he said, 'I will take this one.' * * * And the boy, my brother-in-law, —this friend, Mr. Smith, stepped up and he identified himself as the Shore Patrol, and the fellow first knocked my husband—he knocked my husband down and he first called him a 4-F man, and he was just discharged from the Navy a week before, and he said, 'Hell, I don't want any trouble with you.' And when he knocked my husband down, all the other marines came up, and I was standing by the car and Miss Samson came up from behind me and got my arms and turned them behind me. * * * I said, 'What do you mean?', and she said, 'Just be still and you will find out.' And she knocked me down on the sidewalk, and when she did, I finally got up and she knocked me down again, and I got up and she got me up against the wall and cut me with a bottle. * * * She broke the bottle and cut me in the arm. * * * Like this (indicating) * * *

and she said, 'I will cut your eyes out', and when she did, I threw up my arm and she cut my arm, here * * * It was a beer bottle." Said witness testified that the muscle of her arm was cut necessitating the taking of twenty-eight stitches in her arm; that she had received medical attention "three times and maybe I will have to have another operation"; and was still under the care of a doctor. The husband of the prosecuting witness, Mr. Grady Fullerton, testified: "One boy came up and grabbed my wife around the waist * * * and I was asking him to leave my wife alone, and then they came up and one boy hit me. * * * She (appellant) grabbed her by the arm and threw her down on the sidewalk * * * She came from behind one time and grabbed her by the arm. * * * I was fighting with the marines. * * * part of the time I was up. * * * I heard my wife holler 'Leave me alone', and I looked up and saw she (appellant) had hold of her (prosecuting witness) * * * my wife finally got loose, and she (appellant) broke this bottle on the sidewalk or on the curb." That he saw the bottle in appellant's hand; that he was then fighting with the marines, who still had hold of him; that he was trying to get loose and get to his wife; that he did not see everything that was going on, but he saw enough to know that appellant cut his wife, that appellant had the bottle in her hand, and he saw appellant beating his wife's head on the sidewalk; that he saw no one else strike his wife.

Police Officer McCaughin testified that he and Officer Sloan were sitting in a police car on the northwest corner of 18th and Main Streets; that they observed the fight, and as they approached the scene "Mrs. Fullerton was on the sidewalk and Mrs. Samson was on top of her * * * they were scrapping, fighting each other. At the time we approached Mrs. Samson was—had her (Mrs. Fullerton) by the hair of the head and was beating her head on the sidewalk"; that his brother officer pulled out his police badge and stated who they were, and Officer McCaughin took Mrs. Samson by the arm in an effort to break up the fight and get her out of the crowd; that the group of marines jumped on him

at that time and he "hit the sidewalk"; that he observed that Mrs. Fullerton was injured. "She had quite a bit of blood on her; her arm was cut, the forearm of the left arm. * * * She had blood all over her clothes and coat"; that both the Fullertons were sober at the time of the altercation.

The records of the Georgia Street Receiving Hospital were introduced which showed that Dr. Nador made a diagnosis of Mrs. Fullerton's injuries as "a four inch laceration of the left forearm with severance of the pronator muscle."

Appellant took the stand in her own defense, and testified that Mrs. Fullerton was in the midst of the fighting and was being pushed around "so I went over and took her by the hand and pulled her away, and told her to be careful or she would get hurt. So she just stood there with me for quite a little while; we were watching them fight. Then she started back and I caught hold of her and then she whirled and hit me. So when she hit me we started fighting. * * * She hit me in the face and then got hold of my hair * * * There is a big place pulled out right here (indicating)." She denied that she had any bottle or any glass in her hand but that when she fell to the ground she saw glass and felt it too, having been cut on the knee; that she held Mrs. Fullerton by the hair, but did not remember bouncing her head up and down on the sidewalk; and that her first interest in Mrs. Fullerton was to see that she did not get hurt in the fight.

[1-3] In the light of the evidence presented, it was for the jury to decide which story was the truth, and having decided, it is not within the province of an appellate tribunal to disturb the judgment based thereon. As stated by this court in *People v. Ohman*, 67 Cal.App.2d 467, 474, 154 P.2d 463, 466:

"It is not within the province of an appellate tribunal to retry the case and to make inferences from the facts proved. That function belongs to the trial court. The appellate court is limited to deciding only whether upon the face of the evidence it can justly be held that sufficient

facts could not have been found to warrant the inference of guilt. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778.

"Unless we can say that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the triers of fact, we are not warranted in directing a reversal of the judgment on the ground of insufficiency of the evidence to support it."

[4] The judgment of conviction in the instant cause is abundantly supported by the evidence.

The judgment is affirmed.

DORAN and WHITE, JJ., concur.



75 Cal.App.2d 308

In re THEE.

THEE v. RICHARDSON.

Civ. 15163.

District Court of Appeal, Second District,
Division 1, California.

July 11, 1946.

1. Executors and administrators ⇨252

Where claim against estate of a decedent has been rejected by executor and is not approved by court, burden rests upon claimant to establish validity of the claim by preponderance of evidence, but where claim is allowed by executor and approved by court, approval is prima facie evidence of its correctness and burden of proving its invalidity rests upon contestant. Probate Code, § 713.

2. Executors and administrators ⇨221(5)

Even though presumption of implied promise to pay reasonable value of services rendered could not be indulged because claimants and decedent were closely related by blood, claimants sustained by substantial evidence their burden of showing that decedent who was their father had made an express promise to pay them for

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Herman Adolf Thee, deceased. From an order approving the allowance of the claims of Lloyd H. Thee and Earl J. Thee against the estate, Alice Thee Richardson, contestant, appeals, and from order denying his motion to strike the motion for a new trial from the files, Lloyd H. Thee, in his capacity as executor of the estate, appeals.

The order on which appeal was taken by contestant affirmed, and appeal of the executor dismissed.

Arthur C. Fisher, of Los Angeles, for Alice Thee Richardson, contestant, appellant and respondent.

John J. Dillon, of Culver City, for Lloyd Herman Thee, petitioner, appellant and respondent.

WHITE, Justice.

By his will the decedent herein left his entire estate with the exception of an oil royalty, to three children, Alice Thee Richardson, contestant (hereinafter referred to as appellant), Earl J. Thee and Lloyd H. Thee, in equal shares. Lloyd H. Thee was appointed executor. Lloyd H. Thee and Earl J. Thee each filed a claim against the estate for personal services rendered during the lifetime of the decedent in the sum of \$1,000. Another daughter, Hulda Thee Wopschall, filed a claim for \$500, likewise for personal services rendered during the lifetime of decedent. Said claims were allowed by the executor and approved by the court. Upon the filing of the executor's first and final account, appellant presented objections to the claims upon the grounds that they were based upon false allegations; that the personal services therein set forth were never rendered; and that decedent never agreed to pay for such services. After a hearing, the objections were overruled. From that portion of the order settling the executor's account which approved the

payment of the claims this appeal is prosecuted.

Respondent, Lloyd H. Thee, in his capacity as executor, filed a notice of appeal from "the denial of the executor's motion to strike the motion for a new trial from the files," but such appeal has been abandoned.

[1,2] Appellant's sole ground for a reversal of the judgment is that the claimants being related to the decedent by close ties of blood, the presumption that where one accepts services from another and receives the benefit of the work there is an implied promise to pay the reasonable value of such services was not available to them. *Collier v. Landram*, 67 Cal.App.2d 752, 757, 155 P.2d 652; *Newbert v. McCarthy*, 190 Cal. 723, 725, 214 P. 442. However, the cases just cited involved actions to establish the validity of claims which had been rejected by the executor and were not approved by the court. Obviously, in such an action the burden rested upon the claimants to establish the validity of the claims by a preponderance of the evidence. In the case at bar, however, the challenged claims were allowed by the executor and after a hearing thereon, a transcript of which hearing is now before us, were by the court ordered paid out of the assets of the estate in the course of administration.

When a claim is allowed by the executor and approved by the court, it thereby becomes an "acknowledged" debt of the estate, to be paid in due course of administration. Prob.Code, sec. 713. And when a claim has been approved by the court, as in the instant case, such approval is prima facie evidence of its correctness and the burden of proving its invalidity rests upon the contestant. In re Estate of Scheller, 64 Cal.App.2d 65, 148 P.2d 393. Conceding the correctness of appellant's contention that where, as here, the parties are closely related by blood, the preceding presumption of an implied promise to pay the reasonable value of services rendered may not be indulged, nevertheless there is in the record ample evidence adduced at the hearing before the court when the claims were approved, that it was expected and understood

by both the testator and the claimants that compensation should be made by the former to the latter for the services rendered. The claimants therefore met the burden imposed upon them and by substantial evidence established an express promise upon the part of the decedent to pay for the services performed. This was all that was required of them. *Newbert v. McCarthy*, supra, 190 Cal. 725, 214 P. 442; *Collier v. Landram*, supra, 67 Cal.App.2d 757, 155 P.2d 652.

At the hearing on the objections to the first and final account, the evidence presented by appellant was through another sister, Martha Wopschall, who testified that decedent said that he paid the claimant Hulda Wopschall, but that she did not know what services, if any, the claimant Earl J. Thee had rendered. She testified to a conversation with claimant Lloyd H. Thee at the time of the hearing on the petition for probate of the will, in which the witness said to Mr. Thee, "Don't you think you are asking a lot, \$1,000, for your services to Dad?" to which he replied, "I can't see why." Amplifying this conversation, the witness testified that Lloyd H. Thee said, "Earl and I are both going to put in the sum of \$1,000 for Earl having a doctor bill and I for the different things I have done." The witness said, "Lloyd, don't you think that is a little bit high? We are willing that you should be paid, but I think you are high." To this Lloyd Thee replied, "That is what it is." Whatever intrinsic value be accorded this evidence, it at the most served only to raise a factual conflict which the court by its decision resolved against appellant.

After presenting the foregoing evidence, counsel for appellant asked for a continuance for the purpose of securing bank statements to show alleged payments by the decedent. This the court denied. After some discussion, counsel for appellant chose to rest his case. Appellant does not now contend that the court abused its discretion in denying the continuance, and the record contains no showing that would support such a claim.

The claimants having met the burden cast upon them by reason of their relationship with the testator, and appellant hav-

ing failed to meet the burden of proof resting upon her, a contestant of an approved claim, the decision arrived at by the probate court cannot be disturbed.

The appeal of Lloyd Herman Thee as executor from the order denying his motion to "strike the motion for a new trial from the files" is dismissed. The order and portions thereof from which this appeal was taken by contestant, Alice Thee Richardson, are and each is, affirmed.

YORK, P. J., and DORAN, J., concur.



75 Cal.App.2d 272

ARMBRUST v. ARMBRUST.

No. 13002.

District Court of Appeal, First District,
Division 2, California.

July 9, 1946.

1. Receivers ⌘36, 37, 38

Evidence to justify the appointment of a receiver may be presented in the form of allegations in a complaint or other pleading, by affidavit or by testimony.

2. Receivers ⌘8

The appointment of a receiver is a matter in the discretion of the trial court.

3. Appeal and error ⌘955

If it appears that the party seeking the appointment of a receiver has at least a probable right or interest in the property involved and that there is danger of its being lost or destroyed or misappropriated, and upon conflicting testimony, such right or interest and danger of destruction or misappropriation of the property or fund are found to exist, a reviewing court generally is in no position to say that a nisi prius court has abused its discretion in the appointment of a receiver.

4. Receivers ⌘37

In action to rescind a written agreement under which plaintiff and his divorced

wife held property as joint tenants, where defendant in verified cross-complaint for accounting and appointment of receiver alleged that she was physically ejected from apartment building held by parties jointly, that plaintiff had received and retained rental and dividends from securities also held jointly, and that plaintiff had failed to properly care for and manage property to the dissatisfaction of tenants, and was occupying an apartment without payment of rent, appointment of receiver was not an abuse of discretion.

5. Appeal and error ⌘955

In suit involving appointment of a receiver, the discretion of the trial judge is so broad that his order based upon facts concerning which reasonable minds might differ with respect to the necessity for the receivership will not be reversed.

6. Appeal and error ⌘955

To justify appellate court in interfering with an order confirming an appointment for a receiver, it must be made clearly to appear that the order was an arbitrary exercise of power.

Appeal from Superior Court, City and County of San Francisco; Melvin I. Cronin, Judge.

Suit by William John Armbrust against Louise Mathilda Armbrust to rescind a written agreement and to establish plaintiff's interest in certain real and personal property, wherein defendant filed cross complaint for an accounting and appointment of a receiver. From an order appointing a receiver pending the determination of the suit, plaintiff appeals.

Order affirmed.

Gus. L. Baraty and Earl B. Myers, both of San Francisco, for appellant.

Donohue & Sumner of San Francisco, for respondent.

GOODELL, Justice.

Appellant by this appeal questions the validity of an order appointing a receiver pending the determination of a suit brought by him against his divorced wife to rescind a written agreement and to establish his

interest in certain real and personal property, on the ground that there was no showing as required by Code Civ.Proc. sec. 564, subd. 1, that the property in dispute is in danger of being lost, removed, or materially injured.

The agreement in question was entered into by the parties hereto several months after their marriage in 1943. It provided in substance for the creation of a joint tenancy in three parcels of real property owned by the respondent as her separate property, including an apartment house in San Francisco, and certain shares of stock then owned by the appellant as his separate property.

The complaint alleges that shortly after their marriage the parties purchased the San Francisco apartment property as joint tenants, "contrary to plaintiff's desire and without his consent" as he had been "led by the defendant to believe that said property would be held in a manner which would show the respective contributions" toward the purchase price, i. e., \$15,905.18 by appellant and \$2,553.62 by respondent. After this purchase, it is alleged, at respondent's instance and as evidence of appellant's love and affection, he executed a deed placing title to the property in respondent's name; thereafter he entered into the agreement now in question, in the belief and upon the representation "that she was merely to hold the property in trust for the use and benefit of the plaintiff." Pursuant to the agreement the real property was placed in joint tenancy, but title to the shares of stock, which are alleged to be in the possession of the respondent, remains in appellant.

The appellant also alleged that the written agreement is void for lack of consideration and mutual assent; he charges the respondent with fraud and undue influence, and prays for a decree establishing that the written agreement and all deeds executed in furtherance thereof are null and void; that appellant has an interest in the apartment property proportionate to his contribution toward the purchase price thereof; that he is the owner of the shares of stock covered by the agreement and entitled to the possession thereof; that respondent shall execute a deed of her interest in the apart-

ment property upon the repayment of her contribution toward the purchase price. The complaint recites that respondent commenced divorce proceedings in April, 1944, and that appellant's suit was brought because "the court has no jurisdiction to determine the separate property rights of the parties * * * in said divorce action."

Respondent in her answer admits the execution of the agreement, but denies that it was the result of misrepresentations, fraud, undue influence, threats or duress. She alleges that the stock certificates were delivered to her in performance of the agreement, and that appellant at no time prior to the commencement of the suit gave notice of rescission or offered to restore any part of the consideration she had paid.

By verified cross-complaint the respondent prays for an accounting and the appointment of a receiver. She alleges that the parties owned as joint tenants the apartment property in dispute, two promissory notes secured by deeds of trust, certain shares of stock and bank balances; that she was physically ejected from the apartment premises in September, 1944, and that *thereafter appellant has received and retained the rental from the premises and the dividends from the securities; that appellant has failed to properly care for and manage the property, to the dissatisfaction of the tenants; that he is occupying one of the apartments without payment of rent; that unless a receiver is appointed loss of rentals, deterioration and depreciation of the property, and dissipation of other assets is likely to result.*

At the hearing on respondent's motion for the appointment of a receiver, the court did not permit her to testify, upon the objection made by the appellant that respondent's notice of motion did not indicate that the motion was to be presented on oral testimony. The court stated that it would consider the matter "solely on the verified cross-complaint and the records and files of the action." It found that "said property is in danger of being lost, removed, or materially injured to the irreparable injury of the defendant and cross-complainant", and appointed a receiver pending the determination of the action.

Appellant seizes upon the fact that respondent's oral testimony was not received at the hearing and contends that respondent failed to produce any evidence to support her motion or which now supports the order appealed from; whereas appellant presented "positive evidence" that the real property was *not* in danger of being lost, removed or materially injured. This evidence was appellant's testimony that the real property and the shares of stock were not encumbered, that the rents and proceeds of the property were deposited in a separate bank account, and that the tenants were all quite satisfied.

[1] Appellant's argument overlooks the fact that the "showing of the propriety for a receiver may be in the complaint". (22 Cal.Jur. 467). Evidence to justify the appointment of a receiver may be presented "in the form of *allegations in a complaint or other pleading*, by affidavit or by testimony." (Emphasis added.) Baldwin v. Baldwin, 67 Cal.App.2d 175, 177, 153 P.2d 567, 569.

It is readily apparent from an examination of the record in the instant case that the pleadings were considered by the court "as an affidavit or evidence in support of [the] application for a receiver" Goes v. Perry, 18 Cal.2d 373, 378, 115 P.2d 441, 444, and as such, "it was the province of the trial court to pass upon its weight and to reconcile all conflicts therein." Appellant asserts that respondent "did not introduce her verified cross-complaint nor any records or files" in support of her motion. But they were properly before the court for the notice of motion states that it would be based "upon the verified cross-complaint * * * and upon the records and files of this action". The judge commented that "the thing that brings it more before the Court, to my belief, is the original complaint, rather than the cross-complaint", but that he would "listen to the matter solely on the verified cross-complaint and the records and files of the action."

[2, 3] The appointment of a receiver is a matter in the discretion of the trial court (22 Cal.Jur. 435). If it appears that the party seeking the appointment "has at least a *probable* right or interest in the property"

and that "there is danger of its being lost or destroyed or misappropriated", then if "upon conflicting testimony, such right or interest and danger of the destruction or misappropriation of the property or fund are found to exist, a reviewing court is as a general rule in no position to say that a nisi prius court has abused its discretion in the appointment of a receiver." Whitley v. Bradley, 13 Cal.App. 720, 725, 110 P. 596, 598. Here the verified pleadings showed the probable interest of the respondent and the danger of misappropriation of the property or its proceeds sufficiently for the judge to state his conclusion that "the appointment of a receiver * * * may be a step in the right direction for the preservation of the assets that are involved in the controversy, * * * as set forth in the complaint itself. * * * It certainly would keep in status quo the property and assets of the litigants."

[4-6] The position of the appellant is simply that a close examination of the facts "obviously shows" that no benefit or advantage is to be gained by the appointment of a receiver. But it has been held that the discretion of the trial judge is so broad "that his order based upon facts concerning which reasonable minds might differ with respect to the necessity for the receivership will not be reversed." The conclusion of the appellate court cannot be substituted for that of the trial court "made upon sufficient evidence even if we should be of the opinion that there was no danger of the loss or removal of, or other irreparable injury to, the assets of the joint venture. To justify our interference with the order confirming the appointment * * * it must be made clearly to appear that the order was an arbitrary exercise of power." Moore v. Oberg, 61 Cal.App.2d 216, 221, 222, 142 P.2d 443, 446. In both Lowe v. Copeland, 125 Cal.App. 315, 13 P.2d 522, and Whitley v. Bradley, 13 Cal.App. 720, 110 P. 596, *supra*, cited by appellant, there is found a recognition that the appointment of a receiver rests in the sound judicial discretion of the trial court. See, also, Breedlove v. Breedlove Excavating Co., 56 Cal. App.2d 141, 132 P.2d 239; Baldwin v. Baldwin, *supra*; Misita v. Distillers Corp., Ltd.,

54 Cal.App.2d 244, 250, 128 P.2d 888; *Sunset Farms, Inc. v. Superior Court*, 9 Cal.App.2d 389, 50 P.2d 106. The remaining cases cited by appellant may be readily distinguished on their facts: In *De Leonis v. Walsh*, 148 Cal. 254, 82 P. 1047, a receiver was appointed in an action to set aside a fraudulent conveyance where "the complaint showed a proper case for a receiver." After judgment was entered in favor of the plaintiff, the receiver died, and a new receiver was appointed upon the application of the *defendant*. This appointment was set aside because "no just ground or valid reason" was presented "for the appointment of a receiver [after judgment] at the request of the *defendant*." (Emphasis added.) In *Bank of Woodland v. Stephens*, 144 Cal. 659, 79 P. 379, the court held the appointment of a receiver improper in an action to foreclose a mortgage as it was not established, as required by the code, that "the property is probably insufficient to discharge the mortgage debt." Subd. 2, sec. 564, Code Civ.Proc.

There was no abuse of discretion in the instant case.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.



75 Cal.App.2d 691

RANKIN et ux. v. SATIR.
Civ. 3607.

District Court of Appeal, Fourth District,
California.

Aug. 6, 1946.

Rehearing Denied Aug. 28, 1946.

Hearing Denied Oct. 1, 1946.

1. Trusts ⇨110

Evidence warranted findings that tenant agreed to protect landlords during lease against foreclosure of first trust deed, that tenant agreed to advance the money and buy in the property at foreclosure sale and to hold the property for the landlords who

were to repay the tenant, that landlords in reliance on such agreement made no effort to secure the money elsewhere, and that tenant purchasing at foreclosure sale held property in trust for landlords. Civ.Code, §§ 2223, 2224.

2. Trusts ⇨91

A "constructive trust" resting on fraud or wrongdoing is not based primarily on intention of parties, but is forced on conscience of trustee by equitable construction and operation of law. Civ.Code, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

3. Trusts ⇨91

To establish a constructive trust based on fraud or wrongdoing, an oral promise is sufficient, and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling. Civ.Code, § 2224.

4. Trusts ⇨91

In order to create a constructive or involuntary trust, as defined in statute, no conditions other than those stated in the statute are necessary. Civ.Code, § 2224.

5. Trusts ⇨91

A constructive trust for fraud or wrong, being based on equitable principle that no one can take advantage of his own wrong, exists in almost any case where there is a wrongful acquisition or detention of property to which another is entitled. Civ.Code, § 3517.

6. Trusts ⇨100

A tenant who agreed to protect landlords for period of lease against foreclosure of trust deed and to advance the money and buy the property at foreclosure sale and hold the property for landlords, and who purchased at foreclosure sale and refused to convey to landlords offering to repay tenant, held the land subject to constructive trust resting on fraud or wrongdoing. Civ.Code, §§ 2223, 2224.

7. Landlord and tenant ⇨62(2)

Generally, a tenant in possession under a lease cannot attack the landlord's title.

8. Landlord and tenant ➞147

A foreclosure sale under third trust deed did not relieve tenant from performing his agreement to protect landlords during period of lease against foreclosure of first trust deed, where tenant continued in possession under lease after foreclosure sale under third trust deed, and purchaser at such foreclosure sale recognized the lease.

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Action to establish a trust in connection with certain real property by George Rankin and Blanche A. Rankin, his wife, against George Satir. From the judgment, the defendant appeals.

Affirmed.

Clarence B. Smith, of El Centro, and William H. Wylie, of San Diego, for appellant.

S. P. Williams and A. C. Finney, both of El Centro, for respondents.

BARNARD, Presiding Justice.

This is an action to establish a trust in connection with certain real property.

The plaintiffs were the owners of 350 acres of land in Imperial County, subject to a first trust deed in favor of the Federal Land Bank, to a second trust deed in favor of Frank B. Johnson, and to a third trust deed in favor of El Centro Production Credit Association. On March 15, 1940, the plaintiffs, in writing, leased this land to the defendant for a period of two years, beginning July 1, 1940, and ending July 1, 1942. As an inducement to obtain this lease, the defendant agreed to protect the plaintiffs for the term of the lease against any foreclosure of the first deed of trust. The defendant was informed of the amount due under that deed of trust and of the fact that payments were in default. Nothing was said between the parties about the second or third deeds of trust. The plaintiffs were to receive as rent one-fourth of the value of crops produced during the lease, and it was arranged that this rental should be paid to the Fed-

eral Land Bank to apply on the first trust deed.

The defendant took possession of the land on July 1, 1940, and planted a crop of flax. On August 24, 1940, the land was sold at trustee's sale under the third trust deed and was bought in by the credit association. On May 14, 1941, the land was sold under the second trust deed to Frank B. Johnson, the holder thereof. Neither of these purchasers attempted to interfere with the defendant's possession of the premises, and the credit association notified him that it would recognize his lease. In June, 1941, the defendant harvested his crop of flax and one-fourth of the proceeds therefrom was paid to the Federal Land Bank, in accordance with the agreement. In November, 1941, the defendant planted a second crop of flax, producing a crop worth \$12,000 which he harvested in June, 1942.

In the meantime, on April 9, 1942, the land was sold under foreclosure proceedings brought under the first trust deed, the defendant, being the only bidder, purchasing it for \$10,062.72. Shortly before the sale the defendant assured the plaintiff George Rankin that he need not worry about losing the property, and that he (the defendant) would take care of the matter in accordance with his agreement. About two weeks after the sale the plaintiffs, having raised \$12,500, asked to have the land conveyed to them, offering to pay the amount paid out by the defendant and offering to give him \$200 for his trouble. The defendant replied that "he didn't want no pay for his trouble, all he wanted was his money back," and agreed to meet them at another time and place for that purpose. Instead of keeping this appointment he consulted an attorney and then refused to make a conveyance. This action was filed on August 7, 1942, and prior to the trial the plaintiffs had secured quitclaim deeds from the Production Credit Association and from Johnson.

The court found in all respects in favor of the plaintiffs finding, among other things, that as a part of the consideration for the lease the defendant had agreed to

protect the plaintiffs from loss of their property through foreclosure of the first deed of trust, during the period of the lease; that he agreed to furnish the necessary money and take title to the property in his name, holding it as security until plaintiffs could repay the same, with interest, and that he would then reconvey the property to the plaintiffs; that he later assured the plaintiffs to the same effect, stating that he would purchase the property at the foreclosure sale and hold it as security for the money he furnished; that in reliance thereon the plaintiffs ceased to make any effort to find the money elsewhere with which to protect themselves against the loss of the property by foreclosure of said trust deed; that up to the time of the foreclosure sale the defendant misled the plaintiffs and thus prevented them from bidding in the property; that these promises and representations were made by the defendant without any intention of performing them, and for the purpose of securing the land for himself; that this land, during all of this time, was worth \$32 000; and that the defendant purchased this land for the plaintiffs and now holds the same in trust for their benefit. An interlocutory judgment was entered decreeing that the defendant holds title to this property in trust for the plaintiffs and not otherwise, and that the plaintiffs are owners of the property in fee, subject to their reimbursing the defendant for money expended by him in purchasing the property at the sale under the first deed of trust, with interest; requiring the defendant to convey the property to the plaintiffs upon payment of the amounts due to him; and providing for an accounting between the parties, including a determination of the amounts of rental properly due to the plaintiffs. From this judgment the defendant has appealed.

[1] The appellant first contends that the findings to the effect that he agreed to protect the respondents for the period of the lease against a foreclosure of this first trust deed; that he agreed to advance the money, buy in the property at this foreclosure sale, and hold it for the respondents, giving them an opportunity to repay him; that by his promises he misled the respond-

ents with the result that they made no effort to secure the money elsewhere; and that he holds the property in trust for the benefit of the respondents, are not supported by the evidence. This contention is without merit. The essential findings are fully supported by the respondents' testimony, which was believed by the court. Moreover, that testimony is somewhat confirmed by the appellant's own testimony of what occurred when he was approached by the respondents shortly after the foreclosure sale. He confirmed the respondents' testimony as to the conversation at that time, and he admitted that when they then asked him for a conveyance he had said nothing to indicate any claim on his part that he was not obligated to reconvey the property. He testified that at that time he did not know, in his own mind, what he was going to do about the matter, and that he promised to meet the respondents later in order to get away from them and without any intention of keeping the appointment.

It is next contended that the facts here established lack some of the elements essential to a "resulting" trust. Particularly, it is argued that a resulting trust cannot rest upon an express oral agreement; that any oral agreement here was not sufficiently contemporaneous with the conveyance of the legal title to the alleged trustee; and that there was no showing here of such a confidential relationship between the parties as is required for a resulting trust.

[2-5] Assuming that some facts essential to a resulting trust, as that term is usually applied, are here lacking, the facts are clearly sufficient, under long recognized rules, to establish that form of constructive trust which rests upon fraud or wrongdoing. There is a difference between these two forms of trust. *Scadden Flat Gold Min. Co. v. Scadden*, 121 Cal. 33, 53 P. 440. Constructive trusts of this form are not based primarily on the intention of the parties but are forced on the conscience of the trustee by equitable construction and the operation of law. *Millard v. Hathaway*, 27 Cal. 119. In such trusts, based upon fraud or wrongdoing, an oral promise is sufficient and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling.

Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189. "Such trusts are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive." *Sanguinetti v. Rossen*, 12 Cal.App. 623, 107 P. 560, 562. In order to create a constructive or involuntary trust, as defined in section 2224 of the Civil Code, no conditions other than those stated in that section are necessary. *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430. By section 2223 of that code the rule of constructive trust is extended to the case where one person wrongfully detains a thing from another. The rule extends to almost any case where there is a wrongful acquisition or detention of property to which another is entitled, since it is based upon the equitable principle that no one may take advantage of his own wrong. Civ.Code, sec. 3517. As was said in *Brazil v. Silva*, 181 Cal. 490, 185 P. 174, 176, "The instances of its application are as various nearly as the ways in which property can be wrongfully acquired."

[6] These rules, as codified in sections 2223 and 2224 of the Civil Code, and as establishing constructive trusts, have been applied in many cases where property has been wrongfully acquired, in violation of the just rights of another, through buying in the property at judicial sales, foreclosure sales, tax sales, and the like. *Lucas v. Associacao Protectora, etc.*, Da Cal., 61 Cal.App.2d 344, 143 P.2d 53; *Dowd v. Glenn*, 54 Cal.App.2d 748, 129 P.2d 964; *Teich v. San Jose, etc., Bank*, 8 Cal.App. 397, 97 P. 167; *Jenkins v. Frink*, 30 Cal. 586, 89 Am.Dec. 134; *Price v. Reeves*, 38 Cal. 457. In *Neet v. Holmes*, 25 Cal.2d 447, 154 P.2d 854, it was held that a promise to locate adjoining claims for the benefit of the lessors, made as an inducement to obtain a lease, if broken, is sufficient to constitute the lessees trustees for the benefit of the lessors. While the facts in these cases vary somewhat from each other and from the facts in the instant case, the principles there applied are applicable and con-

trolling here. The facts as here found are sufficient to establish a constructive trust and to support the judgment rendered.

[7,8] The appellant makes the further contention that he was relieved from complying with any promise or agreement he made, because the foreclosure sale under the third trust deed on August 24, 1940, terminated the relationship of landlord and tenant between him and the respondents. and thereby terminated any agreement on his part to protect the respondents from a foreclosure sale under the first trust deed "during the period of such lease." It is a general rule that while still holding possession under a lease a tenant may not attack a landlord's title. Whether or not this is applicable here, the appellant continued in possession under his lease after the purported sale under the third trust deed, and the Production Credit Association, the purchaser at that sale, notified him that it would recognize the lease. This purchaser made no attempt to interfere with the appellant in any way and he proceeded under his lease for nearly two years thereafter. The reason the Production Credit Association made no attempt to take possession of the property is apparent, since it must have recognized that its claim was subservient to that of the Federal Land Bank, which held the first trust deed. While the appellant was still thus in possession of the property as a tenant the event occurred, a foreclosure sale under the first trust deed, which the respondents had feared and from which the appellant had agreed to protect them. There was nothing in the foreclosure sale under the third trust deed, which in fact merely clouded the legal title, which would in any way relieve the appellant from the duty to keep and perform his promise and agreement in this regard. Any possible legal complication was later removed by the quitclaim deeds acquired by the respondents. No reversible error appears in this connection.

The judgment appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

SPAULDING et al. v. YOVINO-YOUNG et al.
Civ. 13090.

District Court of Appeal, First District.

Division 1, California.

July 19, 1946.

Hearing Granted Sept. 16, 1946.

1. Evidence ⇨450(4)

A two-year lease with stipulated monthly rental providing that a hold-over would constitute a month to month tenancy only on the same terms and conditions, and granting an option to purchase provided all rent was paid up to time of exercise of option, was sufficiently ambiguous to render admissible extrinsic evidence in determining whether the option could be enforced by specific performance during hold-over period after termination of written lease.

2. Appeal and error ⇨1008(3)

Where there was no extrinsic evidence before trial court upon question whether parties intended option in ambiguous lease agreement to purchase to continue during the hold-over period, the duty of interpreting the meaning and effect of the lease agreement was within powers of Court of Appeal on appeal, unbound by any determination of the trial court.

3. Landlord and tenant ⇨92(1)

An option to purchase in a lease needs no new or additional consideration to support it and is an integral part of a lease and a substantial part of the whole contract.

4. Specific performance ⇨92(1)

Where a two year lease at stipulated monthly rental provided that a hold-over would constitute a month to month tenancy only, on the same terms and conditions, and granted an option to purchase provided all rent was paid up to time of exercise of option, the option was one of the terms and conditions of the lease and could be enforced by specific performance during the hold-over period.

5. Appeal and error ⇨909(5)

In action for specific performance of an option to purchase agreement which was contained in written lease, court on appeal was required to follow the written agree-

ment unless there was some evidence in the record to support a finding that the intention of the parties was something other than a fair and reasonable construction of the language of the agreement indicated, since to do otherwise would be to make a new agreement for the parties.

6. Appeal and error ⇨110

An order denying motion for a new trial was non-appleable.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Bryan J. Spaulding and Sally G. Spaulding against Joseph J. Yovino-Young and Mabel F. Yovino-Young for specific performance of an option to purchase contained in a written lease. From an adverse judgment, plaintiffs appeal.

Reversed. Appeal from order denying motion for new trial dismissed.

Charles A. Christin and Everett H. Roan, both of San Francisco, for appellants.

Rupert R. Ryan and Young, Ryan & Whitton, all of Oakland, for respondents.

SCHOTTKY, Justice pro tem.

Appellants brought an action against respondents asking specific performance of an option to purchase agreement contained in a written lease of certain residence property. The trial court found that appellants had not exercised the option within the time provided in the agreement and rendered judgment against appellants. From that judgment and an order denying a motion for a new trial, appellants appeal.

The facts are simple and not in dispute. Respondents, as lessors, made and entered into a lease in writing with the appellants, as lessees, for certain real property known as 962 69th Avenue, Oakland, California, which premises consisted of a residence. The lease provided that the total rental was \$840, payable in monthly installments of \$35 per month on the seventh day of each and every month, and acknowledged the receipt of \$70 on account of the said rental, and which said lease was for the period com-

mencing March 7, 1941, and ending March 6, 1943. The said lease further provided: "Should the parties of the second part [appellants herein] hold over the term herein created, such tenancy shall be from month to month only and be on the same terms and conditions as herein stated." The document hereinabove referred to, in addition to being the conventional lease for real property, also contained an option for the purchase of the premises by the lessees therein (appellants herein), which was set forth in the said document as follows, to wit:

"It is further understood and agreed as part of the consideration for this lease, Lessors hereby give to the Lessees the option to purchase the real property herein leased for the sum of Thirty five Hundred and Fifty (\$3550.00) Dollars, in lawful money of the United States, provided, however, that said Lessees shall have paid all of the rental due up to the time of the exercise of said option; upon the execution of the necessary documents in connection therewith and the consummation of said sale, this lease shall cease and determine; said purchase price may be payable in cash, or as follows:

"Cash payment of Three Hundred and Fifty (\$350.00) Dollars, upon which will be credited the total amount of rental paid to the date said option is exercised, after deduction, however, from said rental paid of the following items:

"(1) The amount expended by Lessors for fire insurance on said premises.

"(2) The amount expended by Lessors for taxes.

"(3) Such interest as should normally have accrued to the Lessors in the event said sale had been made on the date of this lease agreement, and the payments of rental had been applied for the payment of insurance, taxes, interest and principal. To be more specific, from each monthly payment of rental, there would first be deducted the amount expended for insurance on said property, the amount of taxes due and paid, after which the balance would be applied as payment of interest and the principal on what would be considered the monthly decreasing principal balance.

"The difference between said sum credited and the sum of Three Hundred and Fifty (\$350.00) Dollars, if any, shall be payable in cash; upon said option being exercised, Lessors will execute a deed to said premises and Lessees shall assume any encumbrance which may then be existing against said premises, and further, execute to Lessors a note and Deed of Trust for the difference between said encumbrance and the balance which will be due said Lessors after payment of said Three Hundred and Fifty (\$350.00) Dollars, it being understood that the required monthly payments on the balance shall not exceed Thirty-five (\$35.00) Dollars per month, including interest at six (6%) per cent per annum on the monthly decreasing balances; * * *."

The monthly rental payments of \$35 were paid by appellants to a real estate agent who received a commission for procuring the lease, and who also was to receive a commission in the event of a sale of the property. The two year period set forth in the lease expired on March 6, 1943, but appellants continued in the possession of the property and continued to pay the monthly rental, and on October 7, 1943, appellants made known their election to exercise the option through the agent who had been collecting the rents and tendered to respondents the sum of \$225, this amount apparently having been computed in accordance with provisions of the option. Respondents refused to accept this payment and rejected the tender with the statement that the time within which the option could be exercised had lapsed with the expiration of the two year period. The action for specific performance was then filed by appellants.

Both appellants and respondents agree that the single issue upon this appeal (as it was also stated to be by the trial court upon the trial) is whether the option granted to appellant lessees was exercised within the time of its life. It is contended by appellants that the option to purchase contained no limitations with respect to the time allotted for its exercise, and that it could validly be so exercised at any time while the relationship of landlord and tenant persisted. In this respect, appellants rely heavily upon the provision that any

holding over was to be from month to month, and on the "same terms and conditions" stated in the lease for two years. They contend that the only "condition" upon their right to exercise the option—during the month to month "term"—was that they "shall have paid all of the rental due up to the time of the exercise of said option," as provided by the lease contract.

Respondents' contention is that the option expired at the time that the two year lease ran out, and that it did not carry on into the "holding over" period—even though the lease provided that the holding over was to be on a month to month basis, subject to the "same terms and conditions" set out for the two year term.

[1,2] While there can be no doubt that there is sufficient ambiguity and uncertainty in the lease agreement to render admissible extrinsic evidence to aid in its interpretation, a reading of the reporter's transcript makes it clear that there was no extrinsic evidence before the trial court bearing on the question of the intention of the parties as to the question of the carrying over of the option into the month to month tenancy. Under such circumstances, the duty of interpreting the meaning and effect of the lease agreement and its provision herein involved, is a matter within the reviewing powers of this court unbound by any determination of the trial court on such issue of interpretation. In *re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825; *Moffatt v. Tight*, 44 Cal.App.2d 643, 112 P.2d 910.

There appears to be a dearth of authority upon the question involved upon this appeal. Appellants cite *Abbott v. Seventy-Six Land & Water Co.*, 87 Cal. 323, 25 P. 693. However, the opinion shows the inapplicability of the case on its facts. In that case the original lease contained both an option to purchase and an option to renew the leasehold from year to year, not to exceed two years. In the exercise of the option for renewal, a new lease agreement was drawn for the additional term, and, as set out in the opinion, it was mutually understood and agreed between lessor and lessee that the option to purchase was to persist, but was to be left out of the new lease for the convenience of the lessor. On those facts, the

court held that the option contained in the original lease would carry into the renewal lease and subsequent renewals made under the same circumstances. That is certainly not the instant case.

Appellants rely most strongly upon the English case of *Rider v. Ford* (decided in 1923) 1 Chancery Division 541. In that case the agreement was to the effect that the lessee take the premises for "3, 5, or 7 years at the rent of 147 pounds per annum, and to have the option of purchasing either the freehold for 2900 pounds or a lease of 97 years (ground rent 20 pounds) for 2400 pounds." The agreement was made in 1907, lessees went into occupation in 1908, and then, while still in possession, sought to exercise the option in 1922. The opinion shows that the court treated the original tenancy as having persisted for 7 years, and then stated that the lessee held (after 7 years) as a tenant from year to year. In considering the duration of the options, the court said (pp. 545, 546): "There are two options in the agreement before me, and I cannot read into it any limit in point of time except * * * that the option exists so long as the relationship of landlord and tenant continues, notwithstanding that the original term of seven years has run out. * * * The learned judge held that in 1919 the option was no longer exercisable. That decision has no application to a case such as this where the action is not limited in time. In such a case the true view is, as appears from the authorities to which I have referred, that an option unlimited in time exists so long as the relationship of landlord and tenant continues. In my opinion the defendant is entitled to exercise this option but subject to any effect which the rule against perpetuities may have."

Other cases cited by the parties herein, while related in a general way to the issue here involved, are not authorities on the precise point to be decided. A reading of them will disclose that they involve situations where there was set out in the original lease some limitation upon the time by which options to purchase were to be exercised. In the light of such provisions, the courts were called upon to interpret the effect of renewals, extensions and "hold-

overs" wherein the options were not specifically provided for. See 37 A.L.R. 1239 et seq.; 35 C.J. p. 1043, sec. 188.

[3] Respondents contend also that an option is a distinct and severable agreement in the lease; that any renewal of said option would have to be supported by good and further consideration, and that there was no new and further consideration here. However, we think it must be held that an option to purchase is an integral part of a lease and is a substantial part of the whole contract. 35 C.J. 1038, sec. 182. It needs no new or additional consideration to support it.

[4] The question that we must decide here is whether at the time that appellants admittedly sought to exercise the option to purchase, they still had a right to do so. As already indicated, there is a dearth of authority upon which to rely and we shall therefore analyze the provisions of the lease and option, because in our opinion the answer to the question will be found therein. As already pointed out, the lease provided that the lessors (respondents) gave to the lessees (appellants) an option to purchase the property provided that said lessees shall have paid all rental due up to the time of the exercise of the option. That appellants did pay all of said rental is not disputed. There was no precise time fixed within which the option must be exercised. However, there was the further provision in the lease that should the lessees "hold over the term [2 years] herein created, such tenancy shall be from month to month only and be on the same terms and conditions as herein stated." The lessees (appellants) did hold over with the consent of respondents, who continued to receive the rent, and, therefore, in our opinion, the right to exercise the option, being one of the "terms and conditions of the lease," continued.

[5] Respondents argue that it was never the intention of the parties to extend the option beyond the expiration date of the original lease by the holdover clause, but we do not believe that this contention is supported by the record in this case, nor have we been able to find any authority to

support it. Unless there is some evidence in the record to support a finding that the intention of the parties was something other than a fair and reasonable construction of the language of the agreement indicates that it was, we must follow the written agreement, for to do otherwise would be to make a new agreement for the parties. We conclude, therefore, that at the time appellants sought to exercise the option to purchase, their right to do so had not expired, and that the trial court erred in rendering judgment in favor of respondents.

[6] The order denying appellants' motion for a new trial being nonappealable, the appeal from said order is dismissed.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.



75 Cal.App.2d 249

McCHRISTIAN v. POPKIN et al.

Civ. 14997.

District Court of Appeal, Second District,
Division 1, California.

July 3, 1946.

Rehearing Denied July 22, 1946.

1. Master and servant ☞302(1)

In fixing responsibility upon employer for employee's acts, test is whether at time of doing wrongful act employee was acting in behalf of employer and not on his own account, but it is not required that employer expressly authorized employee to commit the tort if it was committed in course of transaction of employer's business. Civ. Code, § 2338.

2. Master and servant ☞332(2)

In action for injuries received by theater patron when assaulted by special officer employed by theater owner, whether special officer acted in course of his employment in assaulting patron was a question for jury. Civ.Code, § 2338.

3. Master and servant ⇨301(3)

Where special police officer was employed by theater owner to protect property, to check ticket stubs and to maintain order, theater owner could not avoid liability to patron assaulted by special officer on ground that officer was acting only as a special police officer in discharge of his police duties.

4. Master and servant ⇨308

Retention by theater owner of employee who assaulted patron tended to show ratification by theater owners of employee's unlawful act.

5. Trial ⇨251(8), 257

In action against theater owners by patron assaulted by theater employee who was also a special officer, failure to include in instruction upon theory of respondeat superior any reference to theory that employee may have been acting only as a police officer was not error, in absence of pleading stating that issue or timely request was such an instruction.

6. Trial ⇨295(2)

In action for assault and battery giving formula instructions without admonishing jury that facts must be proven by preponderance of evidence and instructing upon which party burden of proof rested was not error, where all instructions in their entirety fairly presented law applicable to case.

7. Trial ⇨295(9)

Where instructions in their entirety fairly admonished jury as the law applicable to case, formula instructions not including all factors essential to a recovery do not constitute prejudicial error.

8. Trial ⇨295(6)

In action for assault and battery against theater owners and their employees by patron who was assaulted by employee, instruction was not subject to objection that it was confusing and misled jury by advising them that if they were convinced that patron was entitled to recover only against employee they might award damages as would compensate patron against all defendants, in view of instructions as a whole.

9. Trial ⇨295(1)

An appellate tribunal, in reviewing instructions, must consider charge as a whole and give to them in their entirety a reasonable construction from the standpoint of probable effect upon jury.

10. Trial ⇨296(1)

Errors of omission in instructions were not prejudicial where such omissions were supplied by other instructions.

11. Appeal and error ⇨1004(1)

Where no request was made for form of verdict suitable for segregation of compensatory and punitive damages, reviewing court in determining whether award was excessive, regarded both elements of damage as entering into the total.

12. Assault and battery ⇨40

\$10,000 to theater patron for assault by theater employee was not excessive in view of evidence that patron had been violently beaten and that he was thereafter subject to fainting spells, headaches and inability to work which might be a permanent condition. Code Civ.Proc. § 657, subd. 5.

13. Assault and battery ⇨38

Damages for assault and battery should compensate plaintiff for injuries directly flowing from alleged assault including compensation for prospective damage and allowance for mental suffering, indignity, disgrace, and mortification with consideration being given to loss of time and labor, expenses incurred, physical pain and suffering and physical and mental impairment.

14. Appeal and error ⇨1004(1)

Damages cannot be set aside on appeal unless they are so outrageously excessive as to suggest at first blush passion, prejudice or corruption. Code Civ.Proc. § 657, subd. 5.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Bennie McChristian, by his guardian ad litem, Catherine Cooper, against Harry M. Popkin and others, co-partners doing business under the firm name and style of Lincoln Theatre, and

others to recover for injuries resulting from an assault and battery committed by defendant Willie B. Chiselm, special officer at the theater. Judgment for the plaintiff, and the defendants appeal.

Judgment affirmed.

Sidney A. Moss and Alfred Gitelson, both of Los Angeles, for appellants.

Francis J. Gabel, of Los Angeles (Jean Wunderlich, of Los Angeles, of counsel), for respondent.

WHITE, Justice.

By this action plaintiff sought damages for injuries claimed to have resulted from an assault and battery committed upon him by the defendant Willie B. Chiselm, a "special officer" at the Lincoln Theatre, operated by the remaining defendants. Plaintiff also asserted that the defendant Chiselm, in committing the assault, acted within the scope of his employment by the proprietors of the theater. In the second cause of action of his complaint plaintiff alleged that the defendant proprietors ratified the wrongful act of the defendant Chiselm and retained him in their employ, "to plaintiff's further damage by way of punitive damages" in the sum of \$35,000. The prayer was for general damages, punitive damages, and special damages "to be later included herein by amendment," but no such amendment was filed. Trial before a jury resulted in a verdict in favor of plaintiff and against all defendants awarding damages in the sum of \$10,000. From the judgment entered on such verdict, the defendants have appealed.

It is asserted by the defendant proprietors of the theater that the judgment and verdict are not supported by any evidence that defendant Chiselm was acting within the scope of his authority and course of his employment; that the wrongful acts were committed outside the theater by direction of "a police officer of the City of Los Angeles" and therefore were not within the scope of Chiselm's authority; that the court erred in its instructions to the jury, and that the damages are excessive. On behalf of appellant Chiselm, who has filed a separate brief, it is likewise urged that the court gave erroneous instructions.

Respondent, a young man of the age of 19 years, who had worked at intervals at odd jobs around the theater during the preceding five years, testified that he knew the defendant Chiselm although he had not talked to him because he did not like him very much; that he had seen Chiselm at various times taking tickets and checking stubs in the theater. He testified that he entered the theater Sunday afternoon, March 26, 1944, in company with two young ladies; that during the performance he left his seat to go to the lavatory; that as he was crossing the lobby defendant Chiselm asked to see his ticket stubs, which he showed to Chiselm, who said that since he had seen the picture he would have to go out. He denied that he had seen the picture, but said that he would leave if he could go back into the theater and get the girl he had brought; that he would go to another show where he could see the same picture "without a special officer bothering me"; that Chiselm refused to let him go back; that respondent insisted upon going back, whereupon Chiselm hit him and knocked him to the outside of the ticket office. Plaintiff then ran out of the theater and defendant Chiselm chased him around the corner from the theater, knocked him down, got astraddle of him, hit his head against the pavement and also against an automobile. Chiselm then told him to go home, but he waited for the two girls to come out. Plaintiff went to the police station and was directed as to where he should go to make a complaint. He then returned and stood across the street from the theater. At this time the manager of the theater came over to him and told him that Chiselm said he was drunk to which he replied that he had not been drinking. In addition to his own testimony, plaintiff introduced the testimony of three physicians as to the extent of his injuries, as well as the testimony of several witnesses in corroboration of plaintiff's story as to the circumstances of the assault. Plaintiff's version of the episode was contradicted by defendant Chiselm, by the head usher of the theater and by a police officer on duty outside the theater, all of whom testified that plaintiff was drunk, disorderly, profane, and struck the first blow. It was admitted that a scuffle

took place in ejecting respondent from the theater.

It is not contended that the evidence is insufficient to support the finding of the jury against appellant Chiselm. The appellant theater proprietors urge, however, that no evidence was introduced to show that the assault was committed by Chiselm while acting within the scope of his authority and course of his employment. It is argued that aside from the evidence that Chiselm's duties included checking ticket stubs, "there was no evidence introduced by respondent nor any testimony whatsoever as to the nature of the duties of appellant Chiselm; the purpose for which he was employed; whether he did nor did not have any authority to, or whether it was or was not a part of his duties to, eject any person from the theater; whether or not that which it is alleged he did was in the transaction of the business of these appellants."

The record reflects that defendant Chiselm was a special police officer of the City of Los Angeles, admittedly employed by defendant theater owners. As to defendant Chiselm's duties, the manager of the theater testified as follows:

"Q. And among Mr. Chiselm's duties has been the checking of tickets, ticket stubs? A. Yes, sir.

"Q. And he put people out of the theatre who remained there longer than one show? A. No, not necessarily longer than one show. He checked the tickets to see—we had a lot of people sneaking into the theater, breaking into the theater, and we check stubs, and we also had to check tickets of a lot of little kids who came in and stayed all day, and at parents' request we checked the theater, but we never objected to anyone in the theater staying over through a show."

That defendant Chiselm's duties were not confined to checking tickets or ticket stubs is shown by his own testimony, when he stated that he did not remember checking any tickets on the afternoon in question because "I was a little busy that afternoon after the extra officer came on, and I had business that took me upstairs." The "extra officer" was Arthur D. Wilson, a regularly appointed and acting police officer of the

City of Los Angeles, who according to his own testimony was employed and paid by defendant theater owners for his work "on special detail at the theater that day," in which capacity he had served "on numerous occasions."

Andy Allen, employed as head usher and assistant manager of the theater, testified that on the day with which we are here concerned he noticed the plaintiff standing in the "aisle-way" and asked him "to find a seat and sit down"; that subsequently he encountered plaintiff near but outside of the men's restroom, where he was "talking loud, and acting like someone did when he was drunk." The witness then requested plaintiff to "find a seat inside or outside," to which the plaintiff replied that he "ain't going to do either one." The assistant manager did not attempt to enforce his order given the plaintiff, but instead, according to his testimony, he "went upstairs and got Chiselm * * * and told him about this fellow and he came back down." The admitted altercation which gave rise to this litigation then ensued. While the evidence concerning the encounter was in marked conflict, the jury adopted the version thereof as given by plaintiff and the witnesses produced in his behalf. Appellants concede that under oft-repeated rules, this court cannot interfere with the conclusion arrived at by the triers of fact and the legally constituted arbiters thereof. If the jury believed, as their verdict indicates they did, the testimony offered in behalf of plaintiff and rejected that presented on behalf of the defendants, it must be held that, factually speaking, there is in the record evidence of sufficient substantiality to support the verdict rendered.

In view of the foregoing testimony, we are persuaded that the facts and circumstances thereof were sufficient for the jury to conclude therefrom that Chiselm had authority to patrol the theater, to check the ticket stubs, and to take such action as to him seemed necessary in order to preserve peace, order and decorum upon the theater premises. Indeed, upon the particular occasion with which we are here concerned, defendant Chiselm was specifically called

by the assistant manager to handle a situation where plaintiff, a patron of the theater, was allegedly conducting himself in a loud and boisterous manner. The test of the employer's responsibility for the act of his employee was described in *Cosgrove v. Ogden*, 49 N.Y. 255, 257, 10 Am.St.Rep. 361, as "not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do."

[1] Section 2338 of the Civil Code, so far as applicable here, reads as follows: "A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business * * *." In fixing responsibility upon the employer, the test is whether at the time of doing the wrongful act the employee was acting in behalf of the employer and not on his own account. It is not required that the employer expressly authorize the employee to commit the tort if it was committed in the course of the transaction of the employer's business. In the case at bar we are impressed that there is evidence justifying a finding that the conduct of defendant Chiselm was a part of and done in connection with the transaction of his employer's business, and was not a departure therefrom to accomplish an independent purpose of his own.

[2] Whether or not defendant Chiselm acted in the course of his employment in doing what the jury found he did is primarily a question of fact for the jury to determine. *Hiroshima v. Pacific Gas & Elec. Co.*, 18 Cal.App.2d 24, 29, 63 P.2d 340; *Stansell v. Safeway Stores, Inc.*, 44 Cal. App.2d 822, 826, 113 P.2d 264; *Dolinar v. Pedone*, 63 Cal.App.2d 169, 175, 146 P.2d 237; 35 Am.Jur. 1040.

[3] It is next contended by appellants that what defendant Chiselm did was done as a special police officer in the discharge of his police duties. This issue was not raised by the pleadings or at the trial, nor was any request made for appropriate instructions to the jury in that regard. Notwithstanding, it is presented for the

first time on appeal, we have considered the same and are convinced the contention is without merit. By their answers all defendants admitted that defendant Chiselm was an employee of defendant theater owners. As a special police officer, Chiselm's sworn duty was to preserve the public peace and to arrest those who were engaged in a breach thereof. As an employee of defendant theater owners, his duty was to protect his employers' property, check ticket stubs and maintain order upon the premises. In the operation of their business, it was necessary for defendant theater owners to so conduct the same as to make it attractive to their patrons. This policy necessitated their restraining or evicting anyone who might by rude or boisterous conduct annoy or offend others. There are many acts which might not be criminal but which would offend against good order, decorum and manners, which defendant theater owners would be authorized to restrain and justified in not permitting upon the theater premises. From the testimony in the case at bar and the acts of the assistant manager, we are convinced that there was evidence justifying the conclusion that it was in furtherance of this policy that defendant theater owners employed defendant Chiselm. In more than one way it is at once apparent that it would be to the advantage of defendant theater owners to employ men who were regular or special police officers, but the fact remains that while so employed they were the employees of such theater owners and the latter were responsible for their acts done in the course of such employment. So far as such employees might make arrests for the commission of crimes upon the premises they were acting as police officers, but in checking ticket stubs, restraining unseemly, rude or boisterous conduct, and regulating good order in and about the theater, such employees were acting as agents of the theater owners and not as police officers. Under the circumstances here present, the contention of defendant theater owners that defendant Chiselm was acting solely in his capacity as a police officer, or that he acted under instructions of Police Officer Wilson, also employed in

a similar capacity by defendant theater owners, cannot be sustained.

[4] It is claimed by appellant theater owners that there was no evidence whatsoever of ratification by them of any alleged unlawful act of defendant Chiselm other than that the latter was retained in the employ of the former. The case of *Edmunds v. Atchison, etc., Ry. Co.*, 174 Cal. 246, 249, 162 P. 1038, relied upon by appellants, is authority for the statement that failure to discharge an agent guilty of oppressive acts toward patrons of the employer is in itself evidence tending to show ratification. The intrinsic weight or value of such evidence is dependent upon the circumstances attending such retention by the defendant employer. If the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages. In the instant case, Mr. Allen, assistant manager of the theater, admittedly knew everything that had occurred on the afternoon in question. True, his recitation of such events was in conflict with that of plaintiff, but the jury was entitled to believe the latter as to the true happenings which the assistant manager witnessed. Mr. Maloney, the theater manager, talked with plaintiff shortly after the altercation, and again the jury was entitled to disbelieve the manager's story as to what plaintiff told him and to accept as true plaintiff's testimony as to what he related to Manager Maloney in connection with what happened to him at the hands of defendant Chiselm. Defendant theater owners had ample opportunity to learn of the alleged conduct of their employee and if they failed to avail themselves of such opportunity, but continued the employee in their service without making investigation or attempting to redress the wrong claimed to have been done, they cannot now be heard to complain.

[5] Appellant theater owners urge that the court committed errors of law prejudicial to them in the giving or failure to give certain instructions. In that regard, it is first asserted that the court erred in

giving four instructions whereby the jury was advised as to the liability of appellant theater owners upon the theory of respondeat superior without admonishing the jury that such appellants were not liable in the event that defendant Chiselm was acting in the discharge of his duties as a police officer, and that "it is a presumption of law that the acts of a special police officer are performed in his capacity as such officer." The answer to this claim is that appellant theater owners neither pleaded, nor offered any instruction to the effect, that defendant Chiselm was acting in the discharge of his duties as a police officer. All of the testimony was to the effect that defendant Chiselm was attempting, not to arrest plaintiff for any infraction of the law, but to eject him from the theater, and as directed by Police Officer Wilson, "take him on down to the corner and get him around the corner." If appellant theater owners desired to raise the affirmative defense that any acts of defendant Chiselm were in the line of duty as a police officer or under the direction of a regular police officer of the City of Los Angeles and that no liability could therefore attach to them, they should have done so by appropriate pleadings and should have made a timely request for proper instructions to the jury thereon. The instructions complained of contained all the elements properly essential to a recovery under the pleadings and the evidence, and therefore met the requirements prescribed in *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 393, 264 P. 237, and *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 169, 170, 153 P.2d 338, for formula instructions.

[6, 7] Appellant theater owners earnestly insist that the trial court erred to their prejudice in giving to the jury, at the request of respondent, formula instructions advising them that a verdict might be rendered for plaintiff if the jury found certain facts to be true, without admonishing the jury that the facts upon which a verdict for plaintiff could be rendered must be proven by a preponderance of the evidence, and that the court failed to instruct the jury upon which party the burden of proof rested. We do not deem it necessary to here set forth the many instructions about which

appellant theater owners complain, as including a formula and not containing all elements essential to a recovery, because to do so would unduly prolong this opinion, and as we view all the instructions together in their entirety the jury was fully and fairly admonished as to the law applicable to the case. In such a situation it has been held that although certain instructions may not include all of the factors essential to a recovery by the plaintiff, the use of such formula instructions does not constitute prejudicial error. *Miner v. Dabney-Johnson Oil Corp.*, 219 Cal. 580, 588, 28 P.2d 23; *Westover v. City of Los Angeles*, 20 Cal.2d 635, 638, 128 P.2d 350; *Wells v. Lloyd*, 21 Cal.2d 452, 457, 132 P.2d 471; *Mazzotta v. L. A. Ry. Corp.*, supra, 25 Cal. 2d 165, 170, 153 P.2d 338. In the case of *Dawson v. Boyd*, 61 Cal.App.2d 471, 483, 143 P.2d 373, 379 (hearing denied by Supreme Court), it was said:

"Plaintiff also urges that the due care instruction was a formula instruction, and contends that since it omitted all reference to the theory of a statutory violation it was incomplete and erroneous, citing *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066. She also contends the due care instruction was in conflict with the statutory violation instruction. *The rigid rules formerly applicable to formula instructions have been greatly modified in recent years. Where the omitted element is fully, fairly and correctly covered by other instructions, and where, from a reading of the instructions as a whole, it is obvious that the jury was not misled, the failure to include one element in a formula instruction is not prejudicial. * * * (Citing cases.)*" (Italics added.)

In the instant case the court adequately and correctly instructed the jury that "the burden of proof by a preponderance of the evidence is, however, on the plaintiff, to show that the said Willie B. Chiselm did commit an assault and battery upon the plaintiff, as alleged in his complaint, and also to prove by a preponderance of the evidence that at the time of the alleged assault and battery, if you find the same did occur, the defendant Willie B. Chiselm was

acting in the scope of his employment and in connection with the business of the remaining defendants * * *."

Again the court admonished the jury: "In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the 'burden of proof' as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue."

The court further instructed the jury: "Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: that unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same to be not true. The term 'preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein."

The jury was further instructed as follows:

"While there are several defendants in this action, 3 of them, Popkin, Ringer & Berman, have been sued on the theory that they are principals for whom the other defendant Chiselm was acting as agent, within the scope of his authority at the time of the events out of which the assault and battery occurred. Whether the facts support this theory is an issue that you may have to decide, inasmuch as plain-

tiff's contentions in this respect have been denied.

"If you find that the defendant Chiselm is not liable, then, of course, it becomes unnecessary to consider the question of agency, because in that event the defendant Popkin, Ringer & Berman may not be held liable, even if agency existed. But if you find that the defendant Chiselm is liable, you then must decide whether, at the time of his participation in events proximately causing the alleged assault or battery, he was acting as agent for the other defendants and within the scope of his authority. If you find either that defendant Chiselm was not then the agent of the other defendants, or, if the agent was not acting within the scope of his authority, then your verdict must be in favor of the defendants Popkin, Ringer & Berman. But if you find that the one defendant was acting as the agent of the others, and within the scope of his authority, then if one is liable, all are liable."

In other instructions the court correctly set forth what constitutes an assault or battery, giving the code definitions thereof (Pen.Code, secs. 240, 242). If appellant theater owners desired further elaboration upon these instructions they should have so requested by proffering additional instructions thereon.

In several instructions the court admonished the jury that plaintiff could not recover against defendant theater owners for the wrongful acts of their codefendant Chiselm unless such wrongful acts, if any, "were committed in and as a part of the transaction of the business of said Harry M. Popkin, Jack Y. Berman and Arthur Ringer, copartners doing business as Lincoln Theatre." The court also advised the jury of the liability of a principal to third parties for the wrongful acts of his agent in the language of section 2338 of the Civil Code.

The court emphatically instructed the jury "that an employer is not liable for the malicious acts of his employee committed outside of the scope of such employment. The wrongful acts must be those which the servant is empowered under such circumstances to do. It must be something which

the employment contemplated"; and "if an employee steps aside from his employer's business, for no matter how short a time, to commit a wrong not connected with such business, the employer is not responsible to the person injured by such wrong"; and further, that "when an employee acts without any reference to the services for which he is employed, and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, the employer is not responsible in that case for either the act or omission of the employee."

The jury was also admonished with reference to the right and duty of a theater proprietor to insist that every patron shall conduct himself with proper decorum, so that good order may be preserved, and to that end such proprietor may adopt and enforce reasonable and proper regulations, using if necessary reasonable force to evict a patron who refuses to leave and persists in violating proper and reasonable regulations. The court also instructed the jury as to the terms of a city ordinance prohibiting any one except an usher or employee of any theater while actually on duty from standing in or obstructing any aisle, passageway or exit of such theater, and again admonished the jury as to the right of a motion picture theater operator to remove therefrom any person persisting in a violation of said ordinance. The court gave a further instruction on the right of defendant Chiselm to use such force as to him appeared reasonably necessary to repel or resist any unlawful assault upon him by the plaintiff.

Contrary to appellant theater owners' contention, the court properly instructed the jury upon the essential elements necessary to fasten liability upon such appellants, advising the jury as heretofore set forth that such acts must be committed within the scope of the employee's authority or course of employment. With reference to any award of punitive and exemplary damages, the jury was properly instructed as to the law applicable to subsequent ratification and approval of any malicious or oppressive acts of the employee by the employer as a prerequisite to an award of exemplary damages against such employer.

[8] From a reading of the instructions as a whole we are not impressed with appellant theater owners' claims that plaintiff's instruction No. 9 was confusing and misled the jury by advising them that even though they were convinced that plaintiff was entitled to recover judgment only against defendant Chiselm they might nevertheless award such damages as in their opinion would compensate plaintiff as against all defendants. It cannot be assumed that the jury believed that if under the evidence only one of the defendants was liable that they could or would assess damages against defendants whom they believed to be innocent of wrongdoing. Furthermore, the court in clear and understandable language pointed out to the jury under what circumstances the defendant Chiselm, the employee, would be liable, and in equally clear language advised the jury under what circumstances such liability would extend to defendant employers.

[9, 10] An appellate tribunal, in reviewing instructions, must consider the charge as a whole and give to them in their entirety a reasonable construction from the standpoint of their probable effect upon the jury. Guided by that rule, an examination of the entire charge given in the instant case does not reveal any prejudicial error requiring a reversal of the judgment. Whatever errors appellants have pointed out in certain instructions were errors of omission, and all such claimed omissions were supplied by other instructions to which we have adverted herein, so that no prejudice ensued to the defendants. *Wells v. Lloyd*, supra, 21 Cal.2d 452, 458, 459, 132 P.2d 471. *Westover v. City of Los Angeles*, supra, 20 Cal.2d 637, 128 P.2d 350; *Miner v. Dabney Johnson Oil Corp.*, supra, 219 Cal. 583, 28 P.2d 23; *Mazzotta v. L. A. Ry. Corp.*, supra, 25 Cal.2d 170, 153 P.2d 338.

[11, 12] Finally, appellant theater owners earnestly urge that the damages herein awarded to plaintiff were excessive and appear to have been given under the influence of passion and prejudice. In this connection appellants contend that the general verdict herein included an award to respondent of punitive damages, the court

having instructed the jury upon the request of respondent with reference thereto. As heretofore indicated, the jury was properly instructed upon the issue of exemplary damages, but just what sum was awarded for compensatory damages and for punitive damages does not appear. No request was made for a form of verdict suitable for such segregation of damages. Upon the authority of *Phelps v. Arnold*, 112 Cal.App. 518, 520, 297 P. 31, we shall therefore regard both elements of damage as entering into the total, and properly so. There is in the record substantial evidence that plaintiff was set upon and forcibly and violently beaten without provocation. There was medical testimony which contained a history showing that following the assault upon him plaintiff suffered from what he termed "spells," which were characterized by "an intense headache and then a feeling of confusion and on several occasions a collapse and falling to the ground * * *; that on several occasions when these spells came on him he had to be taken to his home by bystanders in automobiles and then he would be unable to carry on his work although he had tried to do it." There was also medical testimony that plaintiff's complaints were such as "one does see characteristically in patients who have had an injury to the brain * * *." Other medical testimony was to the effect that there was "some change in the personality" of plaintiff, attributable to "the concussion of the brain which he suffered." One doctor testified that "his condition will be permanent; he will suffer always the same troubles in the kind of headaches or nervousness, that diagnosis, all of his life." There was also evidence given by plaintiff's acquaintances as to his suffering from fainting spells, dizziness and inability to work.

[13] In 4 American Jurisprudence, under "Assault and Battery," page 213, we find the following with reference to compensatory damages: "The plaintiff should be awarded such damages as will fully compensate him for the injuries directly flowing from the alleged assault and for all detriment proximately caused by the defendant's wrongful act. This includes compensation for the prospective damage

that is certain to follow from the nature of the injury—that is, all consequences of the injury, future as well as past—and an allowance for mental suffering and for the indignity, disgrace, and mortification to which he has been subjected or which he has experienced. Other elements that properly may be taken into consideration by the jury in determining the amount of the damages to be awarded to the plaintiff in an action for assault and battery include the loss of time and labor suffered by the plaintiff as a result of the injury, expenses incurred for medical and surgical attention made necessary by the assault, physical pain and suffering, diminished capacity for work caused by the injuries received, impaired mental powers, mutilation, and disfigurement.”

Relief from allegedly excessive damages is available only when it appears that the damages awarded have been given under the influence of passion or prejudice. (Code Civ.Proc., sec. 657, subd. 5.) Treating the verdict herein as one in which the elements of both compensatory and exemplary damages entered into the total, and in view of the circumstances surrounding the assault made upon the plaintiff, as testified to by several witnesses, the verdict cannot be said to be excessive or that it was not the result of the fair, unbiased judgment of the jury. As was said in *Green v. Stewart*, 106 Cal.App. 518, 531, 532, 289 P. 940, 945, “It is the province of the jury, and then of the trial court, upon motion for new trial, to determine and fix the amount of damages awarded a litigant. They have the witnesses before them and can weigh and consider all the circumstances of the case. All presumptions are in favor of the correctness of the judgment, and under the circumstances of this case we cannot hold it excessive.” Also in *Wilson v. Fitch*, 41 Cal. 363, 386, we find the following: “The Court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this

case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must, necessarily, be left to the exercise of a wide discretion; to be restricted by the Court only when the sum awarded is so large that the verdict shocks the moral sense, and raises a presumption that it must have proceeded from passion or prejudice.”

[14] So in the case at bar, while plaintiff's damages, so far as permanent injuries were concerned, might have been fully compensated by a lesser amount than was awarded, that was a matter within the sound discretion of the jury in the first instance and the trial judge on hearing of the motion for new trial. After a review of the decisions of the appellate courts of this state in similar cases, we cannot hold that the damages awarded in the case at bar were excessive, nor can we say, under all the facts and circumstances here present, that the damages are so outrageously excessive as to suggest at first blush passion, prejudice or corruption. Therefore they cannot be set aside on appeal. *Connor v. Henderson*, 108 Cal.App. 237, 242, 291 P. 641.

Appellant Chiselm, the theater employee, has filed a separate brief in his own behalf but the contentions therein made are similar to those advanced by appellant theater owners. The main attack is upon the instructions given and claimed omissions therein. These claims, as well as appellant Chiselm's contention concerning his right to use force, are adequately answered by what we have heretofore said of and concerning the instructions given, their correctness and freedom from prejudicial error as to any of the appellants.

For the reasons herein stated, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

75 Cal.App.2d 408

KELLY v. KELLY.
Civ. 15211.

District Court of Appeal, Second District,
Division 1, California.

July 18, 1946.

1. Divorce ⇨303(1, 3)

One who seeks modification of existing order regarding custody of minor children of divorced parents has burden of proving that conditions have so changed that modification is justified, but courts have jurisdiction to modify previous orders in absence of showing of changed modifications. Civ.Code, § 138(2).

2. Divorce ⇨303(1), 312

An application to change custody of child from one divorced parent to the other is addressed to sound discretion of trial judge whose order will not be reversed except on clear showing of breach of that discretion. Civ.Code, § 138(2).

3. Divorce ⇨303(1)

Once jurisdiction attaches to grant a divorce and award custody of minor children, such jurisdiction is continuing and power to amend, modify or annul an award of custody as existing conditions demand remains. Civ.Code, § 138(2).

4. Divorce ⇨303(2)

Rule of "changed circumstances" authorizing modification of order regarding custody of minor children of divorced parents on changed circumstances means only that action of court in refusing to modify order of custody unless there is a showing of changed circumstances does not amount to an abuse of discretion. Civ. Code, § 138(2).

See Words and Phrases, Permanent Edition, for all other definitions of "Changed Circumstances".

5. Divorce ⇨296, 298(1), 303(1)

In awarding custody of minor children of divorced parents, paramount concern of court is the welfare and best interests of the children, and award of custody and any application for modification of such award must be addressed to sound discretion of

trial court subject to statutory qualifications. Civ.Code, § 138(2).

6. Divorce ⇨303(2)

Where divorce decree awarded custody of minor child to parents jointly but awarded physical custody of child to father because of mother's existing mental and physical infirmities, thereafter mother regained her health mentally and physically remarried and established a home and her husband desired to take the child into that home, and evidence showed that mother was devoted to the child and would give child a suitable home and proper care, modification of order to award physical custody of child to mother permitting father to have reasonable visitations was not an abuse of discretion. Civ.Code, § 138(2).

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action for divorce by Edwin Burton Kelly against Bertha Marie Kelly. From an order of the Superior Court determining the custody of a minor child, the plaintiff appeals.

Affirmed.

John N. Hurtt, of Los Angeles, for appellant.

Marcus, Rabwin & Nash, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from an order of the Superior Court of Los Angeles County determining the custody of a minor child. Plaintiff father secured an interlocutory judgment of divorce in 1941, in which judgment it was provided that plaintiff and defendant have joint custody of the minor child, Patricia, then approximately three years of age, but that plaintiff have physical custody and control until otherwise ordered by the court. In September, 1942, defendant applied for a modification of the interlocutory judgment so as to grant her full custody of the child. Upon recommendation of the court investigator it was ordered on Oct. 23, 1942, "that the plaintiff shall continue with the custody, care and

control of the minor child until further order of the court." In October, 1944, defendant filed an affidavit, entitled "Modification Questionnaire," whereupon an order to show cause why the order of October 23, 1942, should not be modified was issued. In this proceeding plaintiff filed a counter-affidavit, and hearings on the order to show cause were had at intervals from November, 1944, to June, 1945. On July 24, 1945, the trial court entered its order "that until further order of this Court, both parents are fit and proper persons to have the custody of said minor child, Patricia Kelly, and said parents are awarded the joint custody of said minor child, with physical custody of said minor child in the mother, * * *." The court further ordered that the mother have the child during the school term and the father during the vacation periods; and that the father be "entitled to reasonable visitation of said minor child during the period of time that said minor child is with the mother." From the foregoing order of July 24, 1945, plaintiff father prosecutes this appeal.

Appellant contends (1) that neither the facts stated in plaintiff's modification questionnaire nor the evidence adduced by her at the hearing justified changing the physical custody of the child from the father to the mother, and (2) that upon the entire evidence, the trial court abused its discretion in so doing.

The rules generally applicable to the situation here presented are well settled. Section 138, subdivision (2), of the Civil Code, provides:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. In awarding the custody the court is to be guided by the following considerations:

"(1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to

form an intelligent preference, the court may consider that preference in determining the question;

"(2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

[1] It has been held that one who seeks a modification of an existing custody order has the burden of proving that conditions have so changed that a modification is justified. *Prouty v. Prouty*, 16 Cal.2d 190, 193, 105 P.2d 295. However, as was said in *Peterson v. Peterson*, 64 Cal.App.2d 631, 633, 149 P.2d 206, 208.

"The rule of 'changed circumstances' might well be termed a creature of judicial expediency. It is not statutory. It is a means to end the turmoil of litigation so often attendant with matters involving questions of custody and to make it impossible for a dissatisfied party to keep the courts continually occupied with his or her grievances concerning former orders. Accordingly the courts have generally held that in absence of a showing of some change in circumstances making it advisable from the standpoint of the welfare of the child that the former order be modified, a request for a modification will be refused.

"However, that is not to say that the courts have not jurisdiction to modify previous orders in the absence of such a showing nor do the decisions wherein the rule is enunciated 'deny the power of the court to make such modification of its orders relative to the custody of children.' *Bogardus v. Bogardus*, 102 Cal.App. 503, 506, 283 P. 127, 128."

[2] An application to change the custody of a child from one parent to the other is addressed to the sound discretion of the trial judge and his order will not be reversed except on a clear showing of a breach of that discretion. *Bancroft v. Bancroft*, 178 Cal.App. 352, 173 P. 582; *Foster v. Foster*, 8 Cal.2d 719, 730, 68 P.2d 719; *Baldwin v. Baldwin*, 111 Cal.App. 148, 295 P. 93.

The affidavit of respondent mother by which the instant proceeding was initiated contained the following:

"* * * That since said order (of October 23, 1942) was made the conditions and circumstances surrounding the parties, and upon which said order was based, have materially changed, in this: * * * That since said order was made affiant has married Charles Webber who is a Chief Petty Officer in the United States Coast Guard permanently located at San Pedro, California. That your affiant and Mr. Webber have purchased a home located at 710 Grandee Street, Compton, California which is a single family residence, well furnished, and containing two bedrooms. That Mr. Webber is home every night and is anxious to have the custody of affiant's daughter changed to affiant and to accept said minor child into the home and treat said minor child as his own. That affiant and her husband have ample means to provide for said minor child. * * *"

In opposition to the mother's application, plaintiff father filed a counter-affidavit, alleging that at the time of the interlocutory decree and of the making of the order of October 23, 1942, "it appeared, and Margaret C. Harpstrite, an investigator of this court found, that defendant was a manic depressive and not a fit and proper person to have the custody of said minor child; that in addition to defendant being unstable mentally, she consumed large quantities of intoxicating liquors on various occasions, and that she was quite likely to do so if she had said child in her custody and control". The father's affidavit also contained allegations that defendant has continued to be a manic depressive and to consume large quantities of liquor; that defendant stated to plaintiff and others that she knew she was not a fit person to have custody, but intended to annoy plaintiff; that she failed to exercise her right of visitation except at infrequent intervals; that defendant on Christmas 1943, while temporarily having custody of the child, was found in bed in a state of extreme intoxication. Plaintiff further alleged that he was remarried, had a child by this marriage; that the minor child here involved was very happy at

plaintiff's home and did not desire to live with defendant.

On behalf of the defendant, the court investigator, Mrs. Harpstrite, testified: "When I first recommended to the court that Mr. Kelly continue with the custody, care and control of the child, that opinion and that recommendation was based solely upon a report that I had from the State Hospital in Missouri. At that time I felt that Mrs. Kelly was in no mental or physical condition to have the custody of the child. There was nothing regarding her unfitness. I felt that she was a good mother if she could more or less rehabilitate herself and stabilize herself. That is the only reason that I made that type of recommendation, because I felt that she loved her baby and she had her interest at heart, but the odds were just against her at that time. * * *"

The report referred to was a letter from State Hospital No. 2 in Missouri, in reply to the inquiry from Mrs. Harpstrite, the court investigator, in which letter it was stated:

"Mrs. Bertha Marie Kelly was admitted as a patient here on October 8, 1941 * * * released on parole November 16, 1941, * * * discharged as improved on August 8, 1942 * * * she also had a sister who was a patient here * * * we have no information about her addiction to alcohol * * * her history states that she has been treated at the Alamitos Sanitarium at Long Beach, California * * *. Our diagnosis was manic depressive psychosis of the manic type * * *. She exhibited a considerable degree of psycho-motor over-activity and also numerous delusions * * *. Our experience with her was that she was not at all truthful about things pertaining to her ailment * * *. Shortly before coming here she had an abortion which was induced * * *. It is the nature of the manic depressive group to recur, but to present intervals in which the patient is relatively normal * * * we would not consider her case exceptionally favorable, and future mental lapses are almost certain to present themselves."

The defendant in her own behalf testified to her marriage with Mr. Webber August

5, 1944; their purchase of a home; that she had not been drinking—"I did not after 1942, after the custody case"—but after that "very little"; denied that she was drunk on Christmas of 1943, as asserted by plaintiff; that between October 1942 and April 1944 she had taken a drink "approximately three times," but that they kept no liquor in their home. She testified that she married a Mr. Cameron in January, 1943, which marriage was annulled because of his drinking and because "we had never lived together"; that Mr. Cameron was drunk when he arrived home from his first voyage on Christmas, 1943, and occupied the same room with her and the child. The witness denied that she had ever admitted her unfitness or that she had ever threatened to seek custody for the purpose of annoying the plaintiff.

Dr. Thompson, a qualified psychiatrist, testified that he examined defendant on April 3, and April 10, 1943; that he found no evidence of mental disorder. He also testified that a re-examination on February 10, 1945, evidenced no symptoms of mental disorder and that nothing in his examination disclosed any tendencies which would make her an unfit person to have the custody of her six year old daughter. Under examination by the court the doctor testified, in part: "From the story that I have gotten she has been apparently normal mentally for more than three years and her illness was apparently precipitated by domestic difficulty, alcohol, financial difficulty, business troubles, and trouble with her mother, all of those factors. With those things removed I think the outlook is very good for a stable life, and I think she has excellent qualities so far as her personality is concerned. I think it is entirely a matter of the way your Honor looks at it.
* * *

Another psychiatrist examined defendant during the pendency of the hearing, and "found no evidence of psychosis." From the history given him by defendant, he could not say whether there would be a recurrence of the psychosis which she had at the time of her stay in the Missouri State Hospital, but that "statistically manic depressive psychosis in a majority of cases shows a tendency to recurrence"; that he

would have "some reasonable doubt" about whether a mother subject to manic depressive psychosis with a likelihood of recurrence would be as well fitted to care for a child of tender years as one of normal mentality.

The minor child, who was between 6½ and 7 years of age at the time of the hearing, was examined by the trial judge in chambers. She stated that she wanted to live with her stepmother and father because her mother would not let her go to the store or for a walk. "Just let me stay at the house and not play with any of the kinds and stuff like that". To the question, "Wouldn't you like to go over there and live with your real mother for a while and see how it works out?" the child replied, "I will go and visit her for about three days and see how it is." She stated that she liked her mother, but would rather live with her father; that she would like to visit her mother week-ends, but would not like to spend the summer vacation with her. The child volunteered the information that "if I do (live with her mother) and then I go and visit Pat and Burt (her stepmother and father) she always starts crying, and says she is going to be an angel, and that makes me start crying too."

Conceding there is much to be said in support of the view that the trial court did not pursue the safest course to protect the "best interest of the child in respect to its temporal and its mental and moral welfare" (Civ.Code, sec. 138), we are limited to a determination of whether the trial judge, who had the benefit of personally seeing and hearing all the parties to the controversy, clearly abused his discretion in view of all the evidence before him. In other words, was there substantial evidence of the mother's physical and mental rehabilitation and was her condition of health such that she entitled to claim the benefit of the qualification contained in the Civil Code section, *supra*, which reads, "but other things being equal, if the child is of tender years, it should be given to the mother * * *"?

From a reading of the record herein it is at once apparent that at the time physical custody of the child was awarded the

father such action was not taken by the court because of a belief that the mother was morally unfit to have such custody, but only because the court believed the mother to be temporarily incapacitated by illness to assume such responsibility. This is indicated by that portion of the interlocutory judgment which provided that both the father and mother have joint custody of the child and the further fact that it was provided therein that physical custody should be reposed in the father "until otherwise ordered by the court." Judge Paonessa, who granted the interlocutory judgment, testified at the hearing which gave rise to this appeal, and in his testimony we find the following:

"The parties testified in my court and I found that both, as far as I was concerned, were fit parents for the purpose of having the custody of the child. Therefore, I awarded joint custody. I found that the mother at the time was emotionally upset, she was ill, she was in no condition to take care of the child, she had no home for it, no way of providing for its care. She had to work in the daytime and many times at night; as I recall it, she testified she was giving dancing lessons. The husband stated that he was then living in San Bernardino, that he had his folks that would be able to take care of the child, he had a home that was fit for the child at that time. And I stated to them that until such time as she was able to take care of the child she should petition the court for a change of custody, and I deliberately made it joint custody so that she would not come under the rule which says that an award is made to one person because the other person was not a fit parent. I found that both were fit, but temporarily the mother was in no position to take care of the child compared with the ability of the father who had a home to take care of that child. I think I stated to the parties then that if there should ever be any change in her circumstances that she should petition the court for a change in the physical custody. That is the reason I put in this wording here, 'until further order of the court,' to leave it open for the court to continue to hold jurisdiction over the physical custody."

We do not therefore feel that the instant case is one where the so-called rule of "changed circumstances" should be determinative, but that the decision should rest upon the inherent statutory power of the court to make such orders relative to the custody of children "as may seem necessary or proper" and to "at any time modify or vacate the same" (Civ.Code, sec. 138). We are impressed that the "changed circumstances" rule, which is not statutory, is resorted to in those cases where the court has originally determined that the child should be in the custody of one of the parents because of the unfitness of the other to have such custody, if the best interests of the child, temporarily, mentally and morally are to be conserved; and not to cases such as the instant one where the court found both parents to be fit, awarded them both custody, but provided for physical custody in the father because of the existing mental and physical infirmities with which the mother was afflicted.

[3,4] In any event, the "changed circumstances" rule is not iron-clad and one to which there can be "no possible exception." *Foster v. Foster*, supra, 8 Cal. 2d at page 728, 68 P.2d at page 723. It seems to us that the question of "changed circumstances" is but another form of evidence which the court may consider in the exercise of its discretion to hear and decide the question of modification of custody orders previously made. But notwithstanding "changed circumstances", there can be no doubt that once jurisdiction attaches to grant a divorce and award custody of the minor children of the marriage, our statute provides that such jurisdiction is continuing and the power to amend, modify or annul an award of custody as existing conditions demand ever after remains. *Foster v. Foster*, supra, 8 Cal.2d at page 726, 68 P.2d 719. The reasoning which dictated adoption by the courts of the so-called rule of "changed circumstances" is thus epitomized in *Foster v. Foster*, supra, 8 Cal.2d at page 727, 68 P.2d at page 722, where the court, after announcing the rule of law we have just mentioned, stated: "But this does not mean the parties to such litigation may,

after a court has once heard evidence upon the subject of their fitness to act and rule upon the question, immediately again invoke the powers of the court to have it inquire into the same or other facts existing at the time of or prior to the former decree. Such holding would lay a foundation for interminable and vexatious litigation. * * * The rule is stated to be that to justify a modification there must be a change of circumstances arising after the original decree is entered, or at least a showing that the facts were unknown to the party urging them at the time of the prior order, and could not with due diligence have been ascertained. 19 Cor. Jur. 350." The so-called rule means only that the action of the court in refusing to modify an order of custody unless there is a showing of "changed circumstances" does not amount to an abuse of discretion.

[5] Regardless of "changed circumstances," the paramount concern of the court is the welfare and best interests of the child; and both the award of custody and any application for modification of such award must be addressed to the sound discretion of the trial court, subject of course to the qualifications contained in section 138, subdivision (2), of the Civil Code. In *Taber v. Taber*, 209 Cal. 755, 757, 290 P. 36, 37, the Supreme Court said: "In *Simmons v. Simmons*, 22 Cal.App. 448, 451, 134 P. 791, 793, it is said: 'It is manifest that the Legislature * * * intended to confide to trial courts, in the disposition of the minor children of the parties to divorce actions, a very extensive discretion, with a view to the conservation of the highest and best interests of such minors, and the conclusion arrived at by such courts in such cases will not be set aside unless the record discloses a clear abuse of that discretion.' In *Re Johnson's Estate* [101 Cal.App. 110], 281 P. 435, 438, it is stated: 'It is not alone the rights of the parents but the welfare of the child that is presented for determination, and for that reason a wider discretion is afforded the courts in dealing with matters pertaining to children than in many other cases.' One of the lead-

ing cases on the subject is *Crater v. Crater*, 135 Cal. 633, 634, 67 P. 1049, 1050, where in the court discussed the rule as follows: 'The good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this, rather than to the whims and caprices of the parties. The morals of the parents, their financial condition, their subsequent marriage, the age of the child, and the devotion of either parent to its best interests, are all factors to be weighed and considered by the court. All such applications are addressed to the sound legal discretion of the court below, and its conclusion will not be disturbed here, except it should clearly appear that its discretion has been abused.'" And in the case of *Prouty v. Prouty*, 16 Cal.2d 190, 194, 105 P.2d 295, 297, it was said: "The question as to whether a parent is a fit and proper person to have the custody of the minor children refers, however, to his or her fitness at the time of the hearing and is not necessarily controlled by conduct many years prior thereto."

[6] It is not a question of whether we agree with the action taken by the trial court, but, as heretofore stated, we are restricted to a determination of whether the record is so barren of substantial evidence to support the order made as to stricture the same as a clear abuse of discretion. The record herein discloses no such abuse of discretion as would warrant this court in reversing the decision of the trial court. There is present evidence that the mother has regained her health mentally and physically; that she has remarried, has established a home; that her husband is desirous of taking the minor child into that home. There is also evidence that the mother is devoted to the child, and can and will not only give her a good and suitable home, but proper care as well. Nor can we be unmindful of the mandate of section 138, subdivision (2), of the Civil Code, which provides that, other things being equal, if the child is of tender years its custody should be given to the mother. The order here made permits the father to have reasonable visitations with the child while she is with her mother and to

have physical custody of the child during school vacation periods.

For the foregoing reasons, the order is affirmed.

YORK, P. J., concurs.

DORAN, Justice.

I concur, but, in my judgment the so-called "changed circumstances rule", is neither in fact nor in law, a rule. The law with regard to the power of the court in such circumstances is well established. The introduction of additional evidence resulting from any change in the status of the parties in no sense establishes a "rule". Whether the court's discretion has been abused still remains the sole test.



75 Cal.App.2d 375

MARTTER v. BYERS.

Civ. 13057.

District Court of Appeal, First District,
Division 1, California.

July 17, 1946.

Rehearing Denied Aug. 16, 1946.

Hearing Denied Sept. 12, 1946.

1. Appeal and error ⇨901

An appellate court has no duty to scan exhibits and testimony to ascertain the correctness of the amount of a judgment.

2. Appeal and error ⇨932(1)

District Court of Appeal assumed, in absence of a particularized claim of error in amount of the judgment, that trial court properly figured the judgment, and would not examine the calculation to determine the alleged mathematical error.

3. Appeal and error ⇨1011(1)

Where evidence is substantially conflicting, the finding of the trier of facts may not be set aside on appeal.

4. Contracts 175(3)

Where defendant agreed to give plaintiff one-quarter interest in all fees from construction job for lump sum of \$9,800,

and contract provided that, in event of termination of contract after one year from date, defendant would pay plaintiff for his one-fourth interest the lump sum of \$15,000, and construction contract was completed after more than one year by defendant who received \$66,566.07, trial court properly held under evidence that plaintiff was entitled to one-fourth of the profits and also \$15,000. Civ.Code, § 1643.

5. Joint adventures ⇨1

A "joint adventure" is a joint association of persons in a common enterprise for profit, but falling short of a partnership.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

6. Joint adventures ⇨1

Facts showing the joining of funds, property, or labor in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the others through a fiduciary relation that must exist, and that the parties must bear the burden of an injury or loss, if any, will justify a finding that joint venture exists.

7. Joint adventures ⇨1

In the case of a joint adventure, the benefits need not be of equal value or kind, and the losses may consist of money to one and loss of time or labor or property to the other.

8. Joint adventures ⇨1

Usury ⇨38

Contract whereby defendant agreed to give plaintiff one-quarter interest in all fees from construction job for lump sum advanced by plaintiff, and providing that, in event of termination of contract after one year from date, defendant would pay plaintiff for his one-fourth interest the lump sum of \$15,000, provided for a "joint adventure" and not for a loan, and hence defense of usury was not available when plaintiff sought amount due him under the contract. Const. art. 20, § 22.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action on a contract by Perry Francis Martter against R. W. Byers, wherein the defendants filed a cross-action. From a judgment in favor of the plaintiff for \$14,716.39, the defendant appeals.

Judgment affirmed.

John D. Harloe and William P. Golden, both of San Francisco, for appellant.

Rea, Free, Jacka & Frasse, of San Jose, for respondent.

WARD, Justice.

The defendant and cross-complainant appeals from a judgment in favor of plaintiff and cross-defendant for \$14,716.39 based upon a contract entered into between the parties. The appellant attacks the sufficiency of the evidence to support the findings of fact and conclusions of law.

The issues upon the trial were framed by the complaint which alleged that \$17,379.06 was due under a contract between plaintiff and defendant. This contract was set out in *haec verba* in the complaint as follows:

"This agreement between L. L. & R. W. Byers and Perry F. Martter on the Alaska-Canada Military Highway under the direction of the U. S. Public Roads Administration.

"I, R. W. Byers sole owner of L. L. & R. W. Byers agree to give Perry F. Martter a ($\frac{1}{4}$) one quarter interest on all rentals, and fixed fees or any other profits that may accumulate on the above mentioned job for the lump sum of (\$9800.00) Ninety eight hundred dollars, receipt of which is hereby acknowledged.

"It is further understood that if this contract is cancelled by both parties within one year from date, I, R. W. Byers will return cash paid to me plus interest of 10%. If this agreement is in effect more than one year from date, all holdings and equipment on the Canada-Alaska project will be divided ($\frac{1}{4}$) one fourth to Perry F. Martter and ($\frac{3}{4}$) three fourths to the firm of L. L. & R. W. Byers.

"In the event of termination of contract after one year from date, I R. W. Byers agree to pay to Perry F. Martter for his

($\frac{1}{4}$) one fourth interest, the lump sum of \$15,000.00 with out interest.

"Due to the efforts, help and financial aid in securing this contract this agreement is to be strictly a bonus agreement, and can not be construed as giving Perry F. Martter an actual interest in the L. L. & R. W. Byers Co.

"This agreement shall inure to the benefit of and be binding upon the respective heirs, executors, administrators, successors and assigns of the parties hereto."

The contract is signed "L. L. & R. W. Byers by R. W. Byers," the defendant, and by "Perry F. Martter," the plaintiff.

The figure which was prayed for was arrived at from figures in the complaint, to-wit, that defendant received \$66,566.07 as rentals, fees and profits; that one-fourth of that amount is \$16,641.52; that a flat sum of \$15,000 was due under the contract in addition to the above sum; that \$14,262.40 had been paid, which left a balance due of the prayed for amount. The defendant denied that he owed any money on the contract and cross-complained for relief from alleged usury in that the consideration, \$9,800, given by plaintiff, was in reality a loan and that the return on the money which had already been paid by defendant was in excess of that permitted by the usury laws in the sum of \$1,878.68. Plaintiff answered the cross-complaint by denying that the \$9,800 transaction was a loan, and denying that the written contract was in any form a note. The cross-defendant then alleged various transactions preceding the execution of the written contract.

The findings follow closely the allegations set forth in the complaint and the answer to the cross-complaint except in some mathematical items. The court found:

"That there was paid to the defendant under said contract set forth in Paragraph I of said complaint as rentals, fixed fees, and other profits the net sum of \$56,035.40; that under the terms of said contract one-fourth of said sum, or \$14,008.85, belonged to plaintiff, and was due and payable to plaintiff upon its receipt by defendant; that plaintiff received \$14,262.46, or an overpayment of \$253.61;

"That under the terms of said contract there was and is also due and payable to plaintiff the further sum of \$15,000.00 less the overpayment referred to in the preceding finding of \$253.61, making a net amount of \$14,746.39 to which plaintiff is entitled to be paid by defendant according to the terms of said contract between said parties."

There are further findings which are also embodied in the conclusions of law that the contract of August 15, 1942 created a joint venture and was neither a loan nor security for a loan, and that the payments were not usurious and therefore the court concluded that the contract was not "within the provisions of section 22 of article XX of the Constitution of the State of California." The judgment was entered in favor of plaintiff for \$14,746.39. The main question on appeal is whether plaintiff was entitled to the \$15,000 item above noted.

Assuming that plaintiff was entitled to the \$15,000 item, it is not clear how the amount mentioned in the judgment was reached. The court figured that rentals, fixed fees and other profits were of the "net sum of \$56,035.40." The final figure was probably reached by accepting the plaintiff's gross receipts figure and deducting therefrom certain expenses of operation designated in the column "Deductible from Job Receipts," which is contained in an exhibit prepared by defendant which showed his concept of the financial status of the venture. There was a stipulation that several of the amounts shown in that column were not proper deductions from the gross receipts. The defendant asserts, without substantiating his assertion with itemized factual evidence, that the trial court committed error in figuring the judgment on the basis of gross profits. Plaintiff asserts that the judgment was figured on the basis of net profits and this assertion is likewise stated without particularizing the items to substantiate his claim.

[1,2] It is not the duty of an appellate court to scan exhibits and testimony to ascertain the correctness of the amount of a judgment. This court in *People v. Buena-flore*, 40 Cal.App.2d 713, 719, 720, 105 P.2d

621, 624, said: "* * * and it has been held repeatedly that the mere naked assignment of error is quite insufficient to warrant an inquiry into its merits. *People v. McLean*, 135 Cal. 306, 67 P. 770." "As said in effect in *People v. McLean*, supra, the burden rests on an appellant to point out clearly and concisely not only the matters claimed to be erroneous, but the reasons why they are so; and upon his failure so to do, it will be deemed that such matters are not of sufficient importance to demand independent investigation." Giving due weight to the court's use of the term "net sum," and the stipulations concerning deductible expenses, this court will assume, in the absence of a particularized claim of error in the amount of the judgment, that the court figured the judgment on the basis of net profits and will not examine the calculation to determine a mathematical error. Therefore the points that will be considered on this appeal are the appellant's contentions that the court erred in the finding that, in addition to the sum of \$14,262.46 already received, plaintiff was entitled to \$15,000, less \$253.61, overpayment on his share of the net profits, or \$14,746.39; the finding that a joint venture existed between Martter and Byers; and the finding that the contract was not usurious.

It is appellant's interpretation of the contract that the provision for the payment of the \$15,000 is an alternative provision depending upon a contingency, namely, the termination of the contract between plaintiff and defendant after a period of one year but before the completion of the contract with the government to build the roadway. Appellant relies on statements concerning the meaning of "terminate" in *Sanborn v. Ballafonte*, 98 Cal.App. 482, 277 P. 152; *Arnold v. Humphreys*, 138 Cal.App. 637, 33 P.2d 67, and *Blodgett v. Merritt Annex Oil Co.*, 19 Cal.App.2d 169, 65 P.2d 123. The last cited case contains a fair example of the rule that the use of the word in a contract should receive such a reasonable interpretation that it will not violate the intention of the parties. Civil Code, sec. 1643. The word "terminate" may be given a technical meaning to conform to other provisions in a con-

tract, but generally it is used with an ordinary and popular meaning rather than in a technical sense. Webster defines the verb "to terminate", "to put an end to; to make to cease; to end." The noun "termination" is defined as "that which ends, limits, or bounds—outcome; completion; result." To interpret the word in the contract in appellant's way, to the word "termination" must be added "prior to the completion of the project." It would seem that without more the phrase would have to be read "termination for any reason at any time after one year from date" which would include within its terms a completion of the executory portions of the contract and a mutual agreement to release each other from the rights and duties under the contract. Construing the instrument as a whole, without resort to extrinsic facts, the trial court's interpretation is reasonable.

[3, 4] Possibly the change in expression in the previous paragraph: "If this agreement is in effect more than one year from date," to the particular phrase in dispute: "In the event of termination of contract after one year from date" caused some doubt in the trial court's conception of how the phrase was intended to be used. In this case each side must have considered that the contract presented sufficient ambiguity so that extrinsic evidence should be permitted. Evidence on this subject was freely given by plaintiff and defendant. Plaintiff testified on cross-examination, with reference to his "understanding" of the contract:

"Q. Then the next provision is that in the event the contract maintains for more than a year and then it is terminated by and between you, you are to receive \$15,000.00 plus interest [?]-that is the other provision? A. That's—so written.

"Q. What is your understanding about that; was it that in the event the contract terminated after being in effect a year, but before the completion of the main contract with the Government—that if this contract between you and Mr. Byers terminated you were to receive \$15,000.00 plus interest? A. I understood that to mean if the contract ran over one year so that the first clause couldn't be taken in-

to effect—that is, if the contract ran for more than one year those were the terms on which the final settlement would be made.

"Q. Then you would get \$15,000.00 without interest—that's the reading of it? A. That's the reading of it—or one-quarter of the equipment; isn't that what it states there? * * *

"Q. Now, there is nothing said about in lieu of anything else there; that is what I am asking you about, Mr. Martter? A. But the one-fourth interest is set forth in the paragraph directly above, sir, and that is what I understood; the one-fourth interest is set forth directly above that in the contract.

"Q. That clause provides—if the contract is terminated after it is in force for one year; but the prior clause thereto which provides a payment to you of \$9,800.00 plus 10%, provides for a termination before a year? A. That is correct.

"Q. That \$15,000.00 clause, you might call it that,—could only come into effect in the event you and Byers terminated your contract between you prior to the termination of the contract with the Government; isn't that so? A. I don't understand it that way, sir."

It is unnecessary to quote defendant's testimony as the court selected plaintiff's version as the correct one. The evidence is substantially conflicting. Upon that theory the finding of the trier of the fact may not be set aside. *MacDermot v. Hayes*, 175 Cal. 95, 170 P. 616; *Smrekar v. Bay & River Nav. Co.*, 69 Cal.App.2d 654, 160 P.2d 85; *Baylis v. Baylis*, 48 Cal.App.2d 674, 120 P.2d 89; *Nielsen v. Frank*, 117 Cal. App. 117, 3 P.2d 607; *Burgess v. Security-First Nat. Bank of Los Angeles*, 44 Cal. App.2d 808, 113 P.2d 298; *Lang v. Barry*, 71 Cal.App.2d 121, 161 P.2d 949. In *Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689, 690, the court said: "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. *Estate of Snowball*, 1910, 157 Cal. 301, 305, 107 P. 598; *Estate of Barr*, 1924, 69 Cal.App. 16, 33, 230 P. 181. The rule as to our province is:

'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184. The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict." Consequently the trial court's interpretation, inasmuch as it is reasonable and based upon conflicting evidence which was admitted without objection, must be sustained.

The next contention of appellant is that the evidence in the record is insufficient to sustain the finding that a joint venture existed between the parties, which relationship the plaintiff alleged in his answer to the cross-complaint. In addition to the contract of the parties there is evidence that the parties were in the same general line of business. In May, 1942, defendant called at plaintiff's home in Los Angeles and broached the subject of obtaining a contract with the United States government to construct a portion of the Alaska-Canada highway. Defendant was to secure the contract and supply equipment while plaintiff was to put up \$10,000, and go to and remain at the scene of the construction project, except for vacations, etc. The first understanding was that the profits were to be divided equally. On this basis plaintiff resigned his position in Los Angeles and worked for the defendant in Redding until the government contract was arranged. These preliminary matters led to the execution of the written contract. The decrease in percentage to plaintiff was made necessary by the facts that other people became interested in the project and there were

added expenses to defendant. Prior to leaving for the White Horse district, where the construction was to take place, plaintiff assisted in the effort to obtain the contract from the government. Plaintiff supervised the actual construction work as an employee and was so paid by the United States government at a salary of \$650 a month. Defendant at various times had a personal representative caring for and supervising defendant's equipment as required by the government contract. When the representative was absent plaintiff protected defendant's and his own interests. During 1943 defendant sent additional equipment, the rental from which was specifically excluded in writing from the operation of the August, 1942, agreement.

There is nothing inherently wrong with a conclusion that the relationship of the parties by the terms of contract may change slightly as time goes on as demonstrated by the change in the contract concerning the additional equipment forwarded to the project during the year 1943. Isolated statements in decisions or text books sometimes act as an incentive to reach a conclusion if the facts are analogous, but facts seldom are identical and hence such isolated statements are not always binding. Such statements sometimes appear as persuasive but not convincing argument. Each side quotes learned statements of law on "joint adventure" to uphold or oppose the court's finding. It is admitted that the contract resulted in a profit and not a loss. The contract did not provide for the eventuality of a loss as under the terms of the government contract on a fixed fee basis plus rentals it would have been practically impossible to suffer a loss. In any event if the facts sustain the finding that a joint venture relationship was created, "The omission of a provision for the sharing of losses in a joint adventure is immaterial because the law supplies that provision. In the absence of agreement, losses by the parties are shared in the same proportion as profits are to be divided. See section 2412, subd. (a), Civil Code: 'The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules: (a) Each

partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits." *Parker v. Trefry*, 58 Cal.App.2d 69, 75, 76, 136 P.2d 55, 59.

[5-7] As previously stated, plaintiff contends that the provisions of the agreement and what was done thereunder demonstrate a joint venture. Defendant's theory—that the transaction was in fact a loan—under the findings must be disregarded if the finding that it was a joint venture may be upheld. "On the whole, however, it must be said that the courts have not yet laid down any very certain or satisfactory definition of a joint adventure, nor have they established any very fixed or certain boundaries thereof, but in most cases, they have been content to determine merely whether the given or conceded facts in the particular case constituted the relationship of joint adventurers." 30 Am. Jur. 678. "A joint adventure may be defined to be a joint association of persons in a common enterprise for profit, but falling short of a partnership." 14 Cal.Jur. 760. "This definition is based on *Keyes v. Nims*, 43 Cal.App. 1, 184 P. 695." (Note 8.) Since the decision of *Keyes v. Nims*, a number of statements have been made in decisions dealing with joint venture. It appears that the terms of the agreement and the acts of the parties as restricted to the particular projects engaged in, primarily determine whether the undertaking is a joint venture. Facts showing the joining of funds, property or labor in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a fiduciary relation that must exist, will justify a finding that a joint venture exists. This of course presupposes that the parties must likewise bear the burden of an injury or loss, if any. *Freedman v. Industrial Accident Commission*, 67 Cal.App.2d 629, 154 P.2d 922; *Larson v. Lewis-Simas-Jones*

Co., 29 Cal.App.2d 83, 84 P.2d 296; *Beck v. Cagle*, 46 Cal.App.2d 152, 115 P.2d 613; *Enos v. Picacho Gold Mining Co.*, 56 Cal. App.2d 765, 133 P.2d 663; *Parker v. Trefry*, supra. The benefits need not be of equal value or kind, and the losses may consist of money to one and loss of time or labor or property to the other. *Shoemaker v. Davis*, 146 Kan. 909, 73 P.2d 1043.

[8] The facts in the present case show sufficient elements of a joint adventure to sustain the court's finding. The assets of the particular project were owned jointly even under defendant's interpretation. Preliminary expenses were shared and likewise the profits. There was a community of interest, a fiduciary relation and a right on the part of each to direct the conduct of the other in the respective assignments of duties to each. The amount of \$9,800 was a contribution in accordance with the original agreement that plaintiff should donate \$10,000 to the joint project. Plaintiff offered the additional \$200 but defendant stated that an additional contribution was not necessary.

In this connection it might be noted that the agreement provided: "Due to the efforts, help and financial aid in securing this contract this agreement is to be strictly a bonus agreement, and can not be construed as giving Perry F. Martter an actual interest in the L. L. & R. W. Byers Co." The purpose of the provision is demonstrated in that there was to be no misunderstanding on the question that plaintiff had no actual interest in the Byers firm. This provision in the contract indicates that the agreement is to be construed as a bonus agreement in the event that plaintiff claimed an actual interest in the Byers firm; otherwise the \$15,000 without interest after a period of one year was to be accepted in lieu of a one quarter interest in the equipment on the Alaska project. Plaintiff never claimed a one quarter interest in the Byers firm. The \$15,000 was an amount agreed upon as representing one-fourth of "all holdings and equipment on the Canada-Alaska project" under the provisions of the agreement.

Having reached the conclusion that the trial court rejected the defendant's evi-

dence that the transaction was but a loan of money, and that the finding that the transaction created a joint venture is sustained by the evidence, it must be concluded that appellant's position that the contract evidenced only a usurious loan is not well taken. If this transaction was in fact an ordinary loan with usurious interest provided for therein, or a contract wherein there was to be paid a bonus for a loan that would result in usurious payments (Brown v. Cardoza, 67 Cal.App.2d 187, 153 P.2d 767), appellant's position would be well founded. The court found that the contract "was not by way of loan" and that "no interest or bonus whatsoever was paid to plaintiff and cross-defendant by plaintiff and cross-defendant." This finding is sustained by the evidence above outlined, and that ends the matter.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.



STARTUP et al. v. PACIFIC ELECTRIC Ry. CO.

Civ. 15198.

District Court of Appeal, Second District,
Division 2, California.

July 9, 1946.

Hearing Granted Sept. 5, 1946.

1. Railroads 340(2)

Automobile driver was negligent as a matter of law in starting across tracks of interurban railway operated on private right-of-way without looking for approaching trains, relying solely on fact that wigwag signal had stopped moving, and if such negligence was sole proximate cause of collision with train, occupants of automobile could not recover against railroad company for injuries sustained.

2. Railroads 330(2)

Automobile driver is contributorily negligent as a matter of law if he crosses railroad tracks in sole reliance upon safety appliances installed by railroad with complete disregard for his own safety by failing to look to right or left before crossing tracks.

3. Negligence 93(1)

Negligence of automobile driver would be a defense to action against railroad for injuries sustained by driver's guests in collision with train at grade crossing only if such negligence was the sole proximate cause of accident; driver's negligence not being imputed to guests.

4. Negligence 61(2)

The acts and omissions of two or more persons may work concurrently as the efficient cause of an injury in which case each of the participating acts or omissions is regarded in law as the "proximate cause".

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

5. Railroads 340(2)

If automobile driver and railroad are both negligent and their concurring negligence is sole proximate cause of grade crossing collision between automobile and train, the negligence of one is not to be compared with that of the other, and guests of automobile driver will be entitled to recover against railroad for injuries sustained in collision.

6. Railroads 350(5)

Where the only evidence of negligence of interurban railroad company in installation, operation or maintenance of wigwag signal at grade crossing was testimony that signal did not operate in the single instance when collision occurred, trial court correctly instructed jury to find that company was not negligent with respect to the wigwag, even though it stopped operating after freight train had passed crossing notwithstanding approach on another track of train involved in collision.

7. Railroads 307(3)

The mere failure of a grade crossing signal to operate does not of itself constitute negligence.

8. Railroads ⇨348(3)

That repairman employed by interurban railway company was seen working on wigwag mechanism at grade crossing shortly after collision between train and automobile would not warrant inference that company was negligent in maintenance or operation of wigwag signal.

9. Negligence ⇨134(1)

More evidence of negligence than mere speculation, conjecture or surmise is required to support an inference of negligence.

10. Railroads ⇨348(3)

In action against interurban railway company for injuries sustained by automobile passengers in grade crossing collision, evidence was lacking to sustain contention as basis for inference of negligence of company that three-car train involved in collision was following a single car on same track so closely that when single car cut out wigwag signal, it remained inoperative while three-car train traveled last 500 feet or less toward crossing.

11. Railroads ⇨340(2)

Driver of a vehicle about to cross electric railway tracks laid on a private right-of-way had the same duty as a person approaching or crossing tracks of steam railway company to look and listen for approaching train or cars and to stop and yield the right of way to such train or cars.

12. Evidence ⇨84

A person possessing normal faculties of sight and hearing is presumed to have seen and heard that which was within the range of his sight and hearing.

13. Railroads ⇨327(1)

Absent-mindedness or forgetfulness will not excuse neglect of a person about to cross a railroad track to look and listen for possible approaching trains or cars.

14. Railroads ⇨333(1)

A person who attempts regardless of warning to cross in front of a moving train or cars, even though he is apparently in a condition of mental abstraction and consequently indifferent to peril of his situation, is nevertheless negligent.

15. Railroads ⇨340(2)

If driver of automobile was negligent in crossing electric railway tracks laid on a private right of way without looking and listening for approaching train or cars, or in attempting to cross in front of a moving train or car and such negligence was the sole proximate cause of collision with train, driver's guests can not recover against railway company for injuries sustained in collision.

16. Trial ⇨267(2)

Where a requested instruction is erroneous in part, trial judge is not required to modify such instructions or give another instruction in lieu thereof.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Sadie Startup and others against the Pacific Electric Railway Company to recover damages for injuries sustained as the result of a collision between defendant's train and automobile in which plaintiffs were riding. Judgment for defendant, and plaintiffs appeal.

Judgment affirmed.

Samuel P. Young, of Los Angeles, for appellants.

Frank Karr, of Washington, D. C., and C. W. Cornell and O. O. Collins, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for injuries received as the result of a collision between defendant's three-car train and an automobile in which plaintiffs were riding, the latter appeal.

The record discloses that on January 24, 1944, defendant operated an interurban streetcar service to and from Los Angeles and Wilmington over its private right of way, which line ran in a northerly-southerly direction. It maintained four sets of tracks where the railroad intersected Florence Avenue, a through highway 72 feet wide extending in an easterly-westerly direction. These four sets of tracks will be hereinafter referred to as tracks 1, 2,

3 and 4, the westernmost track being 1 and tracks 2, 3 and 4 being the tracks in that order east of track 1. Tracks 1 and 2 were used for southbound trains; tracks 3 and 4 were used for northbound trains. Where these tracks crossed Florence Avenue the pavement of the highway was flush with the tops of the rails, but north and south of Florence Avenue the tops of the ties were exposed and the rails extended their full height above them. The crossing was guarded by two automatic signaling devices, hereinafter called wigwags, which were located on each side of the four tracks and faced vehicular traffic approaching the tracks. On the approach of trains these wigwags were activated by separate relays for each track, each of which acted independently of the other. These wigwags, when in operation, caused a bell to ring, a red light in the center thereof to become lighted, and the disc oscillated from north to south as a pendulum. These were both set in motion and stopped when the trolley of a train contacted brushes which were affixed to the trolley wires above the track on which any given train might be moving. These wigwags began and ceased to operate as above mentioned at certain distances from the center of Florence Avenue which was 72 feet wide as follows:

	"Intermediate"		
	Cut-In ¹	Cut-In	Cut-Out ²
"Track #1	1625 feet	823 feet	74 feet
Track #2	1744 feet	1328 feet	74 feet
Track #3	1574 feet	576 feet	39 feet
Track #4	1128 feet	468 feet	39 feet"

¹ "Cut-in" refers to the switch which caused the wigwag to be placed in motion.

² "Cut-out" has reference to the switch which caused the wigwag to cease operation.

³ Mr. Ercanbrack testified as follows:

"Q. As a matter of fact, you started just about as soon as you could pull in behind the freight train? A. As soon as the wigwag quit working.

"Q. Where was the freight train then? A. Well, it was going down the track, but it was not far. * * *

"Q. Did you look at that time to see how many tracks there were at this crossing? A. No.

"Q. You know, of course, there was more than one because you saw cars on more than one track? A. Yes.

By the above arrangement, if a car or train northbound on track 3 passed the cut-out at a time when it was followed by a car or train about 500 feet behind on the same track 3, the wigwag signal device would stop operating while the rear car was traveling the 500 feet to the crossing, providing there was no other car within 1750 feet from the crossing on any of the other tracks

At about 12:45 a. m., January 24, 1944, a night somewhat misty, although there was good visibility for a distance of at least 500 feet, Mr. Dinty Ercanbrack was driving an automobile, in which the three plaintiffs were riding, in an easterly direction on Florence Avenue. As he approached the above described intersection, he noticed a freight train going south on track No. 1 and he accordingly stopped his automobile 20 or 30 feet from the train. While waiting for the freight train to pass he noticed the wigwag to his right swinging back and forth. At about the time the rear of the freight train passed the intersection, Mr. Ercanbrack saw a single car of defendant traveling north over the intersection. Both the car and train passed about the same time whereupon the wigwag stopped working. Mr. Ercanbrack without looking to his right or left ³ proceeded to cross the tracks, and as he passed over track No. 2 he noticed a dark object and a flash of light, whereupon the automobile which he was driving collided with a three-car train of defendant traveling in a northerly direction on track No. 3. As a result of the ac-

"Q. Did you look to see if there were any others? A. No.

"Q. Did you ever look in any direction, either up or down those tracks, after you started across? A. No, not that I can recall. I probably glanced as I generally do, but that I don't know.

"Q. You didn't look to your right as you came across the tracks that the freight train was on? A. No.

"Q. Now, was this wigwag that you say stopped working, was it standing absolutely still when you started to cross these tracks? A. I believe it was, I know the lights were out.

"Q. You saw the lights go out, did you? A. Yes, sir.

"Q. And when you saw that you just proceeded on across the tracks? A. Yes.

cident the three plaintiffs⁴ who were the guests of Mr. Ercanbrack were injured.

Plaintiffs urge reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

First: *The trial court committed prejudicial error in instructing the jury as follows:*

A

"The driver of the auto in which the plaintiffs were riding testified that he started to cross defendants' tracks without looking for approaching trains, but relied wholly on the wigwag.

"You are instructed that the driver of the automobile was guilty of negligence as a matter of law, and if you find that such negligence on his part was the sole proximate cause of the accident, then your verdict must be for defendant."

[1,2] The foregoing instruction was correct in view of the rule that if the driver of an automobile crosses railroad tracks in sole reliance upon safety appliances installed by a defendant railroad with complete disregard for his own safety by failing to look to the right or left before crossing the tracks, such conduct constitutes contributory negligence as a matter of law. (*Will v. Southern Pacific Co.*, 18 Cal.2d 468, 474, 116 P.2d 44; *Koch v. Southern California Ry. Co.*, 148 Cal. 677, 680, 84 P. 176, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795; *Southern Pacific Co. v. Day*, 9 Cir., 38 F.2d 958, 961.)

In the instant case the uncontradicted testimony of the driver of the automobile in which plaintiffs were riding was that he looked neither to the right nor to the left after the wigwag stopped moving, and that he started to cross the tracks relying exclusively upon the fact that the wigwag was not in motion. The foregoing instruction was therefore correct in view of the above stated rule of law.

[3-5] *Krupp v. Los Angeles Ry. Corp.*, 57 Cal.App.2d 695, 135 P.2d 424, is not here in point. In that case the trial court erred in refusing to instruct the jury, pursuant to a request of plaintiffs, that the negligence of the driver of the car in which plaintiffs were guests was not imputable to them. In the instant case the situation is different for the trial court did instruct the jury on such question as follows:

[1] "As to the defense of contributory negligence there is no evidence from which you could find that the plaintiffs themselves were negligent. The negligence of the driver of the automobile in which plaintiffs were riding is not imputed to them. Negligence of the driver of said automobile is a defense only if you find that it was the sole proximate cause of the accident in question."

[2] "This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause."

[3] "If you find that both the defendant and the driver of the automobile were negligent, and that their concurring negligence was the sole proximate cause of the accident, you are not to compare the negligence of one with the other, and you should return a verdict in favor of each of the plaintiffs."

From the foregoing instructions it is evident that the jury was fully and fairly instructed upon the doctrine of contributory negligence under the facts of the present case.

"Q. Did you look to your left after the freight train started to see if any freight cars were coming south on those tracks?
A. No.

"Q. Then you did not look either way again? You just went right on across the tracks? A. After the wigwags quit working I did not figure there were any

other cars approaching. I did not know how many tracks were there.

"Q. And you did not look to find out?
A. No.

"Q. You relied exclusively on the wigwag? A. Yes." (Italics added.)

⁴ Mr. Ercanbrack, the driver of the automobile, is not a party plaintiff.

B

"In this case there is no evidence upon which to support a finding that the defendant was negligent in respect to the installation, operation or maintenance of the wigwag signals installed at the crossing. You are therefore instructed that as to the issue of whether defendant was negligent in respect to the wigwags, you must find that the defendant was not negligent, even though you may believe from the evidence that the wigwags stopped operating after the freight train passed the crossing."

[6, 7] The foregoing instruction was likewise correct in view of the established rule in California that the mere failure of a crossing signal to operate does not of itself constitute negligence. (*Peri v. Los Angeles Junction Ry. Co.*, 22 Cal.2d 111, 130 et seq., 137 P.2d 441; *Vaca v. Southern Pacific Co.*, 91 Cal.App. 470, 478, 267 P. 346.)

In the present case the record is devoid of any testimony upon which the jury could predicate a finding that defendants were negligent in the maintenance of the wigwag except the testimony that in the single instance the wigwag did not operate. Therefore under the rule just stated the trial court properly instructed the jury that there was not any evidence to support a finding that defendant was negligent in respect to the installation, operation or maintenance of the wigwag signals installed at the crossing.

Will v. Southern Pacific Co., 18 Cal.2d 468, 116 P.2d 44, and *Eastman v. A., T. & S. F. Ry.*, 51 Cal.App.2d 653, 125 P.2d 564, are not here applicable since each case is factually distinguishable from the present one. In the *Will* case six different witnesses testified that at various times during the week before the accident the automatic signal devices failed to operate as the train approached the crossing.⁵ There was no such evidence before the jury in the instant case. In the *Eastman* case

the liability of the defendant was predicated upon its failure to comply with the provisions of section 486 of the Civil Code and not upon the sole ground that the wigwag failed to operate.

[8] There is likewise no merit in plaintiffs' contention that since a repair man employed by defendant was seen working on the wigwag mechanism at the southwest corner of the intersection where the accident occurred shortly after the accident the jury could infer from such fact that defendant was negligent in the maintenance or operation of the wigwag signals. Nor do we find any merit in plaintiffs' contention that the three-car train involved in the accident was following a single northbound car on track No. 3 so closely that when the single northbound car cut out the wigwag it remained silent and inoperative while the three-car train traveled the last 500 feet or less toward the crossing.

[9, 10] Mr. Ercanbrack testified that the northbound streetcar was on the second or third track. Plaintiff Coello testified that the northbound car was on track 3 or 4. Plaintiff Bragg did not place the single car on any specific track, while plaintiff Startup testified that the single car was traveling on track No. 4. Bearing in mind the rule that there must be more evidence of negligence than mere speculation, conjecture or surmise to support an inference of negligence (*Worcester v. Theatrical etc. Corp.*, 28 Cal.App.2d 116, 119, 82 P.2d 68; *Bayside Land Co. v. Phillips*, 43 Cal.App. 255, 258, 184 P. 951; 5 C.J.S. (1937), Appeal and Error, § 1647, page 608), it is clear that the record is devoid of any evidence in the instant case which would sustain a finding that a northbound car preceded on track 3 the three-car train involved in the accident. Mr. Ercanbrack and the plaintiff Coello by their testimony failed to place such a car on track 3, while plaintiff Bragg did not place the car on any track. The only definite testimony which would have supported a finding of

⁵ Though this evidence does not appear in the opinion of the Supreme Court, it is to be found on the following pages of the Reporter's Transcript on Appeal in such case:

Page 77, line 18 to page 78, line 11; page 148, line 13 to page 149, line 5; page 244, lines 13-20; page 316, line 13 to page 317, line 8; page 335, line 21 to page 336, line 4; page 360, lines 2-15.

fact was given by plaintiff Startup who placed the northbound car on track No. 4.

In view of the evidence in the present case the questioned instruction was correct.

C

[11-15] *"As to whether the driver of the automobile in which plaintiffs were riding was negligent you are instructed that the duty of the driver of a vehicle about to cross an electric railway track, laid on a private right of way, like the one in this case, is the same as that required of a person approaching or crossing the track of a steam railway company. The rule is that it is the duty of a person approaching such crossing, whether the same is a steam or an electric railway, to look and listen for approaching trains or cars and to stop and yield the right of way to such trains or cars. The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Absentmindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track, like the one in this case, to look and listen for possible approaching trains, or cars; and a person who attempts, regardless of warnings, to cross in front of a moving train or car, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent, and if you find the driver of the automobile was negligent in these respects and that such negligence on his part was the sole proximate cause of the accident, plaintiffs cannot recover against the defendant, and your verdict should be in favor of the defendant."*

The foregoing instruction was a correct instruction in view of the authorities here-

inbefore cited. There is nothing in said instruction, contrary to plaintiffs' contention, which required the driver of the automobile in which plaintiffs were riding to exercise the same degree of care that he would have been required to exercise had he approached an unguarded crossing. Hence, *Robbins v. Southern Pac. Co.*, 102 Cal.App. 744, 283 P. 850; *Nelson v. Southern Pac. Co.*, 8 Cal.2d 648, 652, 67 P.2d 682; *Marchetti v. Southern Pac. Co.*, 204 Cal. 679, 269 P. 529; *O'Connor v. United R. R.*, 168 Cal. 43, 141 P. 809; *Tousley v. Pacific Elec. Ry.*, 166 Cal. 457, 137 P. 31; *Thompson v. Los Angeles & S. D. B. Ry. Co.*, 165 Cal. 748, 752, 134 P. 709; and *Bush v. Southern Pac. Co.*, 106 Cal.App. 101, 289 P. 190, are not in point.

Second: *The trial court committed prejudicial error in not modifying and giving certain instructions requested by plaintiffs.*

[16] This proposition will not be considered by us for the reason that the law is settled that where a requested instruction is erroneous in part the trial judge is not required to modify the requested instruction or give another instruction in lieu thereof. (*Nelson v. Southern Pac. Co.*, 8 Cal.2d 648, 653, 67 P.2d 682; *Hart v. Farris*, 218 Cal. 69, 75, 21 P.2d 432; *Paine v. Bank of Ceres*, 59 Cal.App.2d 242, 247, 138 P.2d 396 et seq.) In the instant case plaintiffs in their brief state that the instructions "should have been adapted and given". In view of the rule of law just stated, the court properly refused to modify and give the requested instructions.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

75 Cal.App.2d 386

In re GRAY'S ESTATE.

SECURITY-FIRST NAT. BANK OF
LOS ANGELES v. GROW et al.

Civ. 15115.

District Court of Appeal, Second District,
Division 3, California.

July 17, 1946.

As Modified on Denial of Rehearing
Aug. 15, 1946.

Hearing Denied Sept. 12, 1946.

1. Wills ⇐302(1)

Evidence that two persons signing will as witnesses were called by testatrix to witness her will and that on arrival each was handed a pen and signed instrument in the presence of testatrix and of each other was sufficient to show that testatrix declared to the attesting witnesses that instrument was her will. Probate Code, § 50(3).

2. Wills ⇐119, 120

It is not necessary that testator should speak words declaring document to be his will or that he should expressly request the witnesses to sign it as such, but it is sufficient if testator's declaration and requests are unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect. Probate Code, § 50(3).

3. Wills ⇐302(1)

Evidence that two persons signing will as witnesses were called by testatrix to witness her will and that on arrival each was handed a pen and signed instrument in presence of testatrix and of each other, sufficiently showed that testatrix acknowledged her signature to the will. Probate Code, § 50(2).

4. Wills ⇐118

A will not signed by testatrix in the presence of either of the subscribing witnesses is sufficiently executed where she declared to them that the instrument was her will and requested that they sign as subscribing witnesses, since such request was in effect an acknowledgment of her signature to them, for only by signing the will in their presence or by acknowledging it in their presence could they become subscribing witnesses. Probate Code, § 50(2).

5. Wills ⇐289

The signatures of testatrix and of subscribing witnesses raised presumption that will was duly executed. Probate Code, § 50(2, 3).

6. Wills ⇐289

The testamentary disposition of property is favored, and the presumption arising from signatures of testator and subscribing witnesses that will was duly executed should be applied whenever it is reasonable to do so. Probate Code, § 50(2, 3).

7. Wills ⇐119

The purpose of the law in requiring the maker of a will to declare it to be his will is to avoid the possibility of his placing his signature upon a document which purports to be a will in the belief that it is something else. Probate Code, § 50(3).

8. Wills ⇐289

Where there was nothing tending to raise a doubt that testatrix had signed the will before presenting it to subscribing witnesses, the presumption arising from signatures of the testatrix and subscribing witnesses that will was duly executed should prevail. Probate Code, § 50(2, 3).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Odette Gray, also known as Odette Durand, on petition of Security-First National Bank of Los Angeles for the probate of decedent's will which was opposed by Carroll F. Grow and Carroll F. Grow, guardian ad litem of Evelyn E. Grow, a minor, and to which Clyde W. Gray and David Parker Gray, devisees, were made parties. From an order denying probate, the contestant appeals.

Order reversed, and cause remanded with instructions.

Haas & Home, of Los Angeles, and Irwin T. Quinn, of Eureka, for appellant.

Louis Naiditch, of Los Angeles, for respondent Clyde W. Gray.

Roy A. Linn, of Los Angeles, for respondent David Parker Gray.

DESMOND, Presiding Justice.

This is an appeal from an order denying probate of the last will and testament of Odette Gray, also known as Odette Durand, deceased, who died on or about July 17, 1944, at approximately the age of sixty years. Her will was offered for probate by the Security First National Bank of Los Angeles, named as executor and trustee therein. The petition alleged that the estate was "valued at less than \$10,000." The appeal is prosecuted by Carroll F. Grow, the surviving brother of deceased, named in the will, and father and guardian ad litem of Evelyn E. Grow, a minor, principal beneficiary thereunder. The proponent bank does not appeal. Although the hearing in the probate court was not upon a contest, David Parker Gray, son of testatrix, and Clyde W. Gray, her estranged husband, have filed briefs as respondents.

After testatrix's death her will, consisting of eight typewritten pages, was found in her safety deposit box. It had been prepared by her attorney and was dated August 14, 1943. By its terms she bequeathed to her son the sum of \$500 and various personal effects of small intrinsic value "but of high sentimental value to me, as well as to my son." Other small legacies were left to her brother Carroll, to various friends and to the Braille Institute for the Blind. To her husband, Clyde W. Gray, from whom she had never been divorced, she left the sum of \$1, the will stating that they had separated approximately 22 years ago "at which time my said husband disappeared and deserted me and my son, who was then eight months of age, and I have never since heard from him in any way, shape or form." The will provided that after payment of the various legacies the remainder of the estate was to be conveyed to the Security First National Bank of Los Angeles, as trustee, the net income from the corpus of the estate to be paid to Evelyn E. Grow, the niece of testatrix, in monthly installments of not less than \$25 until she became 21 years of age, at which time the balance of the corpus was to be delivered to her and the trust terminated. The will further provided that in the event the niece predeceased the testatrix or died

before she became 21 years of age, the net income and corpus of the estate was to be paid to Mrs. Gray's brother, Carroll F. Grow, and in the event of his death under certain stated conditions, to the Braille Institute for the Blind. The will specifically disinherited the wife of testatrix's son, and provided that if anyone mentioned in the will contested it his share of the estate as designated in the will would pass into the residue. The will nominated and appointed testatrix's attorney, E. Llewellyn Overholt, "who wrote this will, and who understands my wishes and desires," as attorney for the administration of the estate and the trust. The signed name of the testatrix appeared at the end of the will at the foot of the seventh page thereof and, immediately following but on the eighth page, appeared an attestation clause, reading as follows: "The foregoing instrument, consisting of seven pages including the page signed by the Testatrix, was on the date thereof, by the said Odette Durand, also known as Odette Gray, subscribed, published, and declared to be her last Will and Testament, in presence of us, who at her request and in her presence, and in the presence of each other, have signed the same as witnesses thereto; and we further declare that at the time of signing this Will, the said Odette Durand appeared to be of sound and disposing mind and memory and not acting under duress, menace, fraud, or the undue influence of any person whomsoever.

[Signed] Florence Feld
Residing at 6735 Sunset Blvd.

Hollywood, California.

[Signed] Mary L. Krigbaum
Residing at 6722 Sunset Blvd.

Hollywood, California."

When the matter came on for hearing, Mrs. Krigbaum testified that she saw Mrs. Feld sign the will. When asked, "Was the will actually signed by Mrs. Gray in your presence?" this witness answered, "I think it was signed when we got there. As I recall it, she had signed it and passed the pen to Mrs. Feld. She called me on the telephone and asked me if I would witness her will." Mrs. Feld testified that she signed the will at the testatrix's request;

that she saw Mrs. Krigbaum sign the will. Upon being asked whether Mrs. Gray signed it in her presence, she stated, "She didn't sign it in my presence. She asked me to sign it and handed the pen over to me." This witness stated that she "couldn't swear" to the fact that she saw Mrs. Gray's signature on the instrument at the time she signed it; that she did not recognize her signature; that she never knew her previously.

The hearing was continued for one week and on September 14, 1944, Mr. Overholt took the stand and related the details relative to the preparation of the will. He testified that testatrix had been an acquaintance and client of his for a number of years; that he went to her home after she had called him and obtained the necessary information from her and on August 4th mailed her an original and copy of a will, together with a letter of transmittal which suggested that she go over it carefully and make any changes on the copy. The letter advised her that "If everything is in order I will be glad to drop by either Monday or Tuesday and have the will executed in the presence of two witnesses, or you can have it signed in my absence by merely having both the witnesses present at the same time you sign the will and have it signed and witnessed at your request and in the presence of one another." Mr. Overholt further testified that a few days later he received a copy of the will bearing certain changes; that he corrected the document in accordance with the wishes of Mrs. Gray; that a night or two later he took it back to her, discussed it with her quite at length; that at that time there were no witnesses there and so he instructed her to follow the directions given in his letter of transmittal; that on August 29, 1943, she telephoned him and gave him the names and addresses of the two witnesses, stating that "she had executed the will, and followed my instructions, and that the two witnesses had signed in her presence, and so forth. I cannot say she told me definitely she signed in their presence, but she said she followed my instructions and that she was going to put the will in her safety box." Mrs. Krigbaum was then recalled and testified that she went to the testatrix's

home with "Mrs. Feld, the lady that signed it first"; that when they arrived they found the testatrix "sitting at the coffee table, and I thought she signed it, but evidently she had signed it already, because she just handed the pen to Mrs. Feld and she signed it, and then I sat down and signed it. Q. Was anything said at that time as to whether the document was her will? A. No, she didn't say. Q. What did you understand it was? A. I understood it was her will, because she told us to come up to witness her will, and naturally we took it for her will, because she asked us to come up and sign it."

At the conclusion of this testimony, the court denied the petition for probate.

Appellant states in his brief that he is "concerned in the manner of the execution only with subdivisions (2) and (3)" of section 50, Probate Code. That section, in part, provides as follows: "Every will * * * must be executed and attested as follows: * * * (2) *Presence of witnesses.* The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time. (3) *Testator's declaration.* The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will. * * *

[1-7] That there was a declaration sufficient to meet the requirements of subdivision 3, above, appears from the testimony of the two witnesses already quoted, considered in the light of the court's statement in *Re Estate of Silva*, 1915, 169 Cal. 116, 120, 145 P. 1015, 1016: "It is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect. The testimony leaves no doubt that the testator signed the document as his will, that he gave all persons present to understand that it was his will, and that he desired the subscribing witness-

es to attest the same for the purpose of constituting it a will." In the discussion of a similar question in *Re Estate of Cullberg*, 1915, 169 Cal. 365, at page 369, 146 P. 888, at page 890, the following appears: "The courts have, of course, no right to dispense with proof of any of the statutory requirements for the making of wills (In *re Walker's Estate*, 110 Cal. [387], 390, 42 P. 815, 30 L.R.A. 460, 52 Am.St.Rep. 104); but, in determining what is required, regard should be had to the essential purpose of the various provisions, rather than to a strict and rigid reading of the words used by the Legislature. And so it has generally been held that, under statutes like ours, the declaration by the testator that the document is his will, and his request for its attestation, need not be stated in exact terms, but may be implied from his conduct and the attendant circumstances. [Citing cases.]" Since it is clear, under the authorities, that the requirement of section 50, Probate Code, as to declaration or "publication" was met, we feel that, by a parity of reasoning, a similar finding on the question of acknowledgment of the signature should have been made. This principle received recognition in *Re Estate of Abbey*, 1920, 183 Cal. 524, 191 P. 893, where, as briefly stated in the syllabus, "A will not signed by the testatrix in the presence of either of the subscribing witnesses is sufficiently executed where she declared to them that the instrument was her will and requested that they sign as subscribing witnesses, since such request was in effect an acknowledgment of her signature to them, for only by signing the will in their presence, or by acknowledging the same in their presence, could they become subscribing witnesses." In the text appears the following (183 Cal. at page 526, 191 P. at page 893): "The request that these persons sign the will as 'subscribing witnesses' was in effect an acknowledgment of her signature to them, for only by signing the will in their presence, or by acknowledging the same in their presence, could they become subscribing witnesses. The word 'subscribing' in the request is therefore very significant, for the word assumes that the signature appended to the will is her signature, and

hence amounts to an acknowledgment of such signature as her own." It will be noted in the instant case that the signatures of the subscribing witnesses were attached upon the request of Mrs. Gray. Mrs. Krigbaum testified that Mrs. Gray called her on the telephone and asked her if she would witness her will, and Mrs. Feld testified that she signed it at the request of Mrs. Gray. We do not overlook the circumstance that in the *Abbey* case the court noted that the signature of the testatrix was on the same page as those of the witnesses "and no doubt the signature was visible to the subscribing witnesses at the time each signed the will." We do not think this comment was necessary to sustain the opinion, but note that in the present case the attestation clause was signed by the witnesses on page 8 of the instrument and there was visible in that clause a statement that "The foregoing instrument, consisting of seven pages including the page signed by the Testatrix, was on the date thereof, by the said Odette Durand, also known as Odette Gray, *subscribed*, published, and declared to be her last Will and Testament," etc. (Italics added.) No one testified at the hearing that the signature which appeared at the end of the will was that of Mrs. Gray, but no question was raised as to its genuineness. Her signature and those of the subscribing witnesses gave rise to the presumption of due execution (In *re Estate of Pitcairn*, 1936, 6 Cal.2d 730, 732, 59 P.2d 90; In *re Estate of Braue*, 1941, 45 Cal.App.2d 502, 505, 114 P. 2d 386), and there was nothing in the evidence to overcome that presumption. If neither of the subscribing witnesses had been living, the will would have been entitled to probate upon proof of the genuineness of their signatures and the signature of the testatrix. This presumption of due execution is one of the most beneficent and useful known to the law, and since the testamentary disposition of property is favored and protected (In *re McDevitt's Estate*, 1892, 95 Cal. 17, 33, 30 P. 101; In *re Estate of Morey*, 1905, 147 Cal. 495, 505, 82 P. 57), it should be applied wherever it is reasonable to do so, in order that technical rules of law may not be allowed to defeat

the expressed wishes of those who make wills. The actions of Mrs. Gray constituted an unequivocal acknowledgment and declaration that she was executing the document as her will. The law does not require useless formalities, and any oral declaration by her could not have expressed her intentions more unmistakably than they were expressed by her actions. The purpose of the law in requiring the maker of a will to declare it to be his will is to avoid the possibility of fraud or mistake. Considering the facts established by undisputed evidence, there was not even a remote possibility that Mrs. Gray was doing or thought she was doing anything other than to execute her will. What else could she have intended when she handed the witnesses the pen after calling them in to sign her will as witnesses? The natural inference arising from the manner in which wills are usually signed, and the presumption also, established the fact that Mrs. Gray had signed the will before it was presented to the witnesses for their signatures. The presumption, as well as the direct evidence, leaves no doubt that all her actions were motivated by the sole purpose to carry out the instructions of her attorney in the execution of the will. There is nothing in *Re Estate of Krause*, 1941, 18 Cal.2d 623, 117 P.2d 1, relied upon by the respondents, to controvert the reasoning under which the presumption of due execution is to be given effect. In that case the trial judge had found that the testatrix " * * * did not sign said will in the presence of said witnesses, nor declare or acknowledge to them, or either of them, that it was her will or that she had subscribed said will." Nevertheless, the trial court concluded that the will "was executed in accordance with the requirements of law (In re Estate of Pitcairn, 6 Cal.2d 730, 59 P.2d 90), and it should be admitted to probate," thus giving effect to the presumption of due execution, after finding all the facts contrary to the presumption. It was held on appeal (18 Cal.2d at page 626, 117 P.2d at page 2): " * * * the court was not justified under such circumstances in forming its conclusions in accordance with the presumption [of due execution] but

should have based them upon the facts found," and the judgment was reversed. Naturally it could not have been affirmed upon the finding of nonexecution. The Supreme Court in the *Krause* case was not called upon to determine whether the actions of the testatrix did or did not constitute a declaration or an acknowledgment to the witnesses that the document which she presented to them was her will and that it had been subscribed by her. The trial court made an adverse finding upon that subject and then, as the Supreme Court pointed out, made an order admitting the will to probate in direct contradiction to the findings. Under those circumstances no course was open to the Supreme Court other than to reverse the order.

[8] In the present case, the facts call the presumption of due execution into operation and it is evidence as to each and all of the essentials thereof. All the direct evidence tended to support it. There was no single circumstance to raise a doubt that Mrs. Gray had signed the will before presenting it to the subscribing witnesses. In such a situation the presumption should prevail. It serves to furnish the proof of execution where something is lacking in the direct evidence. It can be overcome, of course, by other evidence, but not by a mere absence of evidence. Failure of execution may not be considered established in contravention of the presumption for the single reason that there is missing some element of direct proof which, if present, would have rendered it unnecessary to rely upon the presumption. In other words, in the absence of direct evidence as to whether Mrs. Gray's signature was or was not affixed before those of the subscribing witnesses, it must be assumed to have been there when she asked the witnesses to sign. Our opinion assumes that the subscription at the end of the will is the signature of Mrs. Gray and that the failure to prove that fact was a mere oversight, but upon further consideration we believe that our judgment of reversal should not foreclose the court from taking evidence as to the genuineness of what purports to be her signature. The judgment is reversed and the court is directed to re-

ceive evidence as to whether the name of Mrs. Gray at the end of the will is in her handwriting and to admit the will to probate unless it be found not to be in her handwriting.

SHINN and WOOD, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



75 Cal.App.2d 649

GLENN v. GIBSON et al.

Civ. 7228.

District Court of Appeal, Third District,
California.

Aug. 1, 1946.

1. Libel and slander ⇨30

The falsity of allegedly libelous publication is an essential ingredient of the wrong complained of. Civ.Code, § 45.

2. Libel and slander ⇨42(1), 54

Action for libel will not lie, if the gist is shown to be true or a truthful report of judicial proceedings. Civ.Code, §§ 45, 47, subd. 4.

3. Libel and slander ⇨85

Allegation that portion of allegedly libelous newspaper publication relating to plaintiff's son who was not a party to action for libel and on whose behalf plaintiff was not suing, was false, was insufficient to allege a libel upon plaintiff. Civ. Code, § 45.

4. Libel and slander ⇨87

In action for libel, allegation of falsity of charge must be as broad as the charge itself.

5. Libel and slander ⇨19

The injurious character of a publication is to be gauged by the effect it would have on persons unacquainted with plaintiff and hearing of him for the first time, on whom a truthful accusation and a false accusation masquerading as the truth would

have the same effect as respects conduct toward or regard for the accused person.

6. Libel and slander ⇨87

Allegation that by reason of allegedly libelous publication plaintiff was injured in her reputation and good name merely reaffirmed what is presumed as to plaintiff's reputation and good name, and such allegation, being mere surplusage, could not take the place of an allegation as to falsity of the publication essential to statement of cause of action for libel. Civ.Code, § 45.

7. Libel and slander ⇨83

A complaint in action for libel is fatally defective where it discloses a case of qualified privilege and fails to allege malice in such a manner as to overcome the case thus disclosed. Civ.Code, § 47, subds. 3, 4.

8. Libel and slander ⇨83

Complaint showing that allegedly libelous newspaper articles concerning prosecution for alleged maintenance of disorderly house were published during time of war in a community where extensive military and civilian war activities were being conducted and welfare of those engaged therein was of vital concern showed on its face that publications were within privilege accorded by statute before its amendment in 1945. Civ.Code, § 47, subd. 3.

9. Libel and slander ⇨48(1)

An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that facts exist which affect a sufficiently important public interest. Civ.Code, § 47, subd. 3.

10. Libel and slander ⇨83

Complaint showing that allegedly libelous newspaper articles comprised a history of proceedings in connection with prosecution for alleged operation of a disorderly house and operation of a hotel in a residential district and without a use permit showed on its face that such publications were within statutory privilege accorded to fair and true reports, without malice, of judicial proceedings and hence were not actionable unless malice in fact was affirmatively alleged. Civ.Code, § 47, subd. 4, and § 48.

11. Libel and slander ⇨42(1)

In determining the scope of the term "judicial proceedings" within purview of statute according a privilege to fair and true reports, without malice, of such proceedings, a comparatively broad view of the question is taken. Civ.Code, § 47, subd. 4.

12. Libel and slander ⇨83, 101(4)

Where complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action for libel the pleading must contain affirmative allegations of malice in fact. Civ.Code, § 48

13. Libel and slander ⇨83

Allegation that by malicious act of publishing allegedly libelous newspaper articles, allegedly charging that plaintiff was morally corrupt and guilty of operating a disorderly house, plaintiff was exposed to hatred, contempt, ridicule and obloquy was insufficient to charge such malice in fact as would overcome qualified privilege accorded by statute. Civ.Code, § 47, subds. 3, 4, and § 48.

14. Libel and slander ⇨19

Publication of newspaper headline "Brown Gables Guilty Verdict" was not libelous as implying that owner had been found guilty of a morals charge, where none of previous articles allegedly stressing such charge mentioned owner's name or identity and article published under such headline explained that owner was acquitted on charge of operating a disorderly house and convicted only of operating a hotel in residential district and without a use permit. Civ.Code, § 45; Pen.Code, § 316.

15. Libel and slander ⇨9(1)

Newspaper articles in so far as they stated that plaintiff had been found guilty of operating a hotel in a residential district and without a use permit were not libelous, since whatever opprobrium would attach to such violations of ordinance, would be injurious only in so far as it tended to injure plaintiff in her occupation and since such occupation was unlawful plaintiff would not be entitled to recover for such an injury. Civ.Code, § 45.

Appeal from Superior Court, Solano County; Harlan V. Greenwood, Judge.

Action for libel by Helen B. Glenn against Luther E. Gibson, doing business under the firm name and style of Times-Herald, and Luther E. Gibson, doing business under firm name and style of News-Chronicle. From a judgment sustaining without leave to amend defendants' demurrer to her second amended complaint, plaintiff appeal.

Order and judgment affirmed.

E. C. Mahoney, of Burlingame, for appellant.

O'Hara, Randall, Castagnetto & Kilpatrick and Henry H. Kilpatrick, all of Vallejo, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from a judgment, sustaining without leave to amend defendants' demurrer to her second amended complaint, whereby she seeks to recover damages on account of certain allegedly libelous articles published in defendants' newspapers.

The complaint is in four counts, the first of which alleges that plaintiff owns and operates an auto court known as the "Brown Gables", just outside the city of Vallejo; that on February 7, 1944, under a large headline, defendants published the following libelous article in the Times-Herald:

"VALLEJO MORALS RAID BAGS 28

7 Servicemen Held with 7 Companions

A squad of 13 deputy sheriffs raided the widely talked about 'House of the Brown Gables' at Idora Avenue and Highway 40 early yesterday morning, netting a bag of 28 patrons and would-be patrons.

Although the place was not a house of ill-fame in the ordinary meaning of the word, it was the closest possible substitute. Sheriff John R. Thornton commented after his men had detained 14 of the 28 persons arrested. Seven were service men, seven were 'ladies of the night.'

SHERIFFS SWOOP

Ten deputy sheriffs conducted the post-midnight raid under the leadership of Cap-

tain Guy Headlee and Sergeants Stanley Graves and Patrick Doyle, swooping into the 'House of the Brown Gables' at a given signal.

They found the seven service men and seven women occupying bedrooms in the place. During the time it took to round up those who were arrested, get them dressed and prepare to take them to the City Hall for questioning, 14 other persons—again seven men and seven women—drove up to the establishment in taxi cabs in search of rooms.

LATE ARRIVALS

The 14 late arrivals were released after being questioned by District Attorney Philip B. Lynch in an early morning quiz session which started at 1:30 a. m. and lasted until 5:30 a. m.

Those held to face charges of vagrancy were:

(Here follow the names, ages and addresses of seven women.)

THE SERVICEMEN

(Here follow the names, ages and service designations of seven men.)

NOT MARRIED

All those arrested had registered at the "Brown Gables" as man and wife, but afterward admitted to officers that they were not married, Sheriff Thornton said.

District Attorney Lynch said the owner of the premises, Hugh Glenn, will be charged with operating a hotel without a license and with conducting a disorderly house.

It was recalled that the application by Glenn to operate a hotel at 145 Idora Avenue was rejected. (end of p. 1.) (p. 2. heading) **ARRESTED IN MORALS RAID ON VALLEJO HOUSE** several months ago by the Solano Planning Commission.

In a joint announcement, Sheriff Thornton and District Attorney Lynch said they will urge the strictest penalty for Glenn.

SUSPECT OTHERS

There are several other places in the township suspected of the same violation, and as soon as necessary evidence is ob-

tained, similar raids will be conducted on them, Sheriff Thornton warned.

The sheriff reported that numerous complaints on the premises had been made both by government authorities and by neighbors, and that the raid had been undertaken only after a month's investigation by the sheriff's office.

Sheriff Thornton said evidence obtained by his office's investigation and raid on the premises indicated that Glenn was obtaining \$5 a night for each room he rented, and that it was not uncommon for a room to be rented several times in a night.

There are a dozen rooms in the 'House of the Brown Gables' and often all have been occupied in the past.

Most of the traffic to the 'House of the Brown Gables' was in taxi-cabs and a report on this phase of the goings-on there is being made available to the Office of Price Administration and the Office of Defense Transportation.

The 14 men and women arrested are scheduled to be arraigned in justice court this morning. All of the women were given an examination for venereal disease at the city-county health clinic."

Count two of the complaint alleges that on February 8, 1944, under a photograph of plaintiff's premises, the defendants published in said Times-Herald, and readers thereof saw and read the following libelous article:

"THIS IS THE INFAMOUS 'BROWN GABLES,' which up until Saturday night is alleged to have been a sort of drive-in house of prostitution on Idora Street just off Highway 40. Sheriff's deputies headed by Captain Guy Headlee and District Attorney Phillip P. Lynch, rounded up 28 persons in a raid, 14 of whom were jailed and charged with vagrancy. (Photo by Times-Herald)"

Count three charges that on February 7, 1944, the defendants published in said News-Chronicle, and readers thereof saw and read, the following libelous article:

"THE DISEASE PROBLEM

When the brothels of lower Georgia street were closed recently at the instigation of the U. S. Social Security investi-

gators the prediction was freely made that the activities would go on under cover.

The particular women involved might leave the city but others would come in to take their places (it was said) and many times the others would be more liable to spread disease because they would be handicapped by clandestine surroundings.

The early morning raids Monday by the sheriff's office would seem to give a certain amount of weight to these predictions.

Certainly the activities imputed to the 'House of the Brown Gables' would give substance to such predictions.

The thing that is lacking for a logical comparison of the two situations are figures on the prevalence of venereal disease. It is on the venereal disease ground alone that steps to curb promiscuous prostitution have been taken in military areas—these steps being taken elsewhere as well as in Vallejo.

If the figures would show a decline in venereal disease rates since the brothels, the justification for the tight restrictions would be made fully, but, on the other hand, if the rates show an increase, it would indicate that places of the reputation imputed to the 'House of the Brown Gables' are doing an even bigger disservice to the nation's war effort than the Georgia Street places ever were."

Count four alleges that on or about February 7, 1944, plaintiff was charged, among other things, by complaint filed in the Justice's Court of Vallejo Township, with a violation of section 316 of the Penal Code; that on March 8th and 9th she was tried before said court and found not guilty of said charge; that nevertheless on Sunday, March 12, 1944, defendants published in the Times-Herald, and readers thereof saw and read, the following libelous article:

"BROWN GABLES GUILTY VERDICT

Mother, Son Freed on 1 Count,

Found Guilty on 2 Others.

The infamous Brown Gables case—which opened last February 6 when sheriff's deputies raided the premises and arrested seven unmarried couples who were occupying bedrooms there—ended in justice court yesterday with convictions against the operators on two counts of violation of the coun-

ty zoning ordinance and a not guilty verdict on the charges of operating a disorderly house.

The findings by Judge John J. Bradley were: In the case of Hugh Glenn—

A. Count one—operating a disorderly house—not guilty.

B. Count two—operating a hotel in a residential district—guilty.

C. Count three—operating a hotel without a use permit—not guilty.

In the case against Helen B. Glenn, Hugh Glenn's mother:

A. Count one—not guilty.

B. Count two—guilty.

C. Count three—guilty (as the owner, the use permit was deemed her sole responsibility).

Judge Bradley sentenced each of the Glenns to pay \$300 fine and serve three months in the county jail on the hotel operation charge, but he suspended the three month sentence on the condition that neither of the accused again tries to operate a hotel at the Brown Gables, 145 Idora Avenue.

He also fined Mrs. Glenn \$300 on the charge of operating a hotel without a use permit.

EXECUTION SET OVER

At the request of Defense Attorney E. C. Mahoney, of Burlingame, the execution of the sentence was suspended for five days and the Glenns were released on \$500 cash bail each.

In attempting to prove that the Glenns were operating the Brown Gables as a disorderly house for the purpose of assignation, District Attorney Phillip B. Lynch had tackled one of the most difficult charges in the penal code.

Summing up the case against the Glenns on this count, Judge Bradley on two occasions pointed out that in most cases of disorderly houses, the only possible conviction is on circumstantial evidence. This conviction must be, however, on proof that shows guilt 'beyond any reasonable doubt.'

Further analyzing the case against the Brown Gables, the court pointed out that the one instance of operation was the night

of February 6, when the sheriff's office, in a raid, trapped 14 unmarried men and women occupying rooms at the premises.

NOT ENOUGH EVIDENCE

This isolated instance, the judge pointed out, did not constitute sufficient circumstantial evidence; there was no proof that the Glenns had knowledge that the couples were unmarried; there was no evidence that such conditions had been continued over a period of time.

Only a neighbor testified to (continued on page 2, col. 3)

HUGH GLENN, MOTHER GUILTY IN BROWN GABLES HEARING

(continued from Page 1)

specific instances of disorderly conduct at the premises and this single testimony was not sufficient to base a conviction.

The court felt that there was evidence pointing to the probability that the premises had been operated as a disorderly house, but that the amount of evidence presented was not sufficient nor complete enough to justify the conviction.

NO DOUBT ON OTHERS

Judge Bradley said further there was no question on the matter of operating a hotel without a license—that Glenn himself in his testimony had admitted that he was operating the premises as a hotel. Neither was there any question that the operations were being conducted without a use permit.

In connection with the use permit, however, the court established that the violation was against the owner of the premises—in this case Mrs. Glenn—and not against the son.

Judge Bradley also took occasion to comment on the matter of venereal disease allegedly contracted by enlisted men in the Navy after visits to the Brown Gables.

'We have an unusual situation in this community,' the court commented. 'There is a large number of naval personnel here, and policing is a big job carried on diligently with a minimum amount of help. It seems to me that the court's duty in this community is not only to sit in judgment

but also to determine the best possible policy to follow in connection with our local situation.'

OTHERS DO THE SAME

Certainly if the defendants are guilty of operating a disorderly house, Judge Bradley continued, other hotels in this community must be equally guilty. They sent couples to the Brown Gables when they were unable to handle them, and 'clerks from these establishments were here to testify that they never transferred anyone to the Brown Gables that they would not have accepted in their own premises.'

Holding the civil authorities are at a disadvantage in the matter of dealing with enlisted men, the court suggested that if the naval authorities were truly anxious on the score of venereal disease, they had it within their power to halt the entrance of service men into such premises as the Brown Gables.

'The naval authority's shore patrol, if placed at such places as the Brown Gables, can go to an enlisted man and ask him what he is doing there and get a full explanation from him,' the court said. If the Brown Gables has been a source of infection of enlisted personnel, the naval authorities have it within their power to eliminate it in five minutes.

CAN USE PATROL

'The naval authorities can place a patrol in front of every hotel in this community where enlisted men are contracting venereal disease and eliminate it immediately,' the court continued.

Judge Bradley pointed out that the civilian law enforcement agencies have no right to stop a man and woman and question them as to their marital status if they have every outward appearance and claim to be man and wife. There is no civilian law which will discourage the situation, but naval authorities do have that power, he asserted.

Judge Bradley also castigated the 'tie-up of convenience' between hotels in Vallejo and the Brown Gables, and referred again to the testimony of the hotel clerks.

MRS. GLENN TESTIFIES

Yesterday's session opened with Mrs. Glenn on the stand under cross-examination by District Attorney Lynch. She testified that she makes all the beds and does all the cleaning at the premises and that the tenants are not expected to do the housework about their rooms.

For rebuttal witnesses, District Attorney Lynch called Mrs. O'Reilly, the next-door neighbor; Mrs. E. C. Valentine, who lives at the end of the block; Mrs. R. W. Hooper; Mrs. Harriett Scott; Fred J. Shortridge, Solano county sanitary inspector; Stanley Cravea, deputy sheriff, and Walter Hahn, Jr., secretary-advisor of the Solano County Planning Commission.

All testified that the Brown Gables, to their knowledge, had the reputation of being a disorderly premises."

In addition to the foregoing matter, the complaint alleges that by certain designated language defendants charged and were understood as charging that plaintiff was morally corrupt and vile in character and guilty of keeping and operating a disorderly house upon said premises, and that by said malicious act plaintiff was exposed to hatred, contempt, ridicule and obloquy. It is also alleged that by reason of the publications plaintiff was injured in her reputation and good name and experienced great mental suffering, to her damage in specified amounts; and that by reason of said publications plaintiff's business of operating an auto court has been completely destroyed and the reputation and good will of her place of business has been so publicly maligned that the public no longer patronizes the same, to the further damage of plaintiff in a stated amount. Additionally, and in relation to the headlines of the article of March 12th, in count four it is alleged that "the sub-headline in said publication was absolutely false in that plaintiff's son, Hugh Glenn, was found guilty on only one count of said complaint, which had to do only with a county zoning ordinance, and not on two counts, as charged in said publication."

Although in her opening brief on appeal plaintiff has failed to comply with Rule 15(a) of Rules on Appeal, in not setting

forth separately each point therein, it indirectly appears that she attacks the order of the trial court on the following grounds: that the complaint sufficiently alleges the falsity of the articles published, and that said articles are not privileged, or, if they were, then malice was sufficiently alleged.

By section 45 of the Civil Code, libel is defined as a "false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

[1,2] It is readily apparent from a reading of said section that the falsity of the publication is an essential ingredient of the wrong complained of. Therefore, if on the face of the complaint the gist or sting of the libel is shown to be true, or a truthful report of the proceedings which the publisher purports to recount, no action lies, and the demurrer was properly sustained. *Chavez v. Times-Mirror Co.*, 185 Cal. 20, 21, 195 P. 666; *Mortensen v. Los Angeles Examiner*, 112 Cal.App. 194, 205, 295 P. 927.

[3,4] While the complaint herein does not present as clear a case as that in *Chavez v. Times-Mirror Co.*, supra, nevertheless it is conspicuously evident that nowhere in the complaint herein is there a denial of the truth of the matters charged, either direct or indirect, other than the very limited one contained in count four. Here, as in the *Mortensen* case, the only portion of the published charges which the complaint denies as a nondamaging statement contained in the subheadlines: "Mother, Son Freed on 1 Count, Found Guilty on 2 Others." The basis for this denial is the fact that, as shown in the body of the article, plaintiff's son was freed on two counts and found guilty on only one. However, Hugh Glenn is not a party to this proceeding nor is plaintiff suing on his behalf. Obviously therefore, the statement, even if it contained defamatory implication as to him, would not constitute a libel upon plaintiff. *Skrocki v. Stahl*, 14 Cal.App. 1, 4, 5, 110 P. 957. Such denial does not meet the requirements of the rule that "the allegations

of the falsity of the charge must be as broad as the charge itself." *Mortensen v. Los Angeles Examiner*, supra, 112 Cal.App. at page 202, 296 P. at page 931.

In the comparatively recent case of *Emde v. San Joaquin County etc. Council*, 23 Cal. 2d 146, 160, 143 P.2d 20, 29, 150 A.L.R. 916, a further amplification of the rule applicable to plaintiff's charge of falsity made in connection with said sub-headlines has been stated thus: "It is generally agreed that it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the 'gist' or 'sting' of the remark. *Hearne v. De-Young*, 119 Cal. 670, 52 P. 150, 499; *Kurata v. Los Angeles News Pub. Co.*, 4 Cal.App.2d 224, 227, 40 P.2d 520; *Mortensen v. Los Angeles Examiner*, 112 Cal.App. 194, 203, 296 P. 927; *Skrocki v. Stahl*, 14 Cal.App. 1, 5, 110 P. 957; 3 Rest. Torts, sec. 582, Comment 2; *Prosser on Torts*, sec. 95, pp. 855, 856."

In seeking to sustain the sufficiency of the complaint, plaintiff relies on the allegation that "by reason of said publication * * * plaintiff was injured in her reputation and good name", and from this premise argues that "It would follow that true statements could not affect her reputation and good name and thus an issue has been created as to whether the statements made by respondent were true or false, the pleader indirectly charging that they are false."

[5,6] We do not agree with the conclusion that "true statements could not affect her reputation and good name." The injurious character of a publication is to be gauged by the effect it would have on persons unacquainted with the plaintiff and hearing of him for the first time. *Ervin v. Record Publishing Co.*, 154 Cal. 79, 82, 97 P. 21, 18 L.R.A., N.S., 622. On such persons, obviously, a truthful accusation and a false accusation masquerading as the truth would have the same effect, as far as their conduct toward or regard for the accused person was concerned. Moreover, plaintiff's reputation and good name are not in issue; the averment relied upon

by plaintiff no more than reaffirms that which is presumed, and being mere surplusage cannot take the place of an essential allegation. *Draper v. Hellman etc. Bank*, 203 Cal. 26, 42, 43, 263 P. 240; *Davis v. Hearst*, 160 Cal. 143, 186, 116 P. 530; 36 Cor.Jur., p. 1236, sec. 200; 33 Am. Jur., p. 214, sec. 236.

[7] Irrespective of questions relating to the pleading of falsity, it is readily apparent that the complaint herein is further fatally defective in that it discloses a case of qualified privilege yet fails to allege malice in such a manner as to overcome the case thus disclosed.

[8] In the first place, the complaint shows that the articles were published during times of war in a community where extensive war activities were being conducted, both civilian and military, and where the welfare of those engaged therein was a matter of vital concern to every right-thinking person. It would thus appear that the complaint on its face shows that said publications came within the meaning of subdivision 3 of section 47 of the Civil Code, which, prior to its amendment in 1945, and as it read at the time when the right of action herein, if any, arose, provided: "A privileged publication is one made— * * * 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supporting the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

[9] Particularly applicable to the situation thus disclosed is the rule enunciated in 3 Rest.Torts, sec. 598, wherein it is said in part that: "An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently important public interest * * *. The rule stated in this section is applicable when any recognized interest of the public is in danger, including the interest in the prevention of crime and the apprehension of criminals, the interest in the honest

discharge of their duties by public officers, and the interest in obtaining legislative relief from socially recognized evils."

[10] The complaint discloses a further situation where the communications in question, if without malice, would be qualifiedly privileged under the provisions of subdivision 4 of section 47 of the Civil Code, relating to reports of judicial proceedings. Said section reads in part: "A privileged publication is one made * * * 4. By a fair and true report, without malice, in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued."

[11] That the articles of which plaintiff complains come within this category likewise seem to be clear. They are shown to comprise a history of the proceedings which, according to plaintiff's own recital set out in count four, were instituted by the filing of a criminal complaint in the justice's court of the proper township "on or about February 7th, 1944," the date of the first article, and culminated in court proceedings on March 8 and 9, 1944, which were reported in the alleged libelous article published March 12, 1944. The privileged character of reports of this kind has been recognized in numerous decisions by various courts. *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 P. 303, 305; *Kilgore v. Koen*, 133 Or. 288 P. 192, 194, 195; *Sherwood v. Evening News Ass'n*, 256 Mich. 318, 239 N.W. 305, 306-308. In determining the scope of the term "judicial proceeding" within the purview of the rule, the courts of this state seem to take a comparatively broad view of the question. *Kurata v. Los Angeles News Pub. Co.*, 4 Cal.App.2d 224, 228, 40 P.2d 520.

[12] It follows that, as the complaint herein discloses the existence of the aforementioned qualified occasions, it remains to be seen only if their effectiveness as a complete bar to the action has been undermined by a sufficient showing of malice; for, in the case of a qualified privilege,

"malice is not inferred from the communication or publication" (Civ.Code, sec. 48), and hence, "where the complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleading must contain affirmative allegations of malice in fact." *Locke v. Mitchell*, 7 Cal.2d 599, 602, 61 P.2d 922, 924.

[13] The case last cited furnishes a definite answer to this question. The language of the pleading therein is in general similar to that contained in the complaint before us, wherein, as has been seen, it is alleged that "by such malicious act the plaintiff was exposed to hatred, contempt, ridicule and obloquy." In said case the court stated: "The pleading, of course, does use the words 'malicious' and 'maliciously'; but these words, standing alone, are not sufficient to charge malice in fact. The rule as stated in *Henry v. Moberly*, 6 Ind.App. 490, 33 N.E. 981, 983, 984, is as follows: '* * * When the complaint discloses that the occasion was privileged, the allegation that the language was false and malicious is not sufficient, but in such case the complaint must further show that the defendant acted maliciously in publishing it.'" *Locke v. Mitchell*, supra, 7 Cal.2d at page 603, 61 P.2d at page 924.

[14] With respect to plaintiff's argument that the headline "Brown Gables Guilty Verdict" would be understood as implying that plaintiff had been found guilty of a morals charge, "since defendant's newspapers for several days had been stressing only the morals charges against plaintiff," it is pertinent to point out that in none of the articles preceding the one carrying said headline was plaintiff's name or identity in any way mentioned, and therefore a person reading it would have no reason to associate plaintiff with the case unless or until he had read the succeeding subject matter which explains in detail the exact meaning of the headline. Furthermore, it appears that the statement contained in said headline is literally and essentially true. The cases cited by plaintiff in support of her argument, namely, *Davis v. Hearst*, 160

Cal. 143, 116 P. 530, Commercial Pub. Co. v. Smith, 6 Cir., 149 F. 704, and Pratt v. Pioneer Press, 30 Minn. 41, 14 N.W. 62, which holds that a libelous headline may make the publication actionable if it goes beyond the subject matter contained in the body of the publication, are not in point. In the Davis case the headline read [160 Cal. 113, 116 P. 635]: "Exposures * * * Found to be True"; but the text following the headline showed that only one of the derogatory charges was found to be true. In the Commercial Publishing Company case, the headline was "Murderer Arrested", although from the body of the article it appeared that the person arrested was only a suspect. In the Pratt case, it was held that the heading "Culpable Neglect", in reference to the activities of a physician, might constitute actionable defamation where none of the acts described in the article necessarily justified the charge; "For", said the court, "all the facts stated in the body of the article might be true, and yet not constitute culpable neglect on the part of the plaintiff." [30 Minn. 41, 14 N.W. 63] In the present case, if the facts stated in the body of the article are true, they necessarily show a "Brown Gables Guilty Verdict."

[15] Finally it may be observed that, insofar as the article in question states that plaintiff has been found guilty of operating a hotel in a residential district and without a use permit, it is not libelous per se or at all. 3 Rest. Torts, sec. 569. Whatever opprobrium would attach to the violation of the ordinances in question would be injurious only insofar as it had a tendency to injure plaintiff in her occupation. But since plaintiff's occupation is unlawful she would not be entitled to recover for such an injury. Johnson v. Simonton, 43 Cal. 242, 249, 250. Indeed, it is doubtful if plaintiff may complain of anything said about the business she is found to have been conducting, and which she does not deny conducting unlawfully. "And it thus appearing that the alleged libels were only in respect of an unlawful business carried on by the plaintiff, it results that the action cannot be maintained, 'for I think (said Best, Ch. J.) that where

a man complains of a libel written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaints.' (3 Bing, 440; see, also Hilliard on Torts, 278; Townsend on Libel and Slander, 197-8, and cases there cited.)" Johnson v. Simonton, supra, 43 Cal. at pages 249, 250.

The order and judgment are affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.



75 Cal.App.2d 605

THORPE v. THORPE.

Civ. 15210.

District Court of Appeal, Second District,
Division 1, California.

Aug. 1, 1946.

**1. Appeal and error ⇨966(1)
Continuance ⇨7**

An application for a continuance is addressed to sound discretion of trial court and its ruling will not be reviewed except for the most cogent reason and will not be reversed unless an abuse of discretion is shown.

2. Continuance ⇨12

The inability of a party because of illness to attend on the court does not require granting of an application for a continuance, particularly where showing justifies conclusion that injustice will be as likely to follow from granting continuance as from its refusal.

3. Trial ⇨21

The right of a litigant to be present to defend or prosecute an action is not absolute.

4. Continuance ⇨51(2)

Where order granting second continuance because of plaintiff's illness specified that no further continuance would be granted and plaintiff's deposition had been taken and covered her entire case in detail and

defendant made a showing that his health would suffer unless the trial were brought to a conclusion, court did not abuse discretion in denying plaintiff's application for a third continuance. Code Civ.Proc. § 2055.

5. Divorce ⚖️76

Where plaintiff denied allegations of cross-complaint of adultery with correspondents designated in cross-complaint by fictitious names, thereby raising the issue, and cross-complaint was served upon two individuals designated by such fictitious names as correspondents and the depositions of such correspondents were taken and read in evidence at trial without objection and after completion of trial defendant was permitted to amend cross-complaint to conform to proof, service of original cross-complaint upon such correspondents was a sufficient compliance with code section giving such persons right to appear and be heard in the action. Code Civ.Proc. § 1019.

6. Husband and wife ⚖️259

Earnings of a husband during marriage are normally community property of the spouses.

7. Husband and wife ⚖️34

Evidence sustained finding that antenuptial agreement by which each of the parties relinquished to the other all right, title and interest in any property which he or she might but for the provisions of the agreement acquire by reason of the contemplated marriage, which provision embraced husband's earnings, was a valid contract and that there was no community property to be divided when divorce was awarded to husband.

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Action by Paula Thorpe against Carlyle Thorpe for separate maintenance, wherein defendant cross-complained for divorce. From a judgment awarding a divorce to defendant on the cross-complaint, plaintiff appeals.

Affirmed.

Hahn & Ross and Phillip W. Silver, all of Los Angeles, for appellants.

Wm. M. Rains, of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff filed her complaint for separate maintenance on July 20, 1943, based on the ground of extreme cruelty, and prayed for an award of all of the community property, \$1,000 per month for her support and maintenance, attorneys' fees and costs. Defendant answered, denying the alleged acts of cruelty and alleging that by virtue of the provisions of an antenuptial agreement there was no community property. Simultaneously, defendant filed a cross-complaint for divorce upon two grounds: (a) cruelty and (b) adultery. A demurrer to said cross-complaint was sustained, and sometime thereafter, apparently through agreement between counsel for the parties, plaintiff filed her answer to the original cross-complaint. On the issues so raised the cause went to trial and was submitted for decision on March 31, 1944. On April 27, 1944, defendant filed his first amended cross-complaint to conform to proof, permission to do so having been duly granted by the trial court, and on the same day plaintiff filed her answer to said amended cross-complaint.

The trial court found in favor of defendant husband on all the allegations of cruelty and adultery contained in his amended cross-complaint; that there was no community property and that the antenuptial agreement was a valid and binding contract between the parties. The court also specifically found against the plaintiff as to each and every act of cruelty charged in her complaint, and awarded an interlocutory judgment of divorce to defendant husband, wherein it was adjudged that plaintiff wife should receive no alimony and no support or maintenance from defendant, and that said plaintiff was not entitled to a decree of separate maintenance.

This appeal is prosecuted by plaintiff, who urges:

(1) that the court abused its discretion in denying her motion for a continuance of

the trial on the ground that she was ill and unable to attend the trial;

(2) that the court erred in receiving evidence of acts of adultery, in making findings thereon and in permitting the filing of an amended cross-complaint to conform to proof, without proof of service of said cross-complaint upon the correspondents;

(3) that the court erred in finding the antenuptial agreement valid from its inception and binding upon the parties thereto.

In connection with her first point, appellant argues that the court's denial of a continuance amounted to an abuse of discretion because she was thereby deprived of the opportunity of attending the trial and testifying in person as to the circumstances under which the alleged antenuptial agreement was entered into and of controverting the charges of adultery and extreme cruelty.

As a matter of fact, on various dates in September and October of 1943, the deposition of appellant was taken. This deposition of two hundred and seventeen pages covers all of the issues raised at the trial and covers item by item, and specifically, the facts presented by respondent in his defense and by his cross-complaint. Although taken under section 2055, Code of Civil Procedure by respondent, it was so complete that appellant's counsel read it into the record as appellant's evidence and as her testimony in support of her case in chief.

An examination of the record herein discloses that when the cause was first called for trial on January 25, 1944, the court granted appellant's motion for a continuance to February 2, 1944, which was based upon:

(1) the affidavit of Alfred E. Koehler, M.D., appellant's attending physician, dated January 20, 1944, giving as his opinion that "by reason of illness from which the said Paula Thorpe is suffering * * * she will be confined to her bed and under my care for a period of four weeks or more and that * * * she will not be able to undergo the strain of a trial for a period of at least two and a half months or longer."

(2) the counter affidavit of Franklin R. Nuzum, M. D., dated Jan. 21, 1944, to the effect that appellant's condition was such that it would not be detrimental to her physical health to appear in court in Los Angeles on January 25, 1944.

At the request of the judge, who granted the continuance from January 25, to February 2, 1944, George N. Thompson, M.D., thoroughly examined appellant on January 30, 1944, at the Cottage Hospital at Santa Barbara, where she was then confined, and also consulted with Doctors Nuzum and Koehler; as a result of which he gave as his opinion that "For the medical welfare of the patient it would seem inadvisable to recommend that she go through a court appearance at the time when she is having undiagnosed temperature rise and her physician is in the process of determining the cause for this. However, in view of all the foregoing it would seem that a period of one month should be sufficient to complete all the necessary studies in the case and to build up the patient sufficiently to undergo a court hearing. If at that time her personal physician still believes she is unable to attend a hearing, I believe a further evaluation of the case based on another examination at that date should be made."

When the matter was again called on February 2, 1944, it was continued to March 21, 1944, the order of continuance containing the proviso: "No further continuances to be granted." On March 21, 1944, appellant's motion for further continuance was denied. On that date, the following additional affidavits were before the court:

(1) that of Dr. Alfred E. Koehler, under whose care appellant had been since Jan. 5, 1944, in which he averred that "by reason of illness from which the said Paula Thorpe is suffering * * * she should continue to remain in the hospital under close observation for a period of at least several months, and that she will not be able to undergo the strain of a trial for a period of at least three months or longer."

(2) the affidavit of Arthur Bruce Steele, M.D., who examined appellant at the request of respondent's attorney with the full consent of appellant and her physician, Dr.

Koehler. Based upon his "examination of Mrs. Thorpe, the history, the hospital records and Dr. Koehler's statements", Dr. Steele gave as his opinion "that it will not work any harm to Mrs. Thorpe to appear at the trial in Los Angeles on March 21, 1944. I anticipate that Mrs. Thorpe will be highly emotional in court and probably suffer from some hysteria, but, in my judgment, this would be true now, or six months from now. In other words, it is my opinion that the hysteria which she manifests is an expression of her desire to avoid a severance of the marital status under the present conditions."

(3) the affidavit of Dr. Edward B. Jones to the effect that respondent Carlyle Thorpe had been his patient for a great many years; that as a result of his examination of such patient on March 15, 1944, he found Mr. Thorpe was suffering from stomach ulcers of long standing; that the pendency of his marital litigation "is the producing cause of his worsened condition and the aggravation of his disease"; that he should be hospitalized for at least six months, "if he is to have any hope of being cured but such confinement would be unavailing toward that purpose if the distress of this lawsuit is not first ended. I am definitely of the opinion that the postponement of the trial of this case will further aggravate his condition, very materially diminish his chances of recovery and probably shorten his life."

[1-2] Quoting from *Johnson v. Johnson*, 59 Cal.App.2d 375, 392, 139 P.2d 33, 42: "The rules applicable to the granting of continuances, amply supported by citations to the many cases, are set forth in 5 Cal.Jur., p. 968, § 5, as follows: 'However, it is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary discretion, its action will not be disturbed. It follows that an abuse of dis-

cretion must be shown to justify a reversal of the judgment because of a ruling on such matters. Thus it has been held that the sickness of a party to an action, preventing his attendance on the court, does not ipso facto require the court to grant an application for a continuance, made on his behalf; especially where the showing before the court fully justifies the conclusion that injustice will be as likely to follow from the granting of the continuance as from its refusal. * * *'

[3] "As has already been pointed out, the right of a litigant to be present to defend or prosecute an action is not absolute."

It also seems to be a general rule that "the mere absence of a party furnishes no ground for a continuance, unless it is made to appear that such absence is unavoidable and that the party will suffer damage in his interests, if he is unable personally to attend the trial; and even when a prima facie showing of these essentials is made, if there is presented a counter showing then it becomes the duty of the trial court to resolve the facts and no claim of abuse of discretion can be predicated upon its action. * * * Although continuances should, under proper circumstances, be granted because of the illness of a party, sickness preventing attendance on the court does not ipso facto require the granting of an application for a continuance, made on a party's behalf. As in all other cases, it is for the court, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown upon the application are such as make it proper that a continuance should be granted, and its conclusion, as in other cases, will not be disturbed unless there has been a plain abuse of discretion." 5 Cal.Jur. 978, 979, secs. 10 and 11, and authorities there cited, including *Meier v. Hayes*, 20 Cal.App.2d 451, 455, 67 P.2d 120; *Foster v. Hudson*, 33 Cal.App.2d 705, 92 P.2d 959; *Capital Nat. Bank v. Smith*, 62 Cal.App.2d 328, 339, 144 P.2d 665.

[4] Giving full effect to the facts presented by the record herein, it may not be said that the trial court abused its discre-

tion in refusing to grant a third continuance.

[5] With respect to appellant's second point, i. e., error of the court in receiving evidence of acts of adultery, making findings thereon and permitting the filing of the amended cross-complaint to conform to proof, without proof of service upon respondents, the trial court found that "That Correspondent John L. Scroggs, named as Doe One, and the Correspondent Joseph L. Hoover, named as Doe Two, were respectively duly and regularly served with and notified of the allegations of the cross-complaint filed herein." The original cross-complaint alleged that appellant committed adultery with respondents named therein as Does One, Two and Three, which was denied by appellant's answer thereto and thereby raised the issue. The depositions of respondents Hoover and Scroggs were read in evidence at the trial without objection, and after completion of the trial, respondent was permitted to amend his cross-complaint to conform to proof. Under such circumstances, service of the original cross-complaint upon said respondents was a sufficient compliance with the provisions of section 1019 of the Code of Civil Procedure, which gives such persons the right to appear and be heard in the action.

Appellant finally specifies as reversible error the court's finding that the antenuptial agreement was valid and binding and that consequently there was no community property.

With respect to such agreement, the court found: "that it is true that prior to the marriage of the parties hereto, to-wit: on the 20th day of March, 1940, the parties hereto entered into an Antenuptial Agreement. The Court finds that the said Antenuptial Agreement was from its inception and ever since has been and now is a valid and binding agreement between * * * the parties thereto, in words and figures as follows, to-wit: * * *."

In this regard the court further found that it was not true that said agreement was executed subsequent to the marriage; that appellant's consent or execution was

secured by fraud, misrepresentation or deceit; that said plaintiff was falsely advised that such document "was of no force or effect in so far as the subsequent accumulations of property were concerned or in so far as the support" of appellant was concerned. In addition, the court found that it was not true that prior to the execution of the agreement, or at any other time, respondent told appellant that "he would provide for her financially for as long as she lived in an amount of money sufficient to support her upon the same or any standard of living" of appellant and respondent at said time or at any time or at all. The court also found that "no fraudulent, false or deceitful statements or misrepresentations of any kind or character whatsoever" were at any time made by respondent to appellant in connection with the making, execution or delivery of said antenuptial agreement and that no reliance was placed thereon by appellant, "nor was she induced or persuaded to affix her signature" thereto by reason of any such purported statements. Also, that no confidential relationship of husband and wife existed between the parties at the time of the execution of said document.

The court then concluded: that "there is no community property of the parties hereto. * * * that the Antenuptial Agreement entered into between the parties hereto dated March 20, 1940, was entirely from its inception and ever since has been and now is entirely a valid, binding and effective agreement between the parties thereto."

By its terms the antenuptial agreement provided that each party "after said contemplated marriage, shall possess, hold, own and enjoy all of the property which he (or she) then owns, and which he (or she) may thereafter acquire by gift, inheritance, purchase or otherwise, together with the accretions thereto and the accumulations therefrom, and all of his (or her) earnings subsequent to the said marriage, as his (or her) sole and separate property as absolutely as if he (or she) were to remain unmarried."

[6, 7] While the earnings of a husband during the marriage are normally the com-

munity property of the spouses, as is contended by appellant, the parties herein each relinquished to the other all right, title and interest in any property which he or she "might but for the provisions of this agreement, acquire by reason of the said contemplated marriage." There was competent evidence presented at the trial herein to substantiate the findings of fact made respecting the antenuptial agreement.

The judgment is affirmed.

DORAN and WHITE, JJ., concur.



75 Cal.App.2d 628

**In re MOREY'S ESTATE.
MOREY v. JOHNSON.
FINCH v. SAME.**

Civ. 15219.

District Court of Appeal, Second District,
Division 3, California.

Aug. 1, 1946.

Rehearing Denied Aug. 16, 1946.

Hearing Denied Sept. 19, 1946.

1. Wills ⇨111(2)

Where line in printed form of will immediately before the attestation clause was blank but testator's signature was written in blank space in attestation clause in space which was a scant inch and a half below signature line in printed form with one line of printing intervening, signature was at the "end of will" within requirement of the statute and was placed there for purpose of execution. Probate Code, § 50.

See Words and Phrases, Permanent Edition, for all other definitions of "End of Will".

2. Wills ⇨302(1)

In will contest, evidence sustained finding that subscription to will was acknowledged to witnesses by testator and that he declared instrument to be his will. Probate Code, § 50.

3. Wills ⇨303(1)

In will contest trial judge could compare and weigh witnesses' testimony and

could accept or reject it in whole or in part.

4. Wills ⇨289

Proof of signatures of testator and of subscribing witnesses placed in operation a presumption that will had been duly executed. Probate Code, § 50.

5. Wills ⇨41

Peculiarities, eccentricities and occasional departure from normal conduct do not show a want of testamentary capacity where testator has clear understanding of his estate and ability to form rational opinion as to what would be a fair, just and reasonable division of it among his friends and relatives or others to whom he feels an especial interest.

6. Wills ⇨55(1)

Evidence in will contest sustained finding of testator's testamentary capacity.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

In the matter of the estate of John Henry Morey, also known as John Morey, wherein the will of decedent sought to be probated by Ralph E. Johnson was contested by Mabel Morey and Carrie D. M. Finch. From a judgment for the proponent and from an order denying a motion for new trial, the contestants appeal.

Judgment affirmed and attempted appeal from the order dismissed.

MacDonald & Pettit and L. H. Phillips, all of Los Angeles, for appellants.

Newton Van Why, of Los Angeles, for respondent.

SHINN, Justice.

The will of John Henry Morey, who died October 26, 1944, was filled in by him on a printed form. It stated that he was 74 years of age, that the document was made, published and declared by him to be his last will and testament, and it contained the following provisions in handwriting: "[First: printed] I declare that I am married and that my wife's name is Mabel Morey. [Secondly: printed] I give devise and bequeath unto my wife Mabel Morey

the sum of One hundred dollars, having already given her a certain amount of cash which was agreeable to her and for which I hold a receipt which receipt will be found among my personal effects. [Thirdly: written] I give devise and bequeath unto Mr. Ralph E. Johnson, and his wife Jennie Johnson (share and share alike) the property known as 1311 West 46th St. in the City of Los Angeles Calif. consisting of a Two story residence complete with all its contents. Also a garage complete with all its contents which includes a 1940 Buick auto (5 pass.). The above described property being my home at the time of my demise. Mr. Ralph E. Johnson's present address being 1241 West 47th St. Los Angeles Calif." The printed portion which followed was filled in with the name and address of Ralph E. Johnson, who was named as executor, and the date of the will, January 6, 1942, was written in. The will concluded as follows:

"In Witness Whereof, I have hereunto set my hand and seal this 6th day of January, in the year of our Lord nineteen hundred and forty-two.

————— [SEAL]

The foregoing instrument, consisting of Three pages including this one was at the date hereof, by the said John Henry Morey signed, and sealed and published as, and declared to us to be his last Will and Testament, in the presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto,

Ralph W. Poundstone
Residing at 1317—W 46 St.
William C. Richards
Residing at 1321 W 46th St. Los Angeles Calif."

The name "John Henry Morey" appearing in the attestation clause was that of the testator, written by himself, and this the court found to be his subscription to the will.

The will was contested for want of due execution and upon the ground of incompetency of the testator. Both issues were resolved in favor of the proponent and the contestants appeal.

The provisions of section 50 of the Probate Code which it is claimed were not observed are the following:

"(1) Subscription. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. A person who subscribes the testator's name, by his direction, should write his own name as a witness to the will, but a failure to do so will not affect the validity of the will.

"(2) Presence of witnesses. The subscription must be made, or the testator must acknowledge it to have been made by him or by his authority, in the presence of both of the attesting witnesses, present at the same time.

"(3) Testator's declaration. The testator, at the time of subscribing or acknowledging the instrument, must declare to the attesting witnesses that it is his will.

"(4) Number of witnesses, attestation. There must be at least two attesting witnesses, each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence. The witnesses should give their places of residence, but a failure to do so will not affect the validity of the will."

It is contended by appellants that a testator who places his signature in a blank space in the attestation clause has not subscribed his name at the end of the will as the law requires. It is conceded, as it must be, that if the signature of Mr. Morey had been placed immediately above the attestation clause it would have been at the end of the will, but it is argued that because it was written in the blank space in that clause, it should be considered only as a completion of the form of that clause and not as the testator's subscription to the will.

The physical construction of the document differs in form from that of any will considered in California cases, but the rule by which its sufficiency is to be tested is not in doubt. It was stated and applied in two cases, in one of which it was held that the signature of the testator had been affixed at the end of the will, and in the other of which it was held that the signatures of the subscribing witnesses were

not, as required by law, affixed at the end of the will. The first case is *Estate of Seaman*, 146 Cal. 455, 80 P. 700, 106 Am.St. Rep. 53, 2 Ann.Cas. 726; the second, *Estate of Moro*, 183 Cal. 29, 190 P. 168, 10 A.L.R. 422. Our reasons for choosing these two cases will appear in our discussion of them. In *Estate of Seaman* a printed form of will, consisting of four pages, was used. They were intended to be folded twice from the bottom. There would thus be exposed on the outside, as folded, the lower half of the reverse side of page four, one-quarter of the page on one side of the folded instrument and one-quarter upon the other side. Upon this exposed portion of page four there had been printed the words, "The Last Will and Testament of ———." [146 Cal. 455, 80 P. 701] Beneath these words the scrivener had written the name of the testator, and underneath this the testator had subscribed his name, and following his signature and under the word "Witnesses" the subscribing witnesses had affixed their signatures. The will was written upon page one and a part of page two. On page three there was a printed form for the appointment of an executor and the revocation of former wills and the attestation clause. These were not filled in or signed. The remainder of the third page and the upper half of the fourth page were left blank. The court held that the signature of the testator as subscribed upon the outside of the folded document was not placed at the end of the will. In *Estate of Moro* the will had been typed upon three separate sheets of paper stapled together. The body of the will covered the first sheet and a part of the second. Immediately following this were the words "In Witness Whereof," etc., and thereunder was a line drawn upon which the testator affixed his signature. The remainder of the second page, some eight and one-half inches in length, was blank. The attestation clause was typed at the top of the third page and the signatures of the attesting witnesses were affixed thereunder. The contention was that the signatures of the witnesses, being upon a separate sheet of paper and with some eight and one-half inches of blank space upon the second sheet, were not affixed at the end of the will. Certain of the state-

ments of the court in *Estate of Seaman* were relied upon as supporting this contention. The court held that the signatures of the witnesses were affixed at the end of the will. Chief Justice Beatty, in his concurring opinion in *Estate of Seaman*, said (146 Cal. p. 467, 80 P. 704): "The true test to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution." Justices Angelotti and Shaw concurred in this statement and added that "the name must, of course, be subscribed after the termination of the testamentary provisions." The reasons stated in the several opinions in support of the rule announced are conclusive.

[1] The question which the trial court in the instant case answered in the affirmative was whether the signature of Mr. Morey was placed where it appears in the will "for the purpose of execution." Appellants say that it is more reasonable to believe that it was placed there in order to trick the subscribing witnesses into affixing their signatures, and with the intention upon the part of Morey to sign it or not, as he might decide after further reflection. The argument is not convincing. It would have been a pointless thing to do. One who goes about making a will is in a serious frame of mind and not up to tricks. The signature was but a scant inch and a half below the signature line in the printed form, with one line of printing intervening. Two friends had been called in to witness the will, the acts of Mr. Morey unequivocally indicated that he purposed to execute the will at that time and in their presence, and it seems to be altogether clear that he affixed his signature for the purpose of executing the document as his will. The fact that the signature was not placed where it was supposed to be means nothing if its position indicates that Mr. Morey believed that it belonged where he put it. The court did not err in holding that the signature was at the end of the will and was placed there for the purpose of execution.

The second contention of appellants is two-fold, namely, that there was insufficient evidence to prove (a) that the subscription was made by the testator or acknowledged to have been made by him in the presence of both attesting witnesses present at the same time, or (b) that the testator declared to the attesting witnesses that it was his will.

The evidence disclosed the following facts: Mr. Morey requested his friends, Messrs. Poundstone and Richards, to come to his house, stating to Mr. Poundstone that he wanted him to witness his will with Mr. Richards, and stating to Mr. Richards that he wanted him to sign a document—that he wanted him to witness a document. He did not tell Mr. Richards that it was a will he was to witness, but Mr. Richards understood it was a will. When shown the will, the witness Poundstone testified, "Well, that is his signature, I know that." Mr. Poundstone, when asked what Mr. Morey said, replied: "He said it was his will and he wanted us to sign his will—I signed the two wills for him and I am not sure this is the one where he stated he was signing his will or not. One will that he witnessed, he said that that was his signature." His attention was called to Mr. Morey's signature on the will and he was asked, "He either signed that in your presence and Mr. Richards' presence or declared to you that it was his signature in Mr. Richards' presence? A. Yes.

"Q. It was some years before when you signed another will for him? A. Yes.

"Q. In one of those you saw him sign his name in the presence of Mr. Richards and yourself? A. Yes.

"Q. And in the other he declared to you that it was his signature and he asked you to sign? A. Yes.

Mr. Richards testified that he signed the will as a witness and because Morey asked him to sign it, and

"Q. At that time was his name written there in the attestation clause, 'John Henry Morey.' A. It was.

"Q. What did he say when he asked you to sign it? A. Well, he said that he wanted us to witness that that was his name there.

"Q. That that was his name? Did he say whether or not it was a will? A. I don't remember whether he designated it as a will or not.

"Q. Did he tell you that he wanted you to sign as a witness and that that was his signature? A. No, that that was his name. He did not say signature as far as I know.

"Q. Did he point that out to you and say 'That is my name?' A. Yes.

"Q. Then he wanted you to sign? A. Yes."

[2-4] According to Mr. Richards' testimony, Mr. Morey, in the presence of the two witnesses, pointed to his signature and said that it was his name. According to the testimony of Poundstone, Mr. Morey said it was his will and he wanted them to sign it; that he either signed it in their presence or declared "that it was his signature." This evidence was sufficient to support findings that the subscription to the will was acknowledged to the witnesses by Mr. Morey and that he declared it to be his will. The court found that the testator "acknowledged" the will in the presence of said witnesses present at the same time and that the witnesses signed at the request of the testator and in his presence and in the presence of each other. There were further findings, "That it is not true the deceased did not subscribe said will at the end thereof, or acknowledged his subscription to have been made by him at the end thereof in the presence of Ralph W. Poundstone and William C. Richards" and, "That it is not true that said John Henry Morey did not declare said instrument to be his last will and testament in the presence of said witnesses or either of them." Although the witnesses differed in their recollection as to what took place and was said, it was the province of the trial judge to compare and weigh their testimony and to accept or reject it in whole or in part. In addition to their testimony, the circumstantial evidence was of considerable weight. The presentation of the will to the witnesses, bearing the signature of Mr. Morey, even without spoken words, indicated to them that it was his signature; and such presentation with a request that they sign it, without more,

would have been an unspoken declaration that it was his will. Estate of Abbey, 183 Cal. 524, 191 P. 893. Proof of the signatures of Mr. Morey and of the subscribing witnesses placed in operation a presumption that the will had been duly executed. Estate of Pitcairn, 6 Cal.2d 730, 732, 59 P.2d 90; Estate of Braue, 45 Cal.App.2d 502, 505, 114 P.2d 386; Estate of Silva, 169 Cal. 116, 120, 145 P. 1015. This presumption was to be weighed with the testimony of the subscribing witnesses as to what took place or did not take place and as to what they remembered or did not remember. The findings that the will was duly executed are not unsupported by the evidence.

It is earnestly insisted that the evidence of the contestants of Mr. Morey's incompetency was so strong and that of the proponent so weak that the finding that he was competent is without any substantial support in the evidence. There was no evidence as to whether the handwriting in the will was that of Mr. Morey, nor any evidence that he had received assistance in the preparation of the will. The signature was in a firm, strong hand and the same was true of all the handwriting.

Numerous witnesses, friends of Mr. Morey, stated it to be their opinions that he was incompetent. His widow testified that he attempted suicide three times, "had constantly gone into spells; he would go upstairs" and that she would hear him crying. A cousin by marriage testified that decedent was very excitable, "he was sort of fidgety," and that he would laugh in a way that she would call simple or silly, and she detailed numerous eccentricities and evidences of childishness and excited conduct. Another witness testified that Mr. Morey in 1942 "was talking a little in circles and had forgotten that he had met the wife of the witness when she was a little girl in Saratoga Springs, and that he had known her also in New York and San Diego"; that Mr. Morey "was living in the past definitely with his first wife, Hattie." Another witness testified that she had frequently seen Morey sobbing convulsively like a child; that he also pretended to be talking on the telephone when she knew it was mere pretense. Another wit-

ness testified that she had seen him cutting the lawn wearing only underwear and high shoes and an old hat so she could hardly see his face. Other testimony was to the same general effect and need not be stated.

The subscribing witnesses declined to give any opinion as to his competency. The proponent Johnson testified, but his testimony could not be transcribed by reason of the serious illness of the reporter who took it. By stipulation it was given in narrative form. He testified that he had been a friend and neighbor for many years. He identified the signature in the attestation clause as that of Mr. Morey and testified that in his opinion Mr. Morey was competent to make a will on January 5[6], 1942. He testified that he had heard the testimony of the witnesses for the contestants and that in his opinion the actions of Mr. Morey as detailed by these witnesses did not indicate to him that Mr. Morey was incompetent. A hospital record was received in evidence, which disclosed that he entered the hospital April 23, 1942, and that a diagnosis was made, "Slight mercury poison, senility," and recited that while he was in the hospital he attempted suicide by taking a tablet of bichloride of mercury. It stated that the patient said "that for 15 years he had been off mentally." The physical findings were, "Old man of 75 years who lies in bed, not ill but talks about many things, seems to get lost in his subject. General condition moderately good. Mentally disturbed. C. M. McMullen, M. D." Dr. McMullen was not called as a witness.

Mr. Morey had been married to his second wife for about six years. He was passionately devoted to the memory of his first wife. He had several phonograph records which he played occasionally and which evidently brought back vivid recollections of his past life. It appears to have been the memory of his first wife which occasioned his crying spells. On seven different occasions he persuaded his second wife to leave him for visits with friends and relatives in order that he might be alone. He had a feeling that his first wife was in the home and expressed a desire to be alone. This desire soon left him and he appeared greatly pleased to

have his wife return. The evidence did not by any means show conclusively that Mr. Morey was lacking in testamentary capacity. While a number of witnesses expressed the opinion that he was incompetent, the facts upon which such opinions were based did not indicate that he was unable to remember and keep in mind the nature, character and value of his property or to form intelligent opinions as to his relations toward those about him or the claims of his relatives and friends upon his bounty. There was no evidence that at the time of the execution of the will Mr. Morey was mentally disturbed or excited; upon the contrary, it would appear that he was in a quiet and natural state of mind. Mrs. Morey testified that at one time decedent had given her \$9,000 in cash, which was placed in a joint safe deposit box, but that he thereafter took out \$5,000; that at different times he placed large sums of money on a table and invited her to take it, which she declined to do. He made gifts to nieces and other relatives, ranging from \$500 to \$1,000 each, and made smaller gifts to friends. There was no evidence that he was bitter or unfriendly or possessed of hallucinations or delusions. Mrs. Morey testified that he was very orderly and took care of himself well. Mr. Johnson, the principal beneficiary of the will, had been a neighbor and close friend for many years. There was no evidence that Mr. Morey had received assistance in the preparation of the will.

In April, 1942, about three months after the will was signed, Mr. Morey attempted suicide, the incident was reported to the police by Mr. Johnson, and Mr. Morey was taken to the receiving hospital. On that date he wrote the following note to Mr. Johnson: "Dear Ralph, enclosed you will find four keys, each one properly tagged. Unlock door to closet in library. On top of the safe you will find instructions and a memorandum sufficient to cover every—I guess that is 'contingency,' I believe. Goodbye to you all. J. H. Morey." Below was written: "Tell Mrs. Seman—contingency—no collection. P. S. Call an officer to enter the house with you. J. H.

Morey." The police found another note on the piano in Mr. Morey's home, which read as follows: "With memory failing fast, cataracts forming in both eyes, and intense desire to penetrate the mystery beyond, and believing that some good may be accomplished by my quitting this medium sphere, why hesitate? This in no way reflects upon my wife Mabel who is at present visiting a relative in Phoenix whose address is 38 West Windsor Avenue, care of Mrs. A. K. Smith. She alone has made life worth living up to the present time. My will is properly executed, and Mr. Ralph Johnson is named executor and will look after all details. Said details are embodied in a letter addressed to Mr. Johnson who resides at 1241 West 47th Street. Here is hoping to join my comrades of nearly fifty years, assuming such a thing to be possible. John H. Morey, 1311 West 46th Street. Mr. Ralph Johnson's address is 1241 West 47th Street, and Mr. Ralph Johnson's phone, Axminster 19069." At the same time a letter was found upon Mr. Morey's desk, sealed and airmail stamped, addressed to Mrs. Morey, who was then visiting in Phoenix. This letter was not produced. Those that were received in evidence indicated that the writer was possessed of an active and reasoning mentality.

[5, 6] It is not necessary to refer to the multitude of decisions holding that peculiarities, eccentricities and occasional departure from normal conduct do not show a want of testamentary capacity where the testator is able to and does have a clear understanding of his estate and the ability to form a rational opinion as to what would be a fair, just and reasonable division of it among his friends and relatives or others in whom he feels an especial interest. See *Estate of Schwartz*, 67 Cal.App.2d 512, 520, 155 P.2d 176, and cases cited therein.

The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

DESMOND, P. J., and WOOD, J., concur.

75 Cal.App.2d 663

ENOS et al. v. ARMSTRONG et al.
Civ. 7237; Sac. 5757.

District Court of Appeal, Third District,
California.

Aug. 1, 1946.

Rehearing Denied Aug. 29, 1946.

Hearing Denied Sept. 19, 1946.

1. Appeal and error ⇨1008(1)

In action for declaratory judgment with reference to rights under a contract, the construction of the contract is primarily a matter for trial court after a full opportunity is afforded to all parties to produce evidence of conditions surrounding execution of contract and conduct of parties relative thereto.

2. Appeal and error ⇨1008(1)

Where two constructions of a contract are equally reasonable, that adopted by trial court will prevail.

3. Contracts ⇨176(2)

Where meaning of language of a contract is uncertain and parol evidence is introduced in aid of its interpretation, the question of its meaning is one of fact.

4. Appeal and error ⇨1008(1)

Construction of ambiguous agreement by trial court after taking of oral evidence in aid of its interpretation must stand on appeal unless it is without support in evidence.

5. Contracts ⇨170(1)

Where terms of contract are uncertain and capable of more than one reasonable construction, the practical construction put upon contract by parties thereto, as evidenced by their conduct under it, furnishes one of the most reliable means of arriving at its meaning and their intention when executing it.

6. Animals ⇨27

A lease under which executor rented to defendant a flock of sheep owned by estate was construed to mean that defendant was not to be charged with losses to the flock which did not result from defendant's negligence, provided he added to the flock a specified number of lambs as rent and did not permit the flock to fall below a specified minimum, as against contention

that total flock was to be increased each year by a specified number.

7. Executors and administrators ⇨154

Where evidence disclosed that defendant, under his lease from an estate of a flock of sheep, was short 10 ewes, 8 ewe lambs, and 3 rams under the minimum required to be returned to estate, defendant was required to account to the estate for such shortage.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Lulu K. Enos and others against Mary Armstrong and others for declaratory relief. From an adverse judgment, plaintiffs appeal.

Reversed with directions.

Earl D. Desmond, Gerald Wallace, and E. Vayne Miller, all of Sacramento, for appellants.

Richard Belcher, of San Francisco, and Grayson Price, of Chico, for respondents.

ADAMS, Presiding Justice.

This action was brought by Lulu K. Enos, Anna K. Livingston, Eleanor K. Sanders, Alys K. Walters and Dorothy Keenan (by her attorney in fact) against Mary Armstrong and Ray Armstrong (her husband), and Rex Keenan, and H. B. P. Carden, executor of the estate of Michael Keenan, deceased. Plaintiffs and defendants Mary Armstrong and Rex Keenan are all children of the deceased Michael Keenan, and equal beneficiaries under his will. The main purpose of the action was to secure a declaration of the rights of plaintiffs under two written leases, the one entered into by H. B. P. Carden, as executor of the Keenan estate, with Mary and Ray Armstrong, and the other with Rex Keenan. The amended complaint was in three counts, only the first and the third being pertinent upon this appeal, as the second appertained to the lease to Rex Keenan, who was in the army and as to whom no trial was had.

The first count of the complaint alleged that Carden, as executor, had, on May 31, 1940, entered into the lease with the Arm-

strongs, a copy of the lease being attached to and made a part of the complaint. By the terms of said lease the executor leased to the Armstrongs certain real property and a flock of sheep for a term commencing June 1, 1940, and ending May 31, 1941, at an annual rental of \$1475.00, "plus 288 of the top Rambouillet ewe lambs produced during the year, which shall be added to and become part of the flock of sheep hereinafter referred to. In the event enough Rambouillet ewe lambs are not produced to add this agreed number to the flock, the proceeds from the sale of crossbred lambs shall be used to purchase enough Rambouillet lambs to make up the deficiency." The number of sheep leased is set forth in a subsequent part of the lease as follows:

"During the life of this agreement said lessees shall at all times keep the flock of ewes and lambs up to the number herein leased, i. e. 1440 ewes, 265 lambs and 20 rams, and lessees are to add to the flock each year top Rambouillet ewe lambs in number equal to 288. At the expiration of this lease, lessees are to return to lessor 1705 ewes, 288 ewe lambs and the rams as mentioned herein, less any ewes or lambs which may have been lost by death from no negligence on the part of the lessees, provided that if such loss be so great as to cause the total number of ewes to fall below 1440, lessees must furnish sufficient ewe lambs to bring the total number of ewes up to said 1440 and ewe lambs to 288."

Lessees agreed to assume the expenses incident upon the care of the sheep and to care for them and otherwise handle them and their increase "according to the best methods known to the livestock industry"; they also agreed that "the title to all of said sheep, the increase and increment therefrom and the wool and lambs produced shall at all times during the terms of this lease, remain in the lessor and are to be sold in the lessor's name and the money therefrom turned over to the said lessor, who will then adjust with the lessees any payments that may be due to the lessor, under this lease and all advancements made to Mary K. Armstrong."

The complaint further alleged that defendant had defaulted in the payment of a

portion of the rental due under the lease because, at the final termination thereof, they did not return to the estate the number of sheep required under the terms of the lease, and that as a result the assets of the estate were depleted and the estate was damaged; and that defendants Armstrong had failed to maintain and care for said sheep in a proper and husbandlike manner in accordance with the best animal husbandry practices in the community, resulting in additional loss to said estate.

In the third count it was alleged that Carden, as executor, had filed his final account and petition for distribution in the estate of Keenan, and that unless the rights of plaintiffs under the lease to the Armstrongs were determined and the latter compelled to account for their failure to comply with the terms of their lease the estate would be diminished to plaintiffs' detriment. It is further alleged in this count, on information and belief, that the executor has lent monies of the estate to the Armstrongs instead of paying the net income to the beneficiaries under the terms of the will of Michael Keenan, and they request a declaration of their rights under the said will. The substance of the prayer of the complaint is that the rights and duties of the respective parties be declared under the lease and the will, and that the Armstrongs be ordered to pay damages to or make restitution to the estate for their failure to abide by the terms of the lease.

Answers were filed by defendants, and the issues tendered were tried by the court sitting without a jury. Findings were filed and judgment rendered for defendants.

The evidence shows, apparently without conflict, that at the beginning of the term of the lease the Armstrongs took into their possession 1440 ewes, 265 ewe lambs and 20 rams; that at the end of the first year the lease was orally renewed for another year on the same terms, and at the end of that year was again thus renewed, and that it was finally terminated at the end of May, 1943; that after its termination the Armstrongs turned back to the estate 1430 ewes, 280 ewe lambs and 17 rams. Defendant Ray Armstrong testified that he understood that under the terms of the lease he was

to add to the flock each year 288 Rambouillet ewe lambs, and that he did so.

Appellants admit in their brief that the Armstrongs paid the stipulated cash rental each year and that they "did set aside and add to the flock 288 lambs for the 1940-1941 term, 288 lambs for the 1941-1942 term and 288 lambs for the 1942-1943 term, but the Lessees did not complete performance of their obligation to pay rent in lambs, by reason of the fact that they have failed and refused to *return* (Deliver in payment and satisfaction) to Lessor the 864 sheep due him as rent"; that the evidence conclusively establishes "that the Lessees were at all times obligated to *return to Lessor* 1440 ewes and 20 rams, which number of ewes and rams were established as the base level for the band of sheep and Lessees were obligated to *return to Lessor* 288 top Rambouillet lambs for the first, second and third terms of the lease for a total of 864 sheep. That the defendants have defaulted in the performance of the obligations due for the first term of the lease because they only returned to Lessor 1430 ewes, 17 rams and 280 lambs and defendants have defaulted in performance of the second and third terms of the lease for the reason that they have not returned to Lessor 576 sheep, the rental for those respective terms at 288 lambs for each term." (Italics theirs.)

The position of respondents as stated in their brief is that they were only required to *add* 288 lambs to the flock each year, and in the event the loss from death through no negligence of the lessees was so great as to forestall an increase of the flock, the maximum number they would be obligated to return would be 1440 ewes, 20 rams and 288 lambs. They summarize the issue to be: "Were the lessees * * * obligated on May 31, 1943, to return to the executor of the estate * * * more than 1440 ewes and 288 ewe lambs and 20 rams where losses had occurred by death, due to no negligence on the part of said lessees, so great as to reduce the band to said number."

From these statements of counsel for the respective parties it is apparent that their difference of opinion is as to wheth-

er, regardless of losses, the Armstrongs were obligated to turn back to the estate at the termination of the lease in 1943 the original number of sheep leased to them in 1940, to wit: 1440 ewes, 265 lambs and 20 rams, and also 864 head of ewes in addition, representing 288 ewe lambs for each of the years 1941, 1942 and 1943. It is the contention of appellants that they were, while respondents contend that while they were required to and did add the 864 ewe lambs to the flock, nevertheless the losses were such that by the end of the term only 1430 ewes, 280 lambs and 17 rams remained, and that these losses were due to "death from no negligence on the part of the lessees."

The trial court apparently adopted the construction of the lease contended for by respondents, for it found:

"2. That it is untrue that the minimum number of sheep required to be returned to H. P. B. Carden as executor of the Estate of Michael Keenan, deceased, by the defendants Mary Armstrong and Ray Armstrong under the terms of the lease referred to in said amended complaint was on May 31st, 1941, 2013 head.

"3. That it is untrue that on or about June 1, 1943, the defendants Mary Armstrong and Ray Armstrong returned to H. P. B. Carden as executor of the Estate of Michael Keenan, deceased, a flock of sheep that was less in number than they were required by said lease to return, or that the defendants Mary Armstrong and Ray Armstrong failed to comply with the terms of said lease to return to defendant H. P. B. Carden, as executor, the total number of sheep required thereby.

"4. That it is untrue that the defendants Mary Armstrong and Ray Armstrong failed to comply with any of the terms of said lease referred to as Exhibit A in plaintiffs' amended complaint.

"5. That it is untrue that the plaintiffs or the Estate of Michael Keenan, deceased, has suffered any loss or damage by reason of any acts or conduct of the defendants Mary Armstrong and Ray Armstrong, or that said Mary Armstrong and Ray Armstrong neglected or failed to maintain said

flock of sheep in a proper and husband-like manner according to the best practice of animal husbandry practiced in the community in which such flock of sheep were maintained."

The substance of these findings is that though the Armstrongs received from the lessor a flock consisting of 1725 head, and added thereto (as the Armstrongs testified) 864 ewe lambs, which without losses would have increased the flock to 2589 head, that though they turned back only 1727 head the evidence is sufficient to show that the difference, or 862 head, were lost by death without negligence on the part of the lessees. The questions before us then are, is the lease agreement reasonably susceptible of the construction put upon it by the trial court, and, if so, does the evidence sustain the implied finding that the losses were not due to defendants' negligence.

[1-3] The construction of the contract was primarily a matter for the trial court. In *Walsh v. Walsh*, 18 Cal.2d 439, at pages 443, 444, 116 P.2d 62, at page 65, the court said:

"When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.*' *Barlow v. Frink*, 171 Cal. 165, 173, 152 P. 290, 292. (Italics added.) The governing principle as to when parol testimony may be introduced to explain the language of a contract or to ascertain the intention of the parties is clearly set forth in *Kenney v. Los Feliz Investment Co., Ltd.*, 121 Cal. App. 378, 386, 387, 9 P.2d 225, 229, as follows: 'It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and be-

fore the execution of the contract may be shown. *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 P. 876.' And in *Scott v. Sun-Maid Raisin Growers Ass'n*, 13 Cal.App.2d 353, at page 359, 57 P.2d 148, at page 151, the court stated: 'When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact * * **.' *Thomson v. Leak*, 135 Cal.App. 544, 548, 27 P.2d 795; *Gallatin v. Markowitz*, 139 Cal. App. 10, 13, 33 P.2d 424; *Coats v. General Motors Corp.*, 3 Cal.App.2d 340, 356, 39 P.2d 838.' (Italics added.)"

In *McKee v. Lynch*, 40 Cal.App.2d 216, 226, 104 P.2d 675, 680, it was said:

"We are not prepared to declare that the construction given by the trial court to the entire transaction is an unreasonable construction or that it is untenable or so clearly inconsistent with the intent of the parties as disclosed by their language that we must substitute therefor the interpretation for which appellants contend. In such a situation it is settled that a reviewing court is not justified in disturbing the construction adopted by the trial court. *Whepley Oil Co. v. Associated Oil Co.*, 6 Cal.App.2d 94, 44 P.2d 670; *Shelley v. Byers*, 73 Cal.App. 44, 55, 238 P. 177."

[4] In *Ross v. Pacific Mortgage Guaranty Co.*, 16 Cal.App.2d 672, 676, 61 P.2d 368, the court stated that the construction of an uncertain or ambiguous agreement by a trial court after taking oral evidence in aid of its interpretation must stand unless it is without support in the evidence.

And where two constructions of a contract are equally reasonable that of the trial court will prevail. In *re Estate of Northcutt*, 16 Cal.2d 683, 690, 107 P.2d 607; *McNeny v. Touchstone*, 7 Cal.2d 429, 435, 436, 60 P.2d 986; In *re Estate of Wilson*, 40 Cal.App.2d 229, 234, 104 P.2d 716; In *re Estate of Boyd*, 24 Cal.App.2d 287, 290, 74 P.2d 1049; *O'Hare v. Peacock Dairies*, 26 Cal.App.2d 345, 354, 79 P.2d 433; *Tide Water Associated Oil Co. v. Curtin*, 41 Cal. App.2d 884, 895, 107 P.2d 945; *Richards v. Pacific S. W. Discount Corp.*, 44 Cal. App.2d 551, 112 P.2d 698.

[5] In the construction of a contract it is also generally held that where the terms are uncertain and capable of more than one reasonable construction, the practical construction put upon the instrument by the parties thereto, as evidenced by their conduct under it, furnishes one of the most reliable means of arriving at its meaning and their intention when executing it. *Commercial Discount Co. v. Cowen*, 18 Cal. 2d 610, 615, 116 P.2d 599; *Tanner v. Title Insurance & Trust Co.*, 20 Cal.2d 814, 823, 129 P.2d 383; *Roy v. Salisbury*, 21 Cal.2d 176, 184, 130 P.2d 706; *Moore v. Wood*, 26 Cal.2d 621, 629, 160 P.2d 772; *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal.2d 751, 761, 128 P.2d 665; *Work v. Associated Almond Growers*, 102 Cal.App. 232, 235, 282 P. 965; *Union Sugar Co. v. Hollister Estate Co.*, 3 Cal.2d 740, 754, 47 P.2d 273; *Lemmon v. Stillwater Land & Cattle Co.*, 217 Cal. 474, 481, 19 P.2d 785; *Rosenberg v. Geo. A. Moore & Co.*, 194 Cal. 392, 403, 229 P. 34; *Burns v. Peters*, 5 Cal.2d 619, 623, 55 P.2d 1182.

As hereinbefore stated, the lease provided that the lessees were to keep the flock of ewes and lambs up to 1440 ewes and 265 lambs; and were to *add to the flock* each year 288 ewe lambs; that at the expiration of the lease they were to *return to lessor* 1704 ewes, 288 ewe lambs and 20 rams, "less any ewes or lambs which may have been lost by death from no negligence on the part of lessees," provided that if the total number of ewes fell below 1440, they were to furnish sufficient ewe lambs to bring the total number of ewes to 1440 and the ewe lambs to 288.

[6] From a reading of the record in the cases it appears that the parties to the action were afforded an opportunity to produce evidence of the facts, circumstances and conditions surrounding the execution of the lease, as well as the conduct of the parties under it. The lessor, Carden, apparently construed the lease as contended by the Armstrongs, the lessees, for he testified that though he expected the increase of 288 head to be added to the flock each year, this increase was to be "Less the losses"; and he made no claim that the Armstrongs had not fully complied with

the lease, though he did testify that he figured that the Armstrongs should have returned 1748 head at the termination of the lease. (This would be 1440 ewes, 288 ewe lambs and 20 rams.) In his answer to plaintiffs' complaint he denied that the assets of the estate had been depleted by any failure to perform on the part of the Armstrongs, and, it may be said, took a rather indifferent position in the matter. He stated that the Armstrongs claimed a loss so heavy that they could only return the minimum, but that he did not investigate how the loss occurred, and that he had never requested an accounting from them for the losses. And he made no demand at the end of any one of the three years during which the lease was in effect, that the lessees turn over or return to him the 288 ewe lambs that were to be added each year. Mrs. Armstrong did not testify as a witness, but Mr. Armstrong testified that his inability in 1943 to return the full number of sheep referred to in the lease, plus the 288 ewe lambs which he had added to the flock each year, was due to especially heavy losses in the mountains the summer of 1942, because of bears, coyotes and poison, as well as losses from old age and at lambing. He testified that in the care of the flock he used all the care and customary economy practiced by sheep men in the vicinity, always tried to have ample help to care for them, and himself stayed in the mountains most of the time when the sheep were there. His testimony in this connection was corroborated by other witnesses who testified to the increasing hazards to sheep in the mountains in recent years from predatory animals and poisonous plants, and also by testimony that Armstrong's care of his sheep was on a par with that of other sheep men.

While plaintiffs produced some testimony to the effect that normally such a flock should have suffered no more than five per cent annually from natural causes and the loss would be less among young sheep, they did not show any negligence or lack of care on the part of the Armstrongs to which abnormal losses could be attributed. It is not contended by appellants that the Armstrongs ever sold to others any of the ewes,

lambs or rams belonging to the estate, or that they held out any at the time the flock was turned over to the executor of the estate. And while it might perhaps be inferred from the very extensive losses and from testimony that the sheep were in poor condition when finally sold after the termination of the lease, that they had not had proper care, this was matter for determination by the trial court, and we cannot say, from the record, that its findings to the contrary are not supported by the evidence and proper inferences therefrom. We do not deem it necessary to give a further review of the evidence in the case; but, as was said in *Walsh v. Walsh*, supra, we are not prepared to declare that the construction given by the trial court to the entire transaction is an unreasonable one or that it is untenable or so clearly inconsistent with the intent of the parties as disclosed by their language, that we must substitute therefor the interpretation for which appellants contend. We must therefore say, as was said in that case, that, as a reviewing court, we are not justified in disturbing the construction adopted by the trial court.

[7] However, it is admitted by respondents' counsel in their brief that since the Armstrongs, in 1943, turned back but 1430 ewes they were 10 short of the required number. They say that this shortage was made up, however, because 411 ewe lambs were turned over, but say that "if the court should determine that such finding is not supported with respect to a shortage of ten ewes, respondents are quite willing that the trial court be directed to amend its finding in this respect."

Reference to the testimony of Armstrong himself shows that of the 411 lambs which respondents' counsel say were turned back, 131 belonged to the band which had been leased to Rex Keenan, and did not belong to the flock leased by the Armstrongs. It appears that there was not only a shortage of 10 ewes, but also a shortage of 8 ewe lambs and 3 rams for which defendants Armstrong should account to the estate, since the lease provided, as above stated, that if the losses were so great as "to cause

the total number of ewes to fall below 1440, lessees must furnish sufficient ewe lambs to bring the total number of ewes to said 1440 and ewe lambs to 288;" and since respondents in their brief appear to admit that, in any event, this number of ewes and lambs, and 20 rams were to be accounted for and turned over to the executor.

Regarding issues raised in the third count and the request that the rights of plaintiffs under the will of Michael Keenan be declared, no reference to these issues is made in the briefs before this court, and the will itself is not in the record certified to us.

The judgment is reversed with directions to the trial court to amend its findings to accord with the decision of this court, and to enter judgment accordingly.

PEEK and THOMPSON, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.



75 Cal.App.2d 336

**SOUTHERN CALIFORNIA TELEPHONE
CO. v. CARPENTER et al.**

Civ. 14981.

District Court of Appeal, Second District,
Division 3, California.

July 15, 1946.

1. Appeal and error ⇐110, 113(1), 119

Appeals do not lie from orders denying motions for a new trial, to tax costs, to strike out the cost bill or to vacate judgment. Code Civ.Proc. § 963.

2. Telegraphs and telephones ⇐33(1)

In action for money due under contract for advertisements in classified telephone directory, defendant's offers to prove that reduction of columnar space constituted an increase in rates which was not authorized by Railroad Commission and that rates were unjust and unreasonable were properly rejected, where it appeared

that rates charged to defendant had been approved by Commission, since approved rates were not subject to collateral attack. Gen.Laws, Act 6386, §§ 65, 67.

3. Jury ⇨34(3)

The direction of a verdict for plaintiff-cross defendant on undisputed proof showing that such party was entitled to recover the amount for which verdict was directed did not deprive opposing party of right to jury trial.

4. Trial ⇨178

A verdict may be directed when disregarding conflicting evidence and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party if one should be rendered, and substantially the same rules apply to directed verdicts in favor of plaintiffs as apply to such verdicts in favor of defendants.

5. Appeal and error ⇨997(3)

In passing on the propriety of the trial court's action in directing a verdict, the doctrine of scintilla of evidence must be rejected.

6. Trial ⇨170

A motion for directed verdict may be granted on motion of plaintiff where, upon the whole evidence, the cause of action alleged in the complaint is supported and no substantial support is given to the defense alleged by the defendant.

7. Appeal and error ⇨883

Where appellant had agreed that the correct date from which interest accrued might be inserted in plaintiff's pleading in lieu of the date stated therein, the defendant was not aggrieved by the court's allowance of interest accordingly.

Appeals from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Southern California Telephone Company against W. L. Carpenter,

individually, and doing business as Argonne Van & Storage Company, etc., and others, for money due on contract wherein the defendant filed a cross-complaint. From a judgment for plaintiff for \$1,638 principal and \$112.86 interest, and from orders denying the defendants' motions for new trial, to tax costs, to strike out the cost bill and to vacate the judgment, the defendants appeal.

Appeals from orders dismissed, and judgment affirmed.

W. L. Carpenter, in propria per.

Lawler, Felix & Hall, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

[1] A verdict rendered by a jury under direction by the court awarded to plaintiff the sum of \$1,638, principal, and \$112.86, interest, as due under a contract entered into between the parties on January 15, 1943. Defendant has claimed an appeal from this judgment, also from the orders of the trial court denying his motions for a new trial, to tax costs, to strike the cost bill and to vacate the judgment. Referring to section 963, Code of Civil Procedure, we find that there is no authority for an appeal from any of the matters mentioned except from the judgment itself. It will be necessary, therefore, to dismiss the purported appeals from the various orders of denial. As to the appeal from the judgment, the appellant, appearing here in propria persona as he appeared also at the trial, has not clearly stated his grounds, but it appears that he takes exception to many rulings of the court in regard to the admission and rejection of certain items of testimony; he also claims that by reason of the court's granting the motion for a directed verdict he was denied his right of trial by jury in violation of the Constitution.

The appellant, for some years, has been engaged in the business of moving service and also storage. As a means of advertising and as a convenience for the public, his patrons and himself, he secured various listings in the Los Angeles Classified Telephone Directory, sometimes called the "Buyer's Guide." These listings, eight in

number, appear in the contract which appellant signed, hereinafter set out, and it will be noted that the first three items provide for publication under the same name as the "advertiser," namely, "Argonne Van & Storage Company," a title under which appellant did business, and that the balance of the listings incorporate that name. The Los Angeles Telephone Directory, issue of March, 1943, was introduced as Exhibit 6 in this case and, on page 379, appears the two-column ad for "Moving Service," for which a charge of \$100 monthly was made under the contract. On page 378 appears a half-inch columnar ad, reading "Hollywood Argonne Van & Storage Company." On page 376, another half-inch columnar ad, reading "Clipper Line Argonne Van Lines," appears. The other ads mentioned in the contract also appear in the directory and in all these ads the same telephone number is listed, namely, ADams 1—1121. On page 579 of the directory, under the title "Storage," appears in the lower left hand quarter thereof under the name "Ar-

gonne Van & Storage Company," the second item listed in the contract, double one-half column, for which a monthly charge of \$55 was fixed.

The contract upon which the action is based reads as follows:

"Southern California Telephone Company—Advertising Contract

"Subject to the terms and conditions printed on the reverse hereof and expressly made a part of this contract, the undersigned requests the Southern California Telephone Company at Los Angeles, to insert advertising as indicated below in the March 1943 issue of the Los Angeles Classified Telephone Directory for one issue only, for which we agree to pay \$182.00 per month, in advance, on publication of the advertising and a like amount each and every month thereafter as long as the advertising appears in the directory.

"No employee of the Company is authorized to vary any of the terms and conditions of this contract.

H. E. Dryden for Hulme
Salesman

Argonne Van & Storage Co.
Advertiser

Date Jan. 15, 1943

Address 806 W. 47th

by W. L. Carpenter
Title Owner

Name	Space	Headings	Mo Charge
Same ADams 1—1121	2 Col	Moving Service	100.00
Same ADams 1—1121	Dbl 1/2 Col	Storage-Household	55.00
Same ADams 1—1121	1/2" Infl	Moving Service	4.50
Beverly Hills Argonne Van & Storage Co. ADams 1—1121	1/2" Infl	Moving Service	4.50
Hollywood Argonne Van & Storage Co. ADams 1—1121	1/2" Infl	Moving Service	4.50
Clipper Line Argonne Van Lines ADams 1—1121	1/2" Infl	Moving Service	4.50
L. A. Argonne Van & Storage Co. ADams 1—1121	1/2" Infl	Moving Service	4.50
Wilshire Argonne Van & Storage Co. ADams 1—1121	1/2" Infl	Moving Service	4.50"

Among the "Terms And Conditions" listed on the reverse side of the contract, the first item is couched in the following language: "This contract constitutes the entire agreement between the parties and is subject to the approval of the Southern California Telephone Company herein called the 'company' it being understood that the advertising copy furnished by the advertiser must be acceptable to the Company and that the printing of the advertising herein specified will constitute such acceptance and approval." The last of the "Terms and Conditions" reads as follows: "This contract shall at all times be subject to such changes or modifications by the Railroad Commission of the State of California as said Commission may from time to time direct in the exercise of its jurisdiction."

The initial step in this proceeding was the filing, on September 18, 1943, in the Municipal Court of Los Angeles, of a complaint for services rendered against W. L. Carpenter, individually and doing business as Argonne Van & Storage Company. After a demurrer was sustained, respondent filed an amended and supplemental complaint, to which appellant filed a pleading entitled "Defendant's Answer to Amended and Supplemental Complaint: Counter Claim and Cross-Complaint," seeking a total of \$10,000 damages. Although there was no separate cross-complaint filed, respondent treated the pleading as containing a cross-complaint and filed an answer thereto. Since the amount prayed for in the "Counter Claim and Cross-Complaint" exceeded the jurisdiction of a municipal court, the case was transferred to the superior court.

When the matter came on for hearing and before the jury was impaneled, it was stipulated between the parties that respondent might file a "Second Amended and Supplemental Complaint" and that appellant's "Answer * * * Counter Claim and Cross-Complaint" be deemed a responsive pleading.

The second amended and supplemental complaint alleged, in substance, the making of the contract between the parties; that

the form thereof and the rates upon which it was based were on file with the Railroad Commission of the State of California and that the advertising was subject to the rates, rules and regulations on file with the commission; that the directory was published on March 1, 1943, and contained the appellant's advertising and listings provided for by the contract; that said issue of the directory was in force for the period of March to November, 1943, inclusive; that respondent performed all the terms of the contract called for, and pursuant thereto was entitled to the sum of \$182 per month for the nine months' period; that no part of that sum, \$1,638, had been paid and that it was due with interest thereon.

Appellant's answer denied that respondent operated pursuant to the rules, regulations and other provisions of the Public Utilities Act, Gen.Laws, Act 6386; denied that the form of the contract pleaded and rates were on file with the Railroad Commission or that the form of the contract or the charges were in accordance with the rates, rules and regulations which the company alleged it had on file with the Railroad Commission; denied that the company had performed all of the terms of the contract to be performed on its part and denied that there was any money due from appellant to respondent. In his first affirmative defense and "for counter claim and cross-complaint" appellant alleged that he was engaged in the business of moving and storing household furniture; that he owned a certificate of public convenience and necessity, issued by the California Railroad Commission, which authorized him to operate as a highway common carrier; that the advertising contract of January 15, 1943, was unlawful and illegal and contrary to the rates, rules and regulations of respondent lawfully on file with the Railroad Commission and in effect at that time; that the respondent "required" appellant to enter into the contract on the form prescribed and furnished by it and at the rates designated by it; that said rates are not just or reasonable nor were they then nor are they now lawful rates approved by the Railroad Commission; that appellant has

been and will continue to be injured and to suffer loss of business because of his refusal to pay unlawful rates of the company for advertising space in the classified directory in that respondent refuses to publish and print advertising matter for appellant at the rates which it has lawfully on file with the Railroad Commission and that because appellant refuses to pay respondent more than its published and approved rates respondent refuses to accept or print appellant's advertisements in its classified directory, all to appellant's injury in the amount of \$5,000. Appellant's second affirmative defense and "for counter claim and cross-complaint" alleges that respondent is a public utility and has a monopoly and, as such, publishes the only classified telephone directory appearing in the Los Angeles area; that appellant requires advertising space in said directory in order for his customers to locate him; that appellant has offered to pay respondent its lawful rates for advertising space in its classified directory but it fails and refuses to publish appellant's advertisements at the lawful rates; that in connection with the publishing and printing of advertisements in the "Moving" section of the classified directory respondent prints and publishes advertisements of moving companies which hold out different moving companies to the public as common carriers of household goods and that such advertisements are injurious and a detriment to appellant's business in that they advertise a service for which the advertisers have no license under the Auto Stage and Truck Transportation Act of 1917, St.1917, p. 330, as a common carrier, all to appellant's injury and damage in the sum of \$5,000.

At the trial respondent proved the material allegations of its second amended and supplemental complaint, introducing Exhibit 4, a certified copy of the classified telephone directory advertising schedule indicating that it had been "filed with and approved by said Railroad Commission" and had been "in effect since December 1, 1940," and revealing that the following charges, among others, were the same as those made in the contract of January 15, 1943, *supra*:

	Charges
"(1) Display Advertisements	Per Month
Two column	\$100
Double 1/2 Column	55
...	
(2) Column Advertising: ...	
1/2 Columnar Inch.....	4.50..."

Plaintiff's Exhibit 2, being a copy of the form of respondent's "Advertising Contract," which had been "filed with and approved by said Railroad Commission" and was "in effect from October 24, 1941 to August 29, 1943," likewise revealed that it was the same form of contract as that entered into between the parties. There was no showing of any change or modification by the Railroad Commission in the form of the contract during its term, nor was there evidence of any change in the rules, rates and regulations by which the respondent was governed.

[2] At the conclusion of respondent's case, appellant, in support of his defense, offered to prove that at some time in the past the classified directory was set up in a three-column page; that the company changed it to a four-column page directory, but continued to make the same charges as when the directory contained a three-column page; that an advertisement which formerly occupied two-thirds of a page in a three-column page directory now occupied only half a page in the four-column directory; that since the size of the columnar space was decreased without any changes or reduction in the rates therefor, this constituted a rate increase which should have been but was not justified by the Railroad Commission after a public hearing; that the present rates as disclosed by Plaintiff's Exhibit 4 "in connection with the present form of the book were not authorized by the Railroad Commission" and that the charges are "unjust and unreasonable and not warranted by the California Railroad Commission"; that appellant has been injured by respondent's demands "to pay the wrong rate" and will continue to be injured and suffer a loss of business by refusal to advertise and to pay a rate which is "unlawful." These offers of proof, ob-

jected to by respondent, were properly rejected by the trial court.

Appellant makes some thirty-six alleged assignments of error, and maintains on appeal, as he did during the trial, that "the contract was made on the basis of a 'Two Column Advertisements' contained in the three-column book and not a four-column book, as, was printed." According to the appellant, the former plan by which a three-column directory was issued by the respondent several years prior to 1940 was abandoned before that year and a four-column directory issued at all times thereafter. There was no evidence before the court regarding any charge for advertising rates in a four-column directory or a three-column directory, as such, but merely schedules of rates charged according to the space provided for in the contract, namely, two column, double one-half column and one-half inch "Inf" (meaning, informational listing). Since all these rates had been approved by the Railroad Commission and applied equally to every advertiser whose name appeared in the directory, it is apparent that there was no discrimination practiced against this appellant and that he suffered no real injury. He obtained just what he bargained for but has endeavored, with an expenditure of time and labor, which, to us, seems altogether disproportionate, to escape payment by relying upon legal principles which have no present application and fanciful theories which the court was compelled to reject. An example of the latter was the idea that he could attack in this proceeding rates which had been approved by the Railroad Commission, while section 65 of the Public Utilities Act provides that "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." In section 67 of the Act, it is stated that "* * * No court of this State (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission [etc.]." That the trial judge was fully aware of this situation appears from his comments quoting sections 65 and 67 of the Act and stating to appellant, "You are making in effect a col-

lateral attack on the rates and charges fixed by the Commission for advertisements in the classified telephone directory as put out by the plaintiff," and at another point, "But it is not for this Court in this proceeding to determine their rates, I mean to correct their rates or to annul their rates or to enjoin the rates they have fixed."

[3-6] The contention of appellant that the trial judge erred when he granted respondent's motion for a directed verdict and thereby deprived the appellant of his right to a trial by jury, as provided by the Constitution, cannot be sustained. It is stated in *Walters v. Bank of America, Etc., Ass'n*, 1937, 9 Cal.2d 46, at page 49, 69 P.2d 839, at page 840, 110 A.L.R. 1259: "The trial court, in a proper case, may direct a verdict in favor of a party upon whom rests the burden of proof, in this case the plaintiff. Substantially the same rules apply to directed verdicts in favor of plaintiffs as apply to such verdicts in favor of defendants. *Bias v. Reed*, 169 Cal. 33, 145 P. 516; 24 Cal.Jur., p. 913, § 163. A directed verdict may be granted, when, disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such a verdict has been [were] rendered. In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; *Parker v. James Granger, Inc.*, 4 Cal.2d 668, 52 P.2d 226. In passing on the propriety of the trial court's action in directing a verdict, the doctrine of scintilla of evidence has been rejected in this state. In re Estate of Baldwin, 162 Cal. 471, 123 P. 267. A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant. *Kohn v. National Film Corp.*, 60 Cal.App. 112, 212 P. 207; 24 Cal.Jur., p. 915, § 163."

[7] A final contention by appellant is that the interest computed on the judgment is erroneous and cannot be reconciled with

the lawful rates of interest in California based on the principal sum claimed due on the second amended complaint. He does not suggest what the proper interest should be nor further enlighten the court as to the basis of his objection. It appears from the reporter's transcript that a motion was made toward the close of plaintiff's case to amend the second amended and supplemental complaint by inserting, as the date from which interest accrued, the 13th day of December, 1943, instead of the date which appeared in the complaint, November 1, 1943. According to the record, appellant stipulated that that change might be made. However, the clerk's transcript shows that the amending date was interlined as December 15th instead of December 13th as had been agreed upon. From this situation arises a difference of two days in reckoning interest, but since appellant had agreed that the correct date might be shown as December 13th, we are satisfied that he was not aggrieved by the court's allowance of interest accordingly.

The purported appeals from the orders denying motions for a new trial, to tax costs, to strike the cost bill and to vacate the judgment are each and all dismissed. The judgment is affirmed.

SHINN and WOOD, JJ., concur.



75 Cal.App.2d 481

BURNS v. McGRAW.

Civ. 15209.

District Court of Appeal, Second District,
Division 1, California.

July 24, 1946.

1. Wills ⇨722

A legatee to whom lessee's interest in lease of realty was bequeathed does not obtain title from executor but directly by virtue of the will provisions, such title being ultimately evidenced by the court's order of distribution. Probate Code, § 300.

2. Landlord and tenant ⇨104

The distribution of a lease under a bequest of lessee's interest to her daughter, without consent of lessor, did not constitute a breach of lease provisions against assignment entitling lessor to declare lease forfeited and repossess the leased premises, in absence of any special provision in lease reserving right to terminate lease upon lessee's death or requiring consent to a bequest of the lease. Civ.Code, § 1442.

3. Appeal and error ⇨1008(3)

When the construction given an instrument appears to be reasonable and consistent with party's intent, the appellate court will not substitute another interpretation.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Margaret Gray Burns against Herschel McGraw for declaratory relief involving the construction of a written lease of real property. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Harry J. McClean and L. J. Styskal, both of Los Angeles, for appellant.

Charles E. Taintor, of Los Angeles, and Allport & Allport, of Hollywood, for respondent.

DORAN, Justice.

This is an action seeking declaratory relief, involving the construction of a written lease of real property known as the "Ivar House" restaurant, etc., located at 1737 Ivar Street in Hollywood, California. The controversy arose out of the death of the lessee, Orsina Gray Thompson, and her will which bequeathed said lease to an adopted daughter, Margaret Gray Burns, the respondent. The facts, which are not in dispute, may be summarized as follows: On April 4, 1941, after a previous lease and tenancy for some years between the same parties, the lease under discussion was executed between the owners, T. T. Perry et al. and the testatrix Orsina Gray Thompson, covering a ten year period ending on April 30, 1951, at a total rental of \$35,700 payable in monthly installments of \$300.

The lessee occupied the premises and operated the "Ivar House" until May 24, 1943, and on that date died, leaving the will in question, which was duly admitted to probate on June 17, 1943, one Ella Rac Briggs being then appointed executrix. The executrix took possession of the premises, operating the business and paying the rent, \$300 per month, up to and including the rent for January, 1945, without objection on the part of the owners. On January 17, 1945, the appellant, Herschel McGraw, purchased the real estate from the Perrys, and in the escrow appellant was apportioned and accepted \$140 of the January rent. Checks for the February and March rent were sent by the executrix and were held by appellant until March 6, 1945, at which time the executrix gave to appellant a writing which stated that "Neither your cashing of the check for \$300.00 which I have heretofore given you in payment of rent * * * nor your acceptance of any rent of said property which I shall hereafter pay you, shall be construed, as far as I, as executrix, am concerned, as a waiver." Thereupon appellant cashed the rent checks for February and March and later accepted rent for April and May.

On March 2, 1945, the executrix filed a petition for partial distribution, asking that the Ivar House business and lease be distributed to the respondent, legatee named in the will. The appellant, as successor to the lessors, filed objections to the distribution on the ground that no consent had been given "to such bequest or any transfer, assignment or conveyance of said lease or to the distribution thereof in the manner prayed for". Such distribution was alleged to constitute a breach of the lease provisions against assignment. The petition for distribution then went off calendar and has not been heard, the present action for declaratory relief being thereafter commenced.

The pertinent provisions of the lease are as follows:

"12. Lessee shall not assign this lease, or any interest therein, * * * without the written consent of lessor first had and obtained, and a consent to one assignment

* * * shall not be deemed a consent to any subsequent assignment * * * Any such assignment * * * without such consent shall be void, and shall, at the option of lessor, terminate this lease. This lease shall not, * * * be assignable as to the interest of Lessee, by operation of law, without the written consent of lessor."

"13. Either (a) the appointment of a receiver * * *, or (b) a general assignment by lessee for the benefit of creditors, or (c) any action taken or suffered by lessee under any insolvency or bankruptcy act shall * * * constitute a breach of this lease by lessee."

"21. The covenants and conditions herein contained shall, subject to the provisions as to assignment, apply to and bind the heirs, successors, executors, administrators and assigns of all of the parties hereto; and all of the parties hereto shall be jointly and severally liable hereunder."

The will of Orsina Gray Thompson contained the following provision:

"I do not own the fee title to the real estate, but have been operating said business for a long period of time on a lease. I hereby give, devise and bequeath said lease, together with all furniture, furnishings, equipment and stock on hand to my daughter, Margaret Gray" (Burns).

As set forth in the Findings of Fact, the controversy herein relates to the question, "Is the consent of the defendant necessary, under the provisions of said lease, to a valid devolution of said lease from Orsina Gray Thompson, through said bequest in her will, to her daughter, Margaret Gray Burns?" Or, stated otherwise: "Will a distribution of said lease, under said bequest, as one of the assets of said business, to the plaintiff, Margaret Gray Burns, without the consent of the defendant, Herschel McGraw, constitute a breach of said lease entitling said defendant to terminate same and declare said lease forfeited and repossess the premises?" The trial court determined that the distribution of the lease to the plaintiff, under the bequest in the lessee's will, without the present lessor's consent, "will not constitute a breach of said lease entitling defendant to declare said lease forfeited," and that the

defendant's consent "is not necessary to a valid devolution of said lease from Orsina Gray Thompson, Deceased, through the bequest thereof * * * to her daughter, Margaret Gray Burns."

It should be noted at the outset of this discussion, that the appellant does not contend that the death of the lessee terminated the lease. The appellant's brief also concedes that "The devolution of the lease to the Executrix having occurred by operation of law, was not a breach of the covenant in the lease against assignment." The brief further states that, "Appellant's contention, applied to the circumstances of the case, leaves the lease in the possession of the Executrix by operation of law, for the benefit of the heirs of the decedent lessee, who may be entitled thereto." The only point presented, therefore, is that "Any attempt by the Executrix to convey or transfer the lease pursuant to the purported bequest * * * would be a breach and would entitle the lessor, Appellant herein, to terminate the lease." Although the decisions in this and other jurisdictions are not numerous, they leave little doubt that under the circumstances here presented the present owner and lessor is not entitled to claim a forfeiture of the lease.

There are three California cases dealing generally with the present subject, and cited by both parties to this appeal. The first of these is *Southern Pacific Co. v. Swanson*, 73 Cal.App. 229, 238 P. 736, 738, in which it was held that a lease to defendant's husband, the term of which extended some six months after the lessee's death, did not terminate upon death, and the lessee's estate "become liable for the payment of rent for the remainder of the term of the lease, to be collected as any other claim against it. *Shepperd v. Tyler*, 92 Cal. 552, 28 P. 601. The estate's liability arises out of privity of contract, based upon the lease * * *." In *Stratford Company v. Continental Mortg. Co.*, 74 Cal.App. 551, 554, 241 P. 429, 430, the appealing landlord insisted, as does the present appellant, upon the forfeiture of a lease forbidding assignment without consent of the lessor. In the *Stratford* case the lease also provided for a forfeiture "in the event that any person other than the

lessee named herein, shall secure possession of the interest of the lessee hereunder, under execution, * * * receivership or proceeding in bankruptcy, or other operation of law, or otherwise." The lessee's administratrix, during the ordinary course of administration, sold and assigned the leasehold interest without the lessor's consent, and the purchaser thereof went into possession. Affirming the decision below, the appellate court held that such sale and assignment did not work a forfeiture of the lease. In this connection, the court said: "we have paid due regard to the rules of law that, where there is a claim made that a forfeiture of rights under a written instrument has occurred, the burden is upon the party making the point 'to show that such was the unmistakable intention of the instrument' (*Quatman v. McCray*, 128 Cal. 285, 60 P. 855); and that the courts tenaciously cling 'to the rule that forfeitures of estates and restraints upon alienation should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction' (*Randol v. Scott*, 110 Cal. 590, 42 P. 976). See, also, *Jameson v. Chancellor-Canfield Oil Co.*, 176 Cal. 1, 167 P. 369, citing Civ.Code, § 1442." The code section just mentioned, provides that "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." In the *Stratford* case, a hearing in the Supreme Court was denied. A third California case is *Joost v. Castel*, 33 Cal.App.2d 138, 91 P.2d 172, where the court held that the lessee's death did not terminate a lease, that an ordinary covenant against assignment does not bind the tenant's executors, and that the lessee's estate was liable for rent for the unexpired term of the lease. The *Stratford* case is cited with approval.

Appellant's brief concedes that another case, *Squire v. Learned*, 196 Mass. 134, 81 N.E. 880, 881, 11 L.R.A., N.S., 634, 124 Am. St.Rep. 525, 12 Ann.Cas. 977, "has been extensively cited as an authority contrary to the contention of this appellant." The Massachusetts court there held that a bequest of the lease term, in trust, did not constitute a breach of a covenant not to assign the lease. The language of this de-

cision seems particularly applicable to the instant case: "The question in all cases is a question of construction. The reason why the bequest to an executor is not a breach of the lessee's covenant not to assign is that [from] the insertion of that covenant (a general covenant not to assign) in a lease for a specified term of years the court cannot impute to the parties to the demise an intention to permit the leasehold interest to go to the administrator and to prevent the lessee from making a will and disposing of his property, including the leasehold interest in question. If it had been the intention of the parties to bring the leasehold interest to an end on the lessee's death, a provision to that effect could have been inserted. So if it had been their intention to provide that the leasehold interest should not pass by will although it could vest in an administrator, a clause to that effect could have been adopted. * * * In the absence of such or similar specific provisions, *the insertion of a general covenant not to assign ought not in our opinion to be construed to prevent the transmission of the leasehold interest either to an administrator or to an executor or legalce.*" (Italics added.) To the same effect is the case of Francis v. Ferguson, 246 N.Y. 516, 159 N.E. 416, 55 A.L.R. 982, where the court cited with approval the Massachusetts case of Squire v. Learned just mentioned. The Francis case held that in order to prevent the executors from disposing of a lease, "general language" against assignment is not sufficient; the prohibitory language of the lease must be "very special".

Appellant, seeking to distinguish the present case from the cited authorities, argues that the lease here under consideration contains "very special" language which should prohibit respondent from taking the lease bequeathed in the will. Appellant then points to the lease provision that "The covenants and conditions herein contained shall, *subject to the provisions as to assignment*, apply to and bind the heirs, successors, executors, administrators and assigns of all the parties hereto." (Appellant's italics.) Far from being "very special" language, however, the instant terminology appears to do nothing more than par-

aphrase the more or less conventional language found in practically all leases. The Ivar House lease neither provides that the lessee's death shall work a forfeiture at the lessor's option, nor does it stipulate that the lessee shall not bequeath the lease along with the business equipment. Had such or similar phraseology been employed, doubtless it would constitute "very special" language which would prohibit any possible devolution of the lease without the lessor's consent. But such language is not there, and cannot by judicial construction or otherwise, be read into the written instrument.

The provision quoted above, to the effect that the lease should be binding upon the "heirs, successors," etc., would reasonably seem to indicate an intent on the part of the makers, that the original lessee's successors, whether technically "heirs" or legatees, might, by reason of the lessee's death, be carrying on the Ivar House business. This interpretation is hardly consistent with the idea of forfeiture. Moreover, the lease definitely provides that certain designated legal contingencies such as receivership, assignment for benefit of creditors, insolvency and bankruptcy proceedings, shall "constitute a breach of this lease by lessee." In this category there is no mention of probate proceedings. It is therefore not unreasonable to assume, as stated in respondent's brief, that the parties "did not intend to include proceedings in probate administration upon death of the lessee. This appears to be an instance where the maxim *expressio unius est exclusio alterius* is applicable. This is confirmed by the addition of the provision which recognized the rights and possible existence of heirs," etc.

It is urged on behalf of appellant, that the "phenomenon of death" should not be permitted to "deprive the landlord of the right which the courts universally agree he possesses"—that of protection against unwanted and undesirable tenants. In *De Angeles v. Cotta*, 62 Cal.App. 691, 695, 217 P. 821, 822, the court quite properly said: "Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him

without his consent." However, the De Angeles case did not involve a situation analogous to the present one, nor is it authority for appellant's contention. So far as the "phenomenon of death" is concerned, appellant does not here claim that the lessee's death worked a forfeiture of the lease. Indeed, it is affirmed that the lease is "in the possession of the Executrix by operation of law, *for the benefit of the heirs of the decedent lessee, who may be entitled thereto.*" If this be so, then such "heirs," taking the lease without the lessor's consent, might easily be as undesirable to the lessor as any legatee named in the lessee's will. In either or any case, the lessor desiring such protection against the intrusion of strangers, has only to insert in the lease "very special" language reserving the right to terminate the lease upon a tenant's death, or requiring consent to a bequest of the lease.

[1] The respondent's brief comments on the fact that the appellant "assumes that title to the lessee's interest under said lease devolved first to the executrix by operation of law," which transfer appellant does not object to; "and subsequently from the executrix by an express transfer to the legatee," to which latter transaction the appellant takes exception. This theory of a double transfer during the course of administration is, however, hardly tenable in view of Section 300 of the Probate Code which provides that: "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed * * * subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition * * *." The legatee, therefore, does not obtain title from the executor, but directly by virtue of the will provision, such title being ultimately evidenced by the court's order of distribution. The executor is, in fact, merely an administrative officer charged with carrying out the testator's expressed wishes under supervision of the court.

[2,3] In the instant case the declaratory judgment of the trial court appears to reflect the law as laid down in the

cited cases. And as said in *Re Estate of Boyd*, 24 Cal.App.2d 287, 290, 74 P.2d 1049, 1050, "When the construction given an instrument * * * appears to be reasonable and consistent with the intent of a party, appellate courts will not substitute another interpretation though it seems equally tenable."

The judgment is therefore affirmed.

YORK, P. J., and WHITE, J., concur.



75 Cal.App.2d 580

In re GALLETTO'S ESTATE.

SATARIANO et al. v. GALLETTO.

Civ. 13089.

District Court of Appeal, First District,
Division 1, California.

Aug. 1, 1946.

As Corrected Aug. 8, 1946.

1. Husband and wife ⇨14(3)

Where separate deeds conveyed to wife an undivided half interest in certain land and an undivided half interest in same land to husband and wife in joint tenancy, the joint tenancy thereby created was valid. Civ. Code, § 164.

2. Joint tenancy ⇨8

The rule that one joint tenant cannot, as to the joint tenancy interest involved, own a greater share than any of the other joint tenants does not prohibit one joint tenant from also owning a different and distinct interest in the property. Civ. Code, § 164.

3. Executors and administrators ⇨3(2)

That general administration of the estate had reached the point of the filing of a final account and petition for final distribution and of holding a hearing thereon before administrator and husband of deceased petitioned to have the estate summarily set aside to him on ground that after deduction of value of property held

in joint tenancy and which had erroneously been inventoried as a part of the estate, the estate would be less than \$2,500 in value, did not prevent the setting aside of estate as prayed upon proof of the facts. Probate Code, § 642.

4. Executors and administrators ⇨3(2)

Under section of Probate Code providing for setting over of estate of less than \$2,500 on the filing of an "inventory", the quoted word must be interpreted to include amended inventory. Probate Code, § 642.

See Words and Phrases, Permanent Edition, for all other definitions of "Inventory".

5. Executors and administrators ⇨72

The inclusion of personal property of administrator in an inventory does not estop him from claiming such property as his own. Probate Code, § 1200.

6. Executors and administrators ⇨3(2)

That administrator first instituted ordinary administration proceedings did not estop him from thereafter instituting summary proceedings where opposing parties could have protected themselves and received actual notice by complying with Probate Code and it was not shown that they could have successfully opposed petition for summary administration if they had appeared. Probate Code, § 1200.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Maria Satariano Galletto, deceased, by Joseph Galletto against Joseph Satariano, Anthony Satariano and Samuel Satariano, to terminate a joint tenancy allegedly existing between plaintiff and the decedent. Judgment for plaintiff and subsequently the entire estate which was less than \$2,500 after deduction of property held in joint tenancy, was set over to plaintiff as the surviving spouse of the decedent, and the defendants appeal.

Orders affirmed.

Simeon E. Sheffey, of San Francisco, for appellants.

Charles R. Collins and Tobin & Tobin, all of San Francisco, for respondent.

PETERS, Presiding Justice.

The appellants are the three sons of Maria Satariano Galletto. Their father predeceased their mother. The respondent is the second husband and surviving spouse of Maria, and is the administrator of her estate. As such administrator he commenced regular administration of his wife's estate filing an inventory in which the total estate was appraised at \$3,825.75. Included within this inventory was the entire interest in a certain parcel of real property valued at \$3,500. The respondent, however, while listing this property as belonging to the estate in its entirety, contended that a one-half interest was held by him and his deceased wife as joint tenants, and that as surviving joint tenant this interest belonged to him. After the death of his wife, he commenced a proceeding to terminate this joint tenancy interest. This proceeding was contested by appellants and resulted in an order in his favor terminating the joint tenancy. Thereafter, the respondent filed an amended inventory in his wife's estate showing that with this interest deducted the total estate was valued at \$2,075.75, and he thereupon petitioned that the entire estate, being less than \$2,500, be set aside to him as surviving spouse. The trial court set aside the estate to respondent. Appellants appeal from the order terminating the joint tenancy and from the order assigning the estate to respondent. Their main contention is that the joint tenancy deed was void in that the wife admittedly owned an undivided one-half interest in the property as her separate property, and it is urged that it is legally impossible for one joint tenant to own an undivided interest in real property as her separate property and the balance with another as a joint tenant. It is also contended that even if the joint tenancy deed is valid, and the estate is less than \$2,500 in value, respondent's application to have it set aside to him came too late in the proceedings, either because he is estopped, or because he has elected his remedy. All of these contentions lack merit.

Before directly discussing these contentions there is a preliminary matter relating to the record to which reference should be made. The record shows that when petitioner filed his amended inventory and petitioned to have the estate assigned to him as surviving spouse the statutory notice was given, but no objection to the petition was made by appellants. Thereafter, the appellants filed the notice of appeal from the orders of the trial court heretofore mentioned. The appellants ordered a clerk's transcript prepared containing copies of various documents. Upon respondent's request the trial court ordered stricken from the proposed clerk's transcript the following documents: (1) The petition for letters of administration; (2) the order appointing administrator; (3) the inventory and appraisal; (4) the final account and petition for settlement and for final distribution; (5) the exceptions to the final account and petition for settlement and for final distribution; (6) the minute order overruling the exceptions and granting the petition for distribution.

Thereafter the appellants petitioned this court pursuant to Rule 12 of the Rules on Appeal to augment the record by the inclusion in the clerk's transcript of these documents. This court granted the request subject, however, to the provision that the court was not then "passing on the relevancy of the documents and saving to respondent all objections to the court considering such documents on the appeal." The respondent contends, with considerable logic, that this appeal is governed by § 1242 of the Probate Code, and that under that section the proffered documents are no proper part of the clerk's transcript. That section provides in part:

"The following papers, without being attached together, shall constitute the judgment roll in the proceedings mentioned in this code:

"1. The petition or application or contest or report or account which initiates a particular proceeding; any order directing notice to be given of the hearing thereof; any notice of the hearing thereof, or any order to show cause made thereon, with the affidavits showing such publica-

tion, posting or mailing of the notice or order as may be required by law or the order of the court; the citation, in case no answer or written opposition is filed by a party entitled, by law or order of court, to notice of the proceeding by citation, with the affidavit or proof of service thereof, and if service of such citation is made by publication, the affidavit for such publication and the order directing publication; any finding of the court or referee therein; the order or judgment made or rendered therein; and the letters testamentary or of administration, if any."

It would appear that, under this section, it is very doubtful indeed whether the proffered documents have any rightful place in the clerk's transcript. However, in view of the conclusions we have reached on these appeals, it is immaterial whether such documents be considered or not, and in the balance of this opinion we will assume that such documents are properly before us.

If the entire proffered record be considered, the following dates are pertinent: June 26, 1941—respondent petitioned for letters of administration in his wife's estate listing himself and the three appellants as the decedent's heirs at law.

July 9, 1941—respondent appointed administrator.

June 19, 1942—respondent filed a petition to terminate a joint tenancy in an undivided one-half of the real property in question, claiming therein such interest as survivor.

June 24, 1942—respondent filed an inventory appraising the estate at \$3,825.75. Included in the inventory was the entire interest in the real property here in question, valued at \$3,500.

June 25, 1942—respondent filed a final account and petition for final distribution.

July 6, 1942—appellants filed exceptions to the petition to terminate the joint tenancy.

July 7, 1942—appellants filed exceptions to the final account and petition for final distribution.

August 3, 1942—decree entered terminating the joint tenancy and determining respondent was the surviving joint tenant of this interest. This decree was filed May 14, 1943.

April 30, 1945—the respondent, as administrator, filed an amended inventory valuing the estate at \$2,075.75, and in which but an undivided one-half of the property was included as an asset. On the same day respondent filed a petition that the entire estate be set aside to him as surviving spouse. The required statutory notices were posted.

May 14, 1945—order made assigning the estate to respondent.

In attacking the orders appealed from it is the theory of the appellants that the estate was of the value of more than \$2,500 because, so they claim, the entire interest in the real property involved belongs to their mother's estate. Before discussing this issue directly some reference should be made to prior litigation involving this property. In the prior litigation appellants took the position the property belonged to the estate of their father who predeceased their mother. See *Satariano v. Galletto*, 66 Cal.App.2d 813, 153 P.2d 201. That case discloses that although when the father of appellants died in 1921 the real property in question may have been part of his estate, his wife subsequently acquired at least a title by adverse possession. Thus it has been judicially determined that the property belonged to Maria Galletto. The opinion in that case also shows that respondent married Maria in 1927 and lived with her on the property until her death in 1940. At the time of the marriage the property was encumbered to the extent of \$1,600 and the respondent paid off, with his separate property, \$900 of this debt. In 1930 Maria conveyed to respondent a one-quarter interest in the property. In 1931 Maria and respondent conveyed their respective interests to a title company, and that company thereupon, by separate conveyances, conveyed an undivided one-half interest to Maria, and, as part of the same transaction, the other undivided one-half interest was conveyed to Maria and respondent as joint tenants. It is the theory of appellants on the present appeals that this last deed from the title company to their mother and respondent as joint tenants was void for the asserted reason that it is legally impossible for one

joint tenant to own an interest greater than the other. It is urged that, under the circumstances here existing, one of the essential unities required for a joint tenancy is lacking, namely, unity of interest. If this argument is sound, the order setting aside the estate to respondent should be reversed because at least one-half of the interest now claimed by respondent ($\frac{1}{4}$ interest in the total property) would be the property of the wife's estate and this would cause that estate to exceed \$2,500 in value.

The argument of appellants is unsound. Appellants place their main reliance in support of a reversal on certain language appearing in the case of *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003. That case has no application at all to the problem here involved. There the husband and wife, with community funds, purchased certain real property and took title as joint tenants. Upon dissolution of the marriage the wife contended that this joint tenancy deed, when read in connection with the presumptions created by § 164 of the Civil Code, created a peculiar joint estate in which she took a one-half interest as her separate property and that the other one-half became the community property of herself and husband. Upon dissolution of the marriage the wife claimed, therefore, that she was entitled to a three-fourths interest. In refuting this contention and in holding the deed created either a conventional joint estate, or that the entire property remained community property, the court stated, 214 Cal. at page 771, 7 P.2d at page 1004:

"Respecting joint tenancy, it is only necessary to amplify the definition quoted from section 683 by a quotation from the case of *DeWitt v. [City of] San Francisco*, 2 Cal. 289, 297, opinion rendered in 1852, defining joint tenancy as follows: 'Joint-tenancy is a technical feudal estate, founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely: unity of *interest*, unity of *title*, unity of *time*, unity of *possession*. (1 Cruise's Digest, by Greenleaf,

355, sec. 11; 2 Crabb's Real Prop. sec. 2303.) But the distinguishing incident is a right of survivorship. (1 Cruise, 359, sec. 27; 2 Crabb's Real Prop. sec. 2306.) These four characteristics are the acknowledged elements of a joint tenancy, Tiffany on Real Property, vol. 1 (2d Ed.) p. 625, par. 191; 2 Blackstone Comm., 180. It is at once evident that there is thereby created but one estate and that each of the four elements, unity of interest, unity of title, unity of time, and unity of possession, must be present and an absence of any one would change the nature of the estate.

"Applying the first of these elements unity of interest, to the situation of a wife holding half the property as her separate estate and the husband holding the other half as community property, it will be at once noted that there can be no unity of interest present, for the interest of the wife would be unequal to and more than that of the husband."

[1,2] The reasoning of that case has no application here. In the instant case, by separate deeds, separate interests in the property were created. By one deed an undivided one-half interest was conveyed to the wife. That severed that portion of the title from the total title. Then the balance of the title was conveyed to the husband and wife as joint tenants. As to *that* interest, all the requisite unities exist. It is, of course, the law that one joint tenant cannot, as to the joint tenancy interest involved, own a greater share than any of the other joint tenants. That is the rule announced in the Siberell case, *supra*. The theory is, that joint tenants together have but one estate and hence their interests must be equal. That is the basis of the requirement that there must be unity of interest. See 2 Tiffany on Real Property, 3d Ed., p. 196 at p. 198, § 418; 2 Jones' Blackstone, p. 955, § 254; 2 Reeves, Real Property, p. 959, § 677. But this rule does not prohibit one joint tenant from also owning a different and distinct interest in the property. Once it is conceded that a joint tenancy may exist as to an undivided interest in property, and that rule is perfectly clear, the balance of the undivided

interest may lawfully be held by one of the tenants as well as by a stranger. The equality of interest requirement simply means that the interests of the joint tenants in the subject or interest involved in the joint tenancy must be equal. The subject of the tenancy involved herein is an undivided one-half interest in the property. In that interest the respondent and wife owned equal and identical interests. They held one and the same interests in the subject of the joint tenancy. As already pointed out, it is entirely immaterial that the wife also owned as her separate property the other undivided one-half interest. There appears to be little case authority directly in point, but the several legal writers in this field that have discussed the problem seem agreed that one joint tenant, independently of his interest in the joint tenancy, may own other interests in the same property. On principle this conclusion seems irrefutable. The usual situation discussed is, where there are more than two joint tenants, and one conveys his interest to one of the others. For example, if A, B and C own Blackacre in joint tenancy and A conveys his interest to B, such conveyance would destroy that interest in joint tenancy, and B would become, as to that interest, a tenant in common with C. But B and C would still remain joint tenants as to the interest originally acquired. This is clearly pointed out in 2 Tiffany on Real Property, 3d Ed., p. 208 at p. 211, § 425, where it is stated: "A joint tenancy may be terminated in part or wholly, not only by a conveyance to a stranger, but also by a conveyance to, that is, a release in favor of, another joint tenant. In such a case, if the effect of the conveyance or release is to vest the whole property in the land in one person, the joint tenancy is terminated because there is no longer a holding by more than one person, while if one of three or more joint tenants conveys or releases his interest in favor of one of the others, there is a severance as regards that interest, and the latter cotenant becomes, with regard thereto, a tenant in common with the third cotenant, while he is still a joint tenant with regard to that which he already held." Cited in support of the text are Litt. § 304;

2 Blackst.Comm. 186; 2 Preston, Abstracts, 61; for an interesting discussion see, also, note in 10 Minn.L.Rev. 325, discussing the case of *Kemp v. Sutton*, 233 Mich. 249, 206 N.W. 366. These principles are equally applicable to the situation involved in the instant case.

Respondent also urges that the issue involved was decided in the case of *Satariano v. Galletto*, 66 Cal.App.2d 813, 153 P.2d 201. That case, as already pointed out, was the one in which appellants were contending the property belonged to their father's estate. The court held that even if the father's estate had good record title, the wife had secured title by adverse possession. In addition to this point the court, near the conclusion of its opinion, did discuss the legal effect of the joint tenancy deed. In this discussion the word "defendant" refers to the respondent in the instant case, and the conveyances referred to are the very conveyances here involved. At page 817 of 66 Cal.App.2d, and at page 203 of 153 P.2d, it is stated: "In view of our conclusion that Maria could and did acquire title by adverse possession, which conclusion requires a reversal of the judgment, we need not discuss the effect of the joint possession of the premises by Maria and defendant over the years following 1930, during which time defendant had at least color of title to an undivided interest by virtue of the conveyances previously mentioned. The due execution of those conveyances is conceded and we are in accord with defendant's claim that, upon the death of Maria, defendant became vested with an undivided one-half interest in the premises as the surviving joint tenant of said one-half interest and that the estate of Maria became vested with the remaining undivided one-half interest which is subject to probate. It therefore appears appropriate to reverse the judgment and to direct a judgment in favor of defendant."

We do not find it necessary to determine whether that holding is *res adjudicata* in the present proceeding (it being contended that it is not because, so it is urged, appellants in the present case were not parties to that issue in that case), because on the merits we agree that that was the proper holding.

[3] Appellants also urge that even if the estate was not of a value of \$2,500, respondent's application to have it set aside to him came too late in the proceeding to be effective. As the table of dates heretofore set forth indicates, general administration of the estate had reached the point of the filing of a final account and petition for final distribution, and of holding a hearing thereon before respondent petitioned to have the estate summarily set aside to him.

Section 642 of the Probate Code provides in part: "If the decedent leaves a surviving spouse * * * and upon the filing of the inventory of the estate it appears that the net value of the whole estate over and above all liens and encumbrances of record at the date of death does not exceed the sum of two thousand five hundred dollars, the personal representative of the decedent * * * may file a verified petition showing the value of the estate to be no greater than as aforesaid, and the clerk shall fix a day for the hearing thereof."

The appellants urge that since the first inventory, filed in June, 1942, showed a value of \$3,825.75, and that subsequently the other acts heretofore mentioned were performed, and since the amended inventory and petition to set aside the estate were not filed until April 30, 1945, the above section was not complied with.

[4] To so interpret the section would frequently result in grave miscarriages of justice. Many times, and the instant case illustrates just such a situation, the value of the estate cannot be ascertained when the first inventory is filed. In the instant case the appellants were claiming the property here involved as part of the estate of their deceased father. Moreover, appellants claim that even if the property belonged to their mother the joint tenancy deed was void. Litigation was pending over these issues. Respondent listed the property as belonging to the estate and it was not until the decision in the *Satariano v. Galletto* case, *supra*, that he realized he had included a part of his separate estate as part of his wife's estate. He immediately filed an amended inventory when he had determined that the estate

was below \$2,500 in value. That he had the legal right to file an amended inventory cannot be doubted. See cases collected 11a Cal.Jur. p. 484, § 353. The word "inventory" in § 642, *supra*, must be interpreted to include an amended inventory. It follows, of course, that, upon filing the amended inventory, the respondent under the section, had the right to petition for summary administration.

[5] It cannot be successfully contended that by listing the whole of the property in the original inventory respondent was in any way estopped from later claiming the whole or part of the property as his separate property. The correct rule, amply supported by citation of authority, is stated as follows in 11a Cal.Jur. p. 487, § 355: "The inclusion of his property in an inventory does not estop the representative from claiming such property as his own, and his admissions made by including his property in the inventory are made for the benefit of the estate and do not conclude his individual right by way of estoppel * * *."

[6] Appellants argue, however, that by instituting ordinary administration proceedings they were put on notice of the pendency of the proceedings and lulled into a sense of security that such proceedings would be continued, and they contend

that if respondent is later allowed to obtain summary administration by merely posting the statutory notice, as was here done, he obtains an unfair advantage in that they, practically speaking, are deprived of an opportunity to be heard on the latter petition where they do not receive actual notice. There is no merit in this contention. In the first place, appellants could have protected themselves and received actual notice by complying with § 1200 of the Probate Code. Furthermore, before appellants can successfully claim that respondent was estopped to change the form of proceedings they must show some prejudice. The mere fact that they did not appear to oppose the petition for summary administration does not constitute prejudice, unless they can show that, had they appeared, they could have successfully opposed the petition. This they cannot do because, if the joint tenancy deed is valid, as we have held, the estate is admittedly less than \$2,500. In such estate, where the petition for summary administration was filed, they had no legal right to share.

These same arguments dispose of the contention that there was an irrevocable election of remedies.

The orders appealed from are affirmed.

WARD, J., and SCHOTTKY, J. pro tem., concur.

28 Cal.2d 686

PEOPLE v. MENDEZ.

Cr. 4721

Supreme Court of California, in Bank.

Aug. 9, 1946.

1. Criminal law ☞997

Relief by way of the writ of error coram nobis must be based on showing that some fact existed which, without fault or negligence on petitioner's part, was not presented to the court at trial of merits, and which if presented would have prevented rendition of judgment.

2. Criminal law ☞997

On petition for writ of error coram nobis, trial court properly refused to set aside plea of guilty to charge of murder.

3. Criminal law ☞997

On petition for writ of error coram nobis the purpose of which was to set aside plea of guilty to charge of murder and to vacate judgment imposing the death penalty, evidence sustained determination that defendant was not denied counsel of his own choice and was duly and ably represented by the public defender at his trial.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Antonio Santiago Mendez was convicted of murder upon his plea of guilty. From an order denying his petition for a writ of error coram nobis, the purpose of which was to set aside his plea of guilty to the charge of murder and to vacate judgment imposing the death penalty, defendant appeals.

Affirmed.

Walter L. Gordon, Jr., Everette M. Porter, and Erskine Stevenson Ragland, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal by the defendant from an order denying his petition for a writ of error coram nobis, the purpose of which

was to set aside his plea of guilty to the charge of murdering his paramour and to vacate the judgment imposing the death penalty.

The defendant was charged by information filed August 3, 1944, with the murder of Maude Pearl Farrington. At his arraignment on August 7, 1944, he pleaded not guilty, the public defender was appointed to represent him, and the cause was set for trial on October 10, 1944. On October 5, 1944, at the request of John Hill, the deputy public defender assigned to represent the defendant, the date of the trial was reset for October 23d. On October 23, 1944, the defendant withdrew his plea of not guilty. Upon rearraignment he pleaded guilty and the court proceeded to hear evidence to determine the degree. The defendant admitted that he killed the deceased and attempted to demonstrate that it was an accident. The trial court discredited his explanation, found him guilty of murder in the first degree and imposed the death penalty. On appeal this court affirmed the judgment, *People v. Mendez*, 27 Cal.2d 20, 161 P.2d 929. On November 9, 1945, the defendant was resentenced and his execution was set for February 1, 1946. This petition for a writ of error coram nobis was then filed in the superior court. The defendant was taken to Los Angeles from San Quentin and hearings were held on January 9, 10, and 11, 1946, at the conclusion of which the order from which this appeal was taken was made.

[1] Two contentions are made on appeal: First, that the trial court committed prejudicial error in refusing to set aside the plea of guilty and vacate the judgment. In passing upon the petition for the writ of error coram nobis the trial court had before it the extensive evidence taken at the hearings on the petition and the decision of this court in affirming the judgment wherein the facts were set forth at length and the questions raised on the appeal were passed upon. The circumstances attending the change of plea are there set forth. To entitle the defendant to relief by way of the writ of error coram nobis he must show that some fact existed which, without any fault or negligence on his part, was not presented to

the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment. *People v. Gilbert*, 25 Cal.2d 422, 442, 154 P.2d 657.

[2] No facts were presented by the defendant relating to his change of plea which in substance and effect were not before the court at the trial on the merits and on the former appeal. The proceedings on re-arraignment were free from error and on the subsequent proceeding to set aside his plea of guilty the court was properly guided by the facts and the law and no error was committed in its ruling in this connection.

[3] The second contention is that the defendant was denied counsel of his own choice and therefore was denied due process. The determination of this contention depends upon the sufficiency of the evidence to support the conclusion of the trial court to the contrary.

The defendant testified that prior to his arraignment and the appointment of counsel to represent him, he tried to communicate by telegraph with two private attorneys, Walter Gordon who now represents him, and Maurice Gleason; that he gave two telegraph messages with money for their transmission to deputy sheriffs at the county jail; that he did not receive a reply; that he had the funds to employ private counsel; that he and his wife had a talk at the county jail with Deputy Sheriff Raymond Hopkinson who was the investigating officer and who advised that the public defender would furnish him with proper representation; that when he was arraigned on August 7, 1944, he was represented by John Hill, a deputy public defender, and he pleaded not guilty; that neither the court nor Mr. Hill advised him of the penalty the law empowered the court to impose on a plea of guilty; that Mr. Hill advised him that if he changed his plea to guilty the court would not fix more than second degree with a maximum of life imprisonment; that he was satisfied with Mr. Hill's efforts when he pleaded guilty but some time during the hearing to determine the degree he became dissatisfied; that he knew he was charged with the murder of Mrs. Farrington; and that he also knew that the death penalty

was one of the penalties for murder in this state.

Mr. Hill, who had been a member of the public defender's office since 1927, during which time as counsel for the accused he averaged five murder cases a year, testified that when the defendant was arraigned he represented the public defender on all motions, pleas and the setting of cases for trial on the master calendar; that prior to the defendant's arraignment, he interviewed him for a period of about 30 minutes; that after the defendant entered the plea of not guilty the case was set for trial on October 10, 1944, in Department 41; that after the arraignment he temporarily dropped out of the case and that the cause was assigned to Lloyd Robinson, the deputy representing the public defender in Department 41; that on October 1, 1944, he was assigned to trial work in Department 41 and then took over the case; that he next saw defendant sometime between October 1 and 5, 1944; that on October 5th he made a motion for continuance on the ground of lack of sufficient time for preparation, which motion was granted; that before the defendant pleaded guilty to the charge of murder he had interviewed him eight or nine times in the county jail; that he advised the defendant as to the degrees of murder and the penalty for first-degree murder as either death or life imprisonment, and of his right to engage private counsel; that he asked defendant if there were any witnesses to be interviewed and subpoenaed in his behalf, and the defendant named a Mrs. Quisenberry, but said he did not want to involve either her or his wife in the trial, and that there were no other witnesses; that he and the defendant together went over the transcript of the preliminary hearing during which he asked the defendant what was correct and what was not correct, and to explain certain episodes referred to in the evidence; that he advised defendant of his right to trial by jury and the defendant stated he believed he would rely on the judge; that the later informed the defendant that the trial judge would not accept a waiver of a jury because of the nature of the first-degree murder charge and the matter of the penalty in the event of a conviction, and that it seemed

likely that he would have to be tried by a jury; that defendant asked if he could plead guilty to an offense less than murder; that later he advised defendant that Mr. Leavy, a deputy district attorney, would not consider a plea of guilty to manslaughter or to second-degree murder and intended to do all he could to obtain the extreme penalty; that defendant stated he was afraid of a jury with women on it, as the victim was a woman, and asked what the result would be if he pleaded guilty to murder; that he informed defendant that the court would take evidence and determine the degree of the crime, that he would urge the court to determine it to be murder of the second degree, and if the court determined it to be first-degree murder, he would urge the court to fix the punishment at life imprisonment; that he told defendant to think it over and he would see him the next day; that on the next day the defendant said he was going to plead guilty and leave it to him to do his best to have the offense determined as second degree and the punishment fixed at life imprisonment; that he told the defendant that he could not assure him of anything except that he would put forth his best efforts, striving to convince the court that the homicide was not premeditated but was the result of the reckless and negligent manner in which the gun was handled at the time of the discharge of the second shot; that he did not tell the defendant that if he would plead guilty he would receive a sentence of second-degree murder and under no circumstances would he be given more than life imprisonment, but told defendant that if the court fixed the offense as murder of the second degree he would get a life sentence as a maximum; that no member of the district attorney's office, either directly or indirectly, led him to believe that no punishment other than the death penalty would be sought by that office; that at no time did he have a conference with the judge who tried the case concerning the merits of the case; and that the court was not previously informed of the fact that the defendant was going to change his plea.

Deputy Sheriff Hopkinson testified that he was one of the investigating officers in

the case; that he had several conversations with the defendant; that prior to the defendant's arraignment and at a time when Mrs. Mendez was visiting him in the attorneys' room, the employment of counsel and their lack of funds were discussed, and he told both of them that the state provided the public defender and if the defendant informed the court that he was without funds, the court would appoint the public defender to represent him, and that there were good attorneys in the public defender's office; that he did not tell the defendant not to hire a private attorney; that he had a stop order on the defendant's mail and that he recalled a letter addressed to Mr. Gleason, an attorney, asking him to call on the defendant at the county jail; that he did not remember any telegrams being sent by the defendant although the stop order would extend to them as well as to letters.

Deputy Sheriff O. R. Bremer testified that he was in charge of the records showing the attorneys who called on persons detained at the county jail; that his records of visits of persons from the public defender's office showed that Mr. Hill visited the defendant on August 24, September 27th, October 18th, and October 20th, and that Robert W. Robinson, Jr., another attorney from the public defender's office, visited the defendant on September 15, 1944; that the records of private attorneys visiting their clients showed that attorneys Abbott C. Bernay and David C. Marcus visited the defendant on July 18 and 19, 1944, respectively; that he was the custodian of the record of telegraph messages sent from the county jail; that he made a search of the records for messages sent by the defendant, and that between July 3 and October 21, 1944, the only telegram sent by him was one to Marian Quisenberry.

Mrs. Mendez testified that Mr. Hopkinson told the defendant and her not to get a private attorney but to have the public defender; that although the defendant asked her to get a private lawyer for him she did not do so; that they did not have any money at all when they were talking about getting a lawyer; that the defendant told her to see Mr. Gordon, and that defendant did not tell her to see Mr. Gleason.

It was stipulated that if Mr. Gleason or Mr. Gordon were called as witnesses they would testify that they had no recollection of receiving any communication from the defendant.

On the evidence presented the trial court was justified in concluding that the defendant was not denied counsel of his own choice and was duly and ably represented by the public defender at his trial.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



28 Cal.2d 671

PEOPLE v. PHYLE.

Cr. 4723.

Supreme Court of California, in Bank.

Aug. 6, 1946.

1. Criminal law ⚔980(1)

The punishment to be imposed upon one who pleads guilty to murder in the first degree is exclusively within discretion of the trial court. Pen.Code, § 189.

2. Homicide ⚔354

In prosecution for murder committed during perpetration of robbery, wherein during trial before jury pleas of not guilty and not guilty by reason of insanity were withdrawn and a plea of guilty was entered, evidence and procedural facts sustained sentence of execution for crime of murder of the first degree. Pen.Code, §§ 189, 1239.



Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

William John Phyle, upon a plea of guilty, was sentenced to be executed for the crime of murder in the first degree. The judgment was brought before the Supreme Court by automatic appeal.

Affirmed.

Harry Bowman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Upon a plea of guilty, William J. Phyle was sentenced to be executed for the crime of murder of the first degree, and the judgment is before this court for review in accordance with the requirements of section 1239 of the Penal Code providing for an automatic appeal in every such case.

Phyle was charged with the murder of Elmer E. Frazee. During the trial before a jury, Phyle withdrew his pleas of not guilty and not guilty by reason of insanity and pleaded guilty. The court then took evidence for the purpose of determining the degree of the crime and fixing the punishment to be imposed.

All of the circumstances in connection with the brutal and unprovoked murder of Frazee were freely admitted by Phyle in conversations with officers a few hours after his arrest and in an interview at the San Diego Police Station the next day, which was reduced to writing by a stenographer. He told the officers that he arrived in San Diego on the night of November 22d. He had no money and the next day, he went to a federal housing project with the intention of robbing the safe there. That night he slept in one of the trucks left on the grounds and in the morning made inquiries in regard to the habits of the employees. Frazee was a plumber regularly employed in the maintenance work of the buildings. During the morning he was in and out of the office where the safe was located but Phyle found out that he would leave about 3 o'clock in the afternoon.

The exact time of the crime is not known. Phyle loitered around the project and, during the afternoon, entered the office. According to his account of the homicide, he stepped into the room and pulled out a 38 caliber revolver. He said nothing and neither did Frazee. Phyle "just let him have it," firing two shots. "I went out" said Phyle "to see if anybody heard the

shots * * * I ejected the two empty cartridges and put in a new one; that took about four minutes. Then I went back in and he wasn't dead yet." Frazee "started moving around again. That's when he gave me the wallet," Phyle explained. "Of course, I got kind of a shock when he wasn't dead * * * I went around in front of him, I think." The final act in the killing followed. Phyle put the gun against Frazee's head and shot him. Asked why that shot was fired, Phyle replied: "I lost my head the second time."

Phyle then went to the lavatory, "washed up," and drove away in a truck owned by the federal government. He went to Solano Beach where he had a meal. At that time he found that there was only \$1.25 in Frazee's wallet. Phyle next drove to Escondido to get off the main highway. His intention, he said, was to "dump the car and hide it out, and then take out from there to pull what I could." Early in the following morning, Escondido police officers saw the truck, which had been reported as stolen, and arrested Phyle. In the truck they found a revolver, fully loaded, a wrecking bar, a pipe wrench and Frazee's wallet.

Frazee's body was found at 5 o'clock in the afternoon, probably about two hours after the homicide. In the opinion of the coroner who performed an autopsy, the two bullet wounds in Frazee's body would not necessarily have caused death; the shot in the head was the fatal one.

The defendant is 32 years of age. At the age of 15 he enlisted in the United States Navy, serving from 1929 to 1931 when he received an honorable discharge. His criminal record commenced in 1931 when he was arrested upon suspicion of having committed a burglary. Many arrests followed; by his own count, he has been arrested 35 times. He first was convicted in 1935 when he was sentenced to 90 days in the county jail at San Luis Obispo, California. In 1940 he was sent to McNeil's Island to serve a year and a day following his conviction in the federal court upon a charge of violating the Dyer Act, 18 U.S. C.A. § 408. After being conditionally released he was twice placed in the federal correctional institution at Terminal Island

for violation of parole. In 1943, while in the army, he was sentenced to the State Prison of Colorado for grand larceny and the theft of a motor vehicle. He served 14 months upon that conviction.

Two physicians appointed by the court to examine Phyle each testified that, in his opinion, at the time of the commission of the crime, the defendant was sane. One of them stated that Phyle knows the difference between right and wrong, but does not agree with society's concepts in that regard and refuses to cooperate with authority.

No briefs have been filed in this court but the entire transcript of the proceedings has been carefully read. It shows that upon the request of the defendant made at the time of his arraignment, the court appointed counsel to represent him. This assignment was fulfilled with fidelity and proficiency. When Phyle informed his attorney that he desired to change his plea, the trial judge examined the defendant at length as to whether he had been fully informed as to his legal rights, Phyle stated that his action was entirely voluntary and he personally withdrew his former pleas and pleaded guilty to the charge of murder. This intention, it appears, was not formed at the moment. Almost two months before, in a letter which Phyle wrote to his mother while he was in the county jail, he said that he would "probably plead guilty." In regard to the crime, he wrote: "There isn't much more to say except that the robbery wasn't for a \$1.25. There was a safe in that office. But him hanging around there botched it up. I hope he's satisfied now. I *now* the publicity is tough on you, but after all, look what I've got coming in the very near future. No, I am not sorry for what I did. I just regret that I didn't empty the whole gun in him."

After the change of plea, Phyle's counsel cross-examined the witnesses who testified as to the circumstances of the homicide and continued to represent the defendant until he was sentenced. When arraigned for judgment, the defendant stated that he knew of no legal cause why it should not be pronounced and he acknowledged the prior convictions. Asked by the trial judge if he had anything to say, Phyle replied:

"Not a thing." There is nothing in the record to suggest that the police officers took any advantage of him when he was interviewed in regard to the crime. Phyle has not challenged any of the statements attributed to him by them, and the stenographic report of the questioning shows that he told his story voluntarily and apparently with complete truthfulness.

[1,2] One who causes the death of another while engaged in the perpetration of, or attempt to perpetrate, the crime of robbery is guilty of murder in the first degree. Pen.Code, § 189. The punishment to be imposed upon one who pleads guilty to that offense is a matter exclusively within the discretion of the trial court. *People v. Hawk*, 17 Cal.2d 812, 112 P.2d 225. Undoubtedly one factor which influenced a determination that the death penalty should be imposed upon Phyle was the testimony of one of the examining physicians that Phyle is a person whose manner of thinking makes him dangerous to society. All of the evidence points to that conclusion.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



28 Cal.2d 664

ROBINSON et ux. v. PULS.

S. F. 17120.

Supreme Court of California, in Bank.

Aug. 1, 1946.

Rehearing Denied Aug. 29, 1946.

1. Jury ⇨13(14)

Where legal and equitable issues are joined in the same action, the parties are entitled to a jury trial on the legal issues.

2. Jury ⇨25(8)

Demand for a jury trial was improperly denied on ground that the demand did not specify the issues to be tried by the jury, even though both legal and equitable

issues were involved. Code Civ.Proc. § 631; Const. art. 1, § 7.

3. Jury ⇨28(1)

That plaintiffs failed to deposit jury fees 10 days prior to date set for trial did not constitute a waiver of a jury where the order denying plaintiffs' demand for a jury was made more than 45 days prior to date set for trial. Civ.Code, § 3532.

4. Common law ⇨9

The law does not require the performance of an idle act. Civ.Code, § 3532.

5. Appeal and error ⇨1172(1)

Where both legal and equitable issues were involved and trial court improperly denied demand for a jury trial merely because the demand did not specify the issues to be tried by the jury, the entire judgment was required to be reversed in order to permit a full consideration on a single trial of all the issues where on appeal it was impracticable to separate the legal from the equitable issues.

6. Evidence ⇨376(4, 8)

Where the person who made the entry is dead, evidence that the books of account were in his handwriting, and that they were kept correctly, is sufficient foundation for their admission. Code Civ.Proc. §§ 1953e to 1953h.

7. Evidence ⇨376(1, 4, 8)

In action for an accounting, sets of books which were identified as those kept by deceased defendant during the years in question, and were in his handwriting, and were shown to have been kept in an orderly manner, and whose dates of entries appeared to correspond reasonably with the dates of the original events, were admissible without any additional showing as to the contemporaneous nature of the entry. Code Civ.Proc. §§ 1963 (20, 23).

8. Evidence ⇨236(1), 269(2), 283, 354(19)

The codal provision, which expressly permits the admission in evidence of writings of a decedent when made against interest, states a separate and distinct exception to the hearsay evidence rule and does not restrict the application of the rule governing the admission in evidence

of book accounts. Code Civ.Proc. § 1946, subd. 1.

9. Appeal and error — 1214

In action for an accounting, where objection was made for the first time on appeal to admissibility of books containing records of deposits and loans, on grounds that the books constituted private memoranda, and it appeared that the original document evidencing most of the transactions were available so that necessity of using the books might not occur at second trial, plaintiff could establish the character of the books at the second trial.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action for declaratory relief by George Durham Robinson and wife against Vera Puls, as administratrix of the estate of Fred Puls, deceased, wherein defendant filed a cross-complaint. Judgment for defendant on cross-complaint, and plaintiffs appeal.

Judgment reversed.

Prior opinion 164 P.2d 332.

William Berger and Abraham Setzer, both of San Francisco, for appellants.

James R. Agee and Breed, Burpee & Robinson, all of Oakland, and Lester Perry, of Haywood, for respondent.

GIBSON, Chief Justice.

This action was brought for declaratory relief, for cancellation of two promissory notes, and for an accounting if a trust were found to exist, or, in the alternative, for a money judgment. Defendant filed a cross-complaint, seeking a money judgment on two book accounts. Plaintiffs' demand for

a jury trial was refused, and after trial by the court without a jury judgment was entered against plaintiffs on their complaint and for defendant on her cross-complaint. Plaintiffs contend on this appeal that the court erred in denying them a jury trial.

[1] The issues raised by the complaint were both equitable and legal in nature and those raised by the cross-complaint were solely legal in character. It is settled in this state that where legal and equitable issues are joined in the same action the parties are entitled to a jury trial on the legal issues. *Connell v. Bowes*, 19 Cal.2d 870, 123 P.2d 456; *Crouser v. Boice*, 51 Cal.App. 2d 198, 124 P.2d 358; *Hutchason v. Marks*, 54 Cal.App.2d 113, 128 P.2d 573.

[2] It is argued, however, that plaintiffs' demand for a jury trial was defective in that it failed to specify the legal issues to be tried by the jury. Defendant relies on *Meek v. De Latour*, 2 Cal.App. 261, 83 P. 300, and *Whittier v. Auth*, 99 Cal.App. 759, 279 P. 491, which hold that it is not error to refuse a general demand for a jury to try a cause consisting of legal and equitable issues. These decisions are based on cases from other jurisdictions and are in conflict with our constitutional and statutory provisions relative to waiver of jury trial. They are therefore disapproved.

This court held, in *People v. Metropolitan Surety Co.*, 164 Cal. 174, at page 177, 128 P. 324, at page 325, Ann.Cas.1914B, 1181, that under article I, section 7, of the state Constitution "The legislature is * * * given the sole power of declaring what shall constitute a waiver of trial by jury * * * and has exercised its power by the enactment of section 631 of the Code of Civil Procedure * * * [and] * * a jury may be waived only in one of the

* "Trial by jury may be waived by the several parties to an issue of fact in manner following:

"1. By failing to appear at the trial;

"2. By written consent filed with the clerk or justice;

"3. By oral consent, in open court, entered in the minutes or docket;

"4. Failure to demand jury. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after

notice of setting if it be set without notice or stipulation; provided, that in justices' courts such waiver may be made by failure of either party to demand a jury within two days after service upon him of the notice provided for in Section 594 of this code; provided further, that in any superior court action if a jury is demanded by either party in the memorandum to set cause for trial and such party thereafter by announcement or by operation of law waives a trial by jury, then in said event any and all ad-

* * * modes prescribed by this section." Nowhere in section 631 is it provided that a jury is waived by failure to specify in the demand the issues to be tried by jury, and the trial court could not, therefore, properly deny plaintiffs a jury trial for the reason that the demand did not so specify. The fact that both legal and equitable issues were involved does not alter the rule.

[3,4] Defendant also contends that plaintiffs waived a jury by reason of their failure to deposit jury fees 10 days prior to the day set for trial, as required by subdivision 5 of section 631. The order denying plaintiffs' demand for a jury was made more than 45 days prior to the date set for trial. Plaintiffs having been refused a jury were not thereafter required to deposit fees for a jury trial which had been denied them. The law does not require the performance of an idle act. Civ.Code, § 3532.

[5] The court therefore erred in denying plaintiffs a jury trial upon the legal issues and they are entitled to a reversal of the judgment, at least insofar as it disposes of issues that should have been submitted to a jury. It is impracticable on this appeal to separate the legal from the equitable issues, and there is some doubt as to the propriety of the refusal of the court to per-

mit plaintiffs to offer evidence on the question of the authenticity of a receipt which was material on the trial of the equitable issues. The entire judgment should therefore be reversed in order to permit a full and proper consideration on a single trial of all the issues. See *Connell v. Bowes*, 19 Cal.2d 870, 872, 123 P.2d 456, outlining proper procedure in such cases.

A question arose during the trial as to the admissibility in evidence of certain books of account and, inasmuch as the court will undoubtedly be confronted with the same question on retrial, we will consider the contentions of the parties with respect thereto. The books in question were kept by Puls and were offered in evidence by the administratrix in support of her cross-complaint for a money judgment. Certain of these books (Exhibits A, B, C and D) were kept by Puls in connection with a gasoline service station operated by him, and reflected transactions with his customers, including plaintiff, George Robinson. A second set of books kept by Puls (Exhibits M and N) covered financial transactions between Puls and Robinson with respect to a fruit growing and drying business in which the latter was engaged. All of these books were admitted in evidence over plain-

verse party or parties shall be given 10 days' written notice by the clerk of the court of such waiver, whereupon, notwithstanding any rule of the court to the contrary, such adverse party or parties shall have not exceeding five days immediately following the receipt of such notice of waiver, within which to file and serve a demand for a trial by jury and deposit advance jury fees for the first day's trial whenever such deposit is required by rule of court, and if it is impossible for the clerk of the court to give such 10 days' notice by reason of the trial date, or if for any cause said notice is not given, the trial of said action shall be continued by the court for a sufficient length of time to enable the giving of such notice by the clerk of the court to such adverse party.

"Regardless of anything contained in the foregoing to the contrary, the court may in its discretion, upon such terms as may be just, allow a trial by jury to be had, although there has been a waiver of such a trial.

"5. Failure to make deposit. By failing to deposit with the clerk, or justice,

a sum equal to the amount of one day's jury fees payable under the law, as provided herein. In justices' courts such deposit must be made two days prior to the date set for trial or prior to the date to which the trial has been postponed because of the demand for a jury trial; in other courts such deposit must be made 10 days prior to the date set for trial.

"6. By failing to deposit with the clerk or justice, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if any be allowed by law) of the jury accrued up to that time;

"7. By failing to deposit with the clerk or justice, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any there be.

"Jury despite waiver. The court may, in its discretion upon such terms as may be just, allow a trial by jury to be had although there has been a waiver of such trial."

tiffs' objection that there was no showing that the entries were made within reasonable proximity to the time of the respective transactions as required by the Uniform Business Records as Evidence Act. Code Civ.Proc. §§ 1953e-1953h.

Both sets of books were identified as those kept by Puls during the years in question; they were in his handwriting and they were shown to have been kept in an orderly manner. The dates of the entries in the books appear to correspond reasonably with the dates of the original events.

[6, 7] Where the person who made the entry is dead, evidence that the books of account were in his handwriting, and that they were kept correctly, is sufficient foundation for their admission. *O'Neill v. O'Neill*, 45 Cal.App. 772, 774, 188 P. 603; see, also, *Foster v. Wehr*, 114 Pa.Super. 101, 173 A. 712; *G. S. Wood Mercantile Co. v. Dougall*, 100 Utah 267, 114 P.2d 202; *Burton v. Phillips*, 161 Ala. 664, 49 So. 848; *Leighton v. Manson*, 14 Me. 208; *Davie v. Lloyd*, 38 Colo. 250, 88 P. 446, 12 Ann. Cas. 75; *Dodge v. Morse*, 3 N.H. 232; *Cram v. Spear*, 8 Ohio 494; *In re Greenwood's Estate*, 201 Mo.App. 39, 208 S.W. 635, 637; 52 L.R.A. 558; 1 *Elliott on Evidence*, § 465; 2 *Ency. of Evidence*, pp. 610-611; 10 *R.C.L.* 1175; 32 *C.J.S.*, *Evidence*, § 684, p. 557; 20 *Am.Jur.* 929. Moreover, the statutory presumptions that "a writing is truly dated" (Code Civ.Proc. § 1963(23)), and that "the ordinary course of business has been followed" (Code Civ.Proc. § 1963(20)) obviate the necessity for any additional showing as to the contemporaneous nature of the entry.

[8] Plaintiffs, citing section 1946, subdivision 1, of the Code of Civil Procedure, contend that the books were not admissible in evidence because the entries were not adverse to the decedent. This section, which expressly permits the admission in evidence of writings of a decedent when made against interest, states a separate and distinct exception to the hearsay evidence rule. *Radtke v. Taylor*, 105 Or. 559, 210 P. 863, 870, 27 A.L.R. 142; see, also, 1 *Elliott on Evidence*, § 477; 5 *Wigmore on Evidence*, § 1518. It does not, however, in

any way restrict the application of the rule governing the admission in evidence of book accounts.

[9] The further contention is made that the books (Exhibits M and N) containing records of deposits and loans made in connection with the fruit growing business constitute private memoranda and, therefore, are not admissible. These books were kept by Puls pursuant to an agreement with Robinson, and an expert accountant testified that the entries appearing therein, with minor exceptions, covered transactions reflected by original vouchers and drafts. The objection that these books are private memoranda was not made in the trial court. It appears that the original documents evidencing most of the transactions are available and it may not be necessary to use the books to prove the account. The defendant, however, is now informed of plaintiffs' contention and if she desires to offer the books at a second trial she will have an opportunity to establish their character in laying a foundation for their admission in evidence.

The judgment is reversed.

SHENK, EDMONDS, CARTER,
SCHAUER, and SPENCE, JJ., con-
curred.

TRAYNOR, Justice.

I concur in the judgment. I cannot agree, however, with that part of the majority opinion holding that the store books and the two other books reflecting the financial transactions between Puls and the plaintiff are admissible in evidence in absence of proof that the entries on which defendants rely were made at or near the time of the transactions in question. Section 1953f of the Code of Civil Procedure, enacted in this state in 1941 as part of the Uniform Business Records as Evidence Act provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, *at or near the time of the act, condition or event*, and if, in the opinion

of the court, the sources of information, method and *time of preparation* were such as to justify its admission." (Italics added.) This statute not only requires preliminary proof in all cases that the record was made "at or near the time" of the transaction, it also vests in the trial court authority to determine, before such records are admitted in evidence, whether the time of its preparation was near enough to the transactions to be proved to justify the admission of the record. The uniform act was formulated after years of discussion (see 5 Wigmore, Evidence, 3d Ed., 362) and its draftsmen undoubtedly weighed the disadvantage of the rule to estates against the dangers of admitting records whose trustworthiness was not established, when they did not deem it advisable to relax the requirements of preliminary proof in the case of the books of a decedent. See Barrow, Business Entries Before the Court, 32 ILL. Rev. 334; 5 Wigmore, Evidence, 3d Ed., 363.

In abandoning the requirement of proof that the record was made at or near the time of the transaction, if the person who made it is dead, the majority opinion opens the door for the admission of records that might be made at a time so remote from their occurrence as to lack trustworthiness. The justification for admitting records as evidence is that they can be regarded as trustworthy when they have been prepared in the ordinary course of business and at or near the time of the transaction. *Palmer v. Hoffman*, 318 U.S. 109, 115, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719; *Hoffman v. Palmer*, 2 Cir., 129 F.2d 976, 982; *Roge v. Valentine*, 280 N.Y. 268, 20 N.E.2d 751, 755. "The entry should have been made at or near the time of the transaction recorded,—not merely because this is necessary in order to assure a fairly accurate recollection of the matter, but be-

cause any trustworthy habit of making regular business records will involve the making of the record contemporaneously." 5 Wigmore, Evidence, 3d Ed., 375. "This is another circumstance very properly required as tending to accuracy, and is similar to the requirement * * * as to entries by deceased persons." 5 Wigmore, Evidence, 3d Ed., 405. There is particular need of such proof when the entries of a deceased person are presented and there is no opportunity to examine those in whose favor the entries speak. Any doubt as to the requirement of such proof is dispelled by section 1946 of the Code of Civil Procedure, which relates specifically to the entries and other writings of a decedent: "The entries and other writings of a decedent, *made at or near the time of the transaction*, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases. * * *" (Italics added.) Thus both section 1946 of the Code of Civil Procedure and the Uniform Business Records as Evidence Act require proof that the entry was made at or near the time of the transaction, and there is no reason for construing them differently.

The cases cited in the majority opinion relate to the shop-book rule of the common law rather than to the uniform act. Under the common law the two books in the present case (Exhibits M and N), which were not store books but books reflecting the financial transactions between Puls and plaintiff, would not have been admissible to show the alleged loans by Puls, for account books were inadmissible to show transactions concerning the paying or lending of money. *Collin v. Card*, 2 Cal. 421; *Yick Wo v. Underhill*, 5 Cal.App. 519, 90 P. 967; see *Le Franc v. Hewitt*, 7 Cal. 186, 84 A.L.R. 147, 148; 5 Wigmore, Evidence, 3d Ed., 396.

28 Cal.2d 643

**PRESTON v. STATE BAR OF
CALIFORNIA.**

L. A. 19669.

Supreme Court of California, in Bank.
July 30, 1946.

1. Attorney and client ☞61

The Supreme Court has the inherent power to reinstate an applicant previously disbarred despite an unfavorable report upon such application by the board of bar governors of the State Bar.

2. Attorney and client ☞61

The recommendation of the board of bar governors concerning reinstatement of an applicant to practice law previously disbarred is advisory only, but, as that body has been provided by legislative enactment as an arm of the Supreme Court for the purpose of assisting in matters of admission and discipline, the greatest deference is accorded to its recommendation by the Supreme Court.

3. Attorney and client ☞61

The final determination, in matters concerning reinstatement to practice law of an applicant previously disbarred, rests with the Supreme Court, whose powers in that regard are plenary and whose judgment is conclusive.

4. Attorney and client ☞61

The burden of proof on one seeking reinstatement to practice law after having been previously disbarred cannot be overcome except by a very strong showing of rehabilitation.

5. Attorney and client ☞61

In proceeding for reinstatement to practice law, evidence of petitioner's present moral character warranted reinstatement.

6. Attorney and client ☞61

In reaching a fair conclusion on the question of the reformation of one seeking reinstatement to practice law who previously had been disbarred, the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily con-

duct and mode of living of petitioner should weigh heavily in the scale of justice.

7. Attorney and client ☞61

In reaching a fair conclusion on the question of the reformation of one seeking readmission to practice law who previously has been disbarred, testimony of members of the bar and bench of high repute is entitled to careful consideration when the petitioner has been close to their observation, since such witnesses are morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement unless they are satisfied of the rehabilitation of his character. Business and Professions Code, § 6068(c).

8. Attorney and client ☞61

In proceeding before board of governors for readmission to practice law, statement by petitioner, who had previously been disbarred after conviction for felony, that petitioner had been unjustly convicted, were not inconsistent with statement at subsequent hearing that the trial was fair, where petitioner's testimony revealed that her views were that, although had all the facts been presented to the court a conviction would have been unjust on the basis of the facts that were presented the conviction was not unfair.

Proceeding by Lois Preston to review action of the Board of Governors of the State Bar of California refusing to recommend petitioner's readmission to practice law.

Petitioner ordered to be reinstated.

Philbrick McCoy, of Los Angeles, for petitioner.

Jerold E. Weil and Stanley N. Barnes, both of Los Angeles, for respondent.

PER CURIAM.

Petitioner seeks review of the action of the Board of Governors of The State Bar declining to recommend her readmission to practice law in this state. (Original Proceedings in Reviewing Courts, rule 59 (b).) She was admitted to practice law in California on October 1, 1932. On Feb-

ruary 14, 1933, she married Irving M. Gilbert, an attorney who had been practicing law for about 13 years. She was disbarred on June 23, 1938, following her conviction on four counts of recording a false instrument, and conspiracy to commit grand theft and to violate sections 476a, 115, 531 and 182(4) of the Penal Code. Gilbert was found guilty of the same offenses. It was ordered that the sentences against petitioner run concurrently. After affirmation of the judgment on appeal (*People v. Gilbert*, 26 Cal.App.2d 1, 78 P.2d 770), petitioner was imprisoned at Techachapi until her parole in September, 1941. She obtained a divorce from Gilbert in 1938, and in 1943 changed her name by court action to Lois Preston. On December 28, 1942, on the unanimous recommendation of the Advisory Pardon Board, petitioner received a full and unconditional pardon. This board reported to the governor that "A recent report from the State Parole Officer reveals that this applicant's behavior has been entirely satisfactory; that she has been working very hard and has kept her parole in every way."

On March 16, 1943, petitioner filed a petition for reinstatement with The State Bar. On the basis of the report of the special committee appointed by the Board of Governors that since only 18 months had elapsed since her release on parole, the petition "comes too soon after petitioner's release from prison" to justify a finding of rehabilitation, the Board of Governors refused to recommend her reinstatement. Petitioner did not seek review of this determination.

In August 1945, she again petitioned for reinstatement, and this petition also was referred to a special committee. The record before this committee reveals that after her parole, petitioner cared for her elderly father, and during her son-in-law's service in the armed forces, also supported her daughter and two grandchildren. From September 1941 to September 1942 she was employed part time as a clerk in the law offices of Hugh E. Macbeth in Los Angeles. Mr. Macbeth testified that he was closely acquainted with petitioner's activities since her disbarment, and went into considerable

detail with respect to his observations as to her honesty and moral character. He testified that petitioner had a "very fast" legal mind and "was a prodigious worker." Her compensation from this employment was \$12.50 a week. During the same period she did part time work as a waitress, earning about \$10 a week. From April 1942 to September 1942 she also did part time work for an insurance company, for which she received about \$10 a week.

From September 1942 to June 1943 she was employed at \$160 a month by Western Truck Lines, Limited, and continued part time employment with Mr. Macbeth. C. J. Norona, who was petitioner's immediate employer, testified that petitioner informed him of her past difficulties after she had been employed for a month trial period, and that he gave her permanent employment despite this information; that petitioner started as a billing clerk and was later promoted; that part of her employment was as cashier and involved handling about \$100 per day six days a week; that she was a "careful and efficient worker," and was found to be "thoroughly honest." "In fact, she terminated her employment with us much against our wishes in order to go on at that time with the preparation of the work necessary for reinstatement." Mr. Norona further testified that he would not hesitate to employ petitioner as his attorney.

In June 1943 petitioner voluntarily terminated her employment with Western Truck Lines and went to Mexico City to enter the University of Mexico. Preceding this trip, she had attempted to enlist in the armed services but failed despite her pardon because of her continued disbarment. She returned to California in October 1943 to care for her daughter when the latter gave premature birth to a child and her husband was drafted. While in Mexico petitioner received an offer to do nonlegal work at a salary of over \$1,200 a month, which she rejected "because she wanted to return to her profession." From November 1943 to June 1944 petitioner was employed by Food Machinery Corporation, where she was under the immediate supervisions of Thomas Bennett, Counsel for

petitioner and the examiner for The State Bar stipulated that Mr. Bennett would testify that petitioner was promoted from invoice auditor to supervisory work, largely because of her ability to command work from others; that she handled no money but that her record during this employment indicated that she was rehabilitated; that he had no reason to question her honesty and integrity; and that in his opinion she was a person of good moral character.

Petitioner attended a bar examination quiz course given by William E. Burby from June to September 1944. She also attended a quiz course given by B. E. Witkin, after moving with her family to Millbrae, California in September 1944. From October 16, 1944 to and including the time of these proceedings she has been employed at San Francisco by Neon Maintenance Corporation. Ralph V. Shelton, the owner of this business, who was her immediate employer, traveled to Los Angeles to testify in petitioner's favor at his own insistence and expense. Mr. Shelton testified that petitioner has been promoted from clerk at \$40 a week to manager and purchasing agent at \$75 a week; that petitioner informed him of her past difficulties when she had been employed for a month trial period, and that he gave her permanent employment despite this information; that one of her positions during her employment involved the handling of funds; that together with the bookkeeper she handled at one time thirty to forty thousand dollars a month; that she could have walked off with "any amount" of money at any time if she were so inclined; that he had no occasion to question any of her work; that she was "a person of excellent moral character" and has shown sympathy and a willingness to assist with respect to personal problems of her fellow employees; that she had done an excellent job as purchasing agent, was "very conscientious" about her employment, and was able to find materials for the plant when competitors could obtain none; that he had a high regard for her for the additional reason that she was able on a small salary to support four dependents while her son-in-law was in the service. Mr. Shelton further testified

that his company intended to retain her as counsel if she is reinstated, and had not previously employed her in this capacity only because she was not a member of the bar. Petitioner testified that Mr. Shelton had made a "very marvelous offer" that she intended to accept if reinstated.

Mr. Justice Thomas P. White, who wrote the decision on appeal affirming petitioner's conviction (*People v. Gilbert*, supra, 26 Cal.App.2d 1, 78 P.2d 770), has known petitioner for a number of years. Justice White testified that he wrote to the Advisory Pardon Board in petitioner's behalf; that her attitude was not one of bitterness, but that she only wanted a chance to start anew; and that it was his opinion that petitioner was a person of good moral character.

Judge Walter S. Gates of the Los Angeles Superior Court presided at petitioner's divorce proceedings and has known petitioner for about 10 years. Judge Gates testified that on the basis of his personal observation and the observations of others with whom he had discussed the matter, petitioner has "entirely rehabilitated herself" and "is a very different woman." He testified that she "absolutely" is a person of good moral character, and that the basis for this opinion in part is "Her whole conduct; her attitude toward her family, her industry * * * I have never known her to shirk a responsibility; people feel that that she is a person of high moral character. It seems to be the consensus of opinion of people with whom I have talked. Her whole life is tied up in her children, her family, and what she could do for other people. Her idea is to get back into practice, to be of service where she can help, not to make money but to serve humanity." Judge Gates further testified that if the occasion ever arose he would not hesitate to employ her as his attorney.

Mark F. Jones, who represented petitioner in her criminal prosecution and in the pardon proceedings, has been in touch with her on a number of occasions since her release from prison. Mr. Jones testified that petitioner was a person of good moral character and a "fast and prodigious

worker"; that she was skilled in the law and would be welcome "without hesitancy" in his office.

Bishop Moore, also a Los Angeles attorney, has known petitioner since about 1936, and also assisted in obtaining her pardon. Mr. Moore has been in touch with her "many times" since her release from prison on occasions when petitioner sought "friendly advice" from him. He testified that petitioner had no bitterness over her criminal conviction; that she was a person of good moral character; and that she was efficient, able, and manifested a good knowledge of the law.

Agnes Underwood, a newspaper reporter for a Los Angeles paper, has known petitioner for about 15 years, and became intimately acquainted with her after her release from prison. Mrs. Underwood testified that petitioner was a "different person" after her divorce from Gilbert; that she would not hesitate to engage petitioner as counsel; and that petitioner was "a person * * * of fine moral character, a fine, true and loyal friend, a person you would be proud to know."

May Rose Starr, an undenominational minister, was intimately acquainted with petitioner, and on the basis of petitioner's conduct both at Tehachapi, where the witness conducted services, and after parole, Mrs. Starr testified that petitioner was a person of good moral character. The witness further testified that if she needed legal advice petitioner "would be the first person I would go to."

Petitioner testified at considerable length and was subjected to careful cross-examination by the examiner for The State Bar. She testified, in addition to matters heretofore related, that she was 43 years of age; that she had no bitterness towards the persons involved in her criminal prosecution and disbarment, and that she had determined to share her home with Mrs. E. Davis, whose property was chiefly concerned in the transactions leading to petitioner's conviction, and who has since become destitute.

Counsel for petitioner and the examiner for The State Bar stipulated that petitioner did not profit by the transactions

leading to her conviction; that all the property therein concerned was accounted for; and that therefore no problem of restitution is presented.

The financial obligations of petitioner are small. The greatest is \$7,300 owed on the purchase price of her home in Millbrae. A letter from W. T. Bivins, superintendent of Motive Power and Lines of the San Francisco Municipal Railway regarding his experience with petitioner with respect to this indebtedness was introduced. The record also contains a letter in petitioner's behalf from E. M. Moore, manager of the Millbrae Branch of Bank of America.

On the basis of the evidence before it, the special committee unanimously made findings favorable to petitioner, and concluded "(a) That petitioner has rehabilitated herself since her disbarment; (b) That petitioner is now a person of good moral character and integrity; and (c) That petitioner's present ability and learning in the law is sufficient to warrant her reinstatement as a member of the State Bar without being required to take an examination." On the basis of these findings and conclusions the committee unanimously recommended petitioner's reinstatement. Wixon Stevens, who was present at the hearing before the committee in behalf of the Los Angeles Bar Association, also submitted a statement to the Board of Governors approving the committee's action.

At the subsequent hearing before the Board of Governors, Alfred E. Cate, the examiner for The State Bar, stated that although at first he had been prejudiced against petitioner because of her husband's activities, on the basis of the evidence before the special committee, he recommended that petitioner be reinstated. The Board of Governors, however, by a vote of seven to six, rejected a resolution that petitioner's reinstatement be recommended to this court. The board's action was based solely on the record before the special committee.

[1-6] "That this court has the inherent power and authority to admit an applicant to practice law in this state or to reinstate an applicant previously disbarred

despite an unfavorable report upon such application by the board of bar governors of the State Bar, we think is now well settled in this state. *Brydonjack v. State Bar*, 208 Cal. 439, 446, 281 P. 1018, 66 A.L.R. 1507; *Vaughan v. State Bar*, 208 Cal. 740, 284 P. 909. The recommendation of the board of bar governors is advisory only but as that body has been provided by legislative enactment as an arm of this court for the purpose of assisting in matters of admission and discipline, the greatest deference should be, and always has been, accorded to its recommendation by this court. Nevertheless the final determination in all these matters rests with this court, and its powers in that regard are plenary and its judgment conclusive. *Fish v. State Bar*, 214 Cal. 215, 225, 4 P.2d 937; *Brydonjack v. State Bar*, *supra*. In *re Lacey*, 11 Cal.2d 699, 701, 81 P.2d 935, 936. Although the burden of proof on one seeking reinstatement cannot be overcome except by a very strong showing of rehabilitation (*Kepler v. State Bar*, 216 Cal. 52, 55, 13 P.2d 509; In *re Morganstern*, 85 Cal.App. 113, 117, 259 P. 90; see In *re Cate*, 60 Cal.App. 279, 286, 212 P. 694; *Vaughan v. State Bar*, 208 Cal. 740, 743, 284 P. 909; *Wettlin v. State Bar*, 24 Cal. 2d 862, 869, 151 P.2d 255), in the present case the evidence before the special committee substantiates overwhelmingly and without conflict its finding that "petitioner has gained the confidence of those with whom she has worked and among whom she has lived, and is now a person of good moral character and integrity, and has fully rehabilitated herself. She has the respect and confidence of many former acquaintances and has gained the respect and confidence of new friends and associates, both in business and out of business." The record reveals convincingly that in employment in which she engaged, petitioner not only showed diligence and efficiency, but also gained the admiration and respect of her associates. Her forthright testimony before the committee under careful cross-examination strongly indicates that this confidence was not misplaced. "In reaching a fair conclusion on the question of reformation * * * the favorable

testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living of an attorney who has suffered disbarment should weigh heavily in the scale of justice." In *re Andreani*, 14 Cal.2d 736, 749, 97 P.2d 456, 462.

[7] Testimony of members of the bar and bench of high repute is also entitled to careful consideration when the petitioner has been close to their observation. In *re Burris*, 147 Cal. 370, 81 P. 1077; In *re Treadwell*, 114 Cal. 24, 45 P. 993; *Vaughan v. State Bar*, 208 Cal. 740, 743, 284 P. 909. Such witnesses are morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement unless they are satisfied of the rehabilitation of his character. In *re Thompson*, 37 Cal. App. 344, 349, 174 P. 86; see *Bus. & Prof. Code*, § 6068 (c).

[8] Respondent contends that petitioner's testimony is inconsistent in that although in her first application for reinstatement petitioner stated that she had been unjustly convicted, she testified at the present hearing that the trial was fair. There is no inconsistency presented, however, for petitioner's testimony reveals that her views were that although had all the facts been presented to the court, a conviction would have been unjust, on the basis of the facts that were presented, the conviction was not unfair.

Respondent points out that several witnesses testified that they did not believe petitioner guilty of the offenses leading to her disbarment, and contends that the testimony of such witnesses is not entitled to much weight on the ground that ordinarily the merits of the disbarment will not be reconsidered on application for reinstatement. In *re Andreani*, 14 Cal.2d 736, 751, 97 P.2d 456; see 9 Cal.Jur.Supp. 474. The record reveals, however, that irrespective of the beliefs of these witnesses as to petitioner's guilt, they believe her now to be a person of good moral character on the basis also of her exemplary conduct since her disbarment.

It is therefore ordered that petitioner be reinstated as a member of The State Bar of California upon payment of the fees and taking the oath required by law.

SCHAUER, J., did not participate therein.



75 Cal.App.2d 759

MACHADO et al. v. FLORES et al.
Civ. 15233.

District Court of Appeal, Second District,
Division 1, California.

Aug. 12, 1946.

1. Judgment ⇨414

Equity will not lend its aid towards restraining collection of any judgment except upon a satisfactory showing of equitable grounds.

2. Judgment ⇨424

A default judgment in personal injury action, which was regularly obtained with the one exception that plaintiff therein had died prior to service of summons upon defendant and no substitution of representatives was had, was not absolutely void, so as to entitle defendant to enjoin enforcement thereof without a showing of equitable grounds.

3. Judgment ⇨414, 447(1)

Equity will not give relief because of extrinsic fraud, defective service, or the like, unless it is made to appear that judgment is unjust and that defendant had a meritorious defense thereto.

4. Equity ⇨66

Proceedings for relief against judgments and void judicial sales are subject to rule that he who seeks equity must do equity.

5. Judgment ⇨414

In order to enjoin enforcement of a judgment there must be a concurrence of fraud, accident, mistake, or other basis of

equitable jurisdiction and the injustice of the judgment itself.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Albert F. Machado and another against Albertina Flores, as administratrix, etc., and others, to enjoin the enforcement of a default judgment entered on January 3, 1928, against named plaintiff in a personal injury action. From a judgment of nonsuit, the plaintiffs appeal.

Affirmed.

John Schlegel and Charles D. Munro, both of Los Angeles, for appellants.

William J. Clark and H. W. Shaw, both of Los Angeles, for respondent.

DORAN, Justice.

On July 28, 1919, a judgment for damages in a personal injury action was rendered against Albert F. Machado, hereinafter called appellant, in the amount of \$10,000, in favor of Concepcion Avila whose administratrix is the respondent Albertina Flores. For the purpose of renewing such judgment, Concepcion Avila filed a complaint on August 29, 1924. Three years later the summons therein was returned to the clerk showing personal service on appellant as of August 29, 1927, and on January 3, 1928, a default judgment was entered against the appellant. The salient feature of this appeal arises from the fact that Concepcion Avila, plaintiff therein, had died on June 23, 1925, between the date of filing such action and the service of summons on the appellant. There was no appointment of an administrator for Concepcion Avila until after September 16, 1935, on which date petition for administration was first made. Finally, on July 16, 1937, and for the first time, an administrator was substituted for and in the place of Concepcion Avila, the deceased plaintiff. Respondent's brief comments: "That the fact of her death was known to any of the parties before the entry of judgment on the default does not appear. Nor does it appear when appellants learned of the death of the judgment creditor but it does appear that they did not take any steps to va-

cate or set aside the judgment until an attempt was made to enforce it by supplementary proceedings".

The present action is one in equity brought to enjoin the enforcement of the judgment, the complaint alleging that by reason of plaintiff's death before service of the summons upon the defendant, "there was no plaintiff before the court in the said matter; that the jurisdiction of the Court to entertain the cause had not been invoked prior to the death of the plaintiff therein; that the Court did not have jurisdiction * * * at any time except * * * to dismiss the action"; that the act of the attorney in entering the default and procuring the judgment was unauthorized and ineffective by reason of the plaintiff's death and constituted a fraud upon the court; and therefore that the judgment, execution and all other proceedings in the case, "were wholly void." Both parties moved the trial court for judgment on the pleadings, which motions were denied. The judgment of non-suit thereafter entered, recites that "Plaintiffs thereupon submitted their cause upon the pleadings on file and Defendant Albertina Flores moved the Court for a non-suit upon the ground that no facts were alleged or proved to entitle the Plaintiffs to restrain or avoid the enforcement of the Judgment * * * or to entitle them to any equitable relief," which motion was thereafter granted. The present appeal is from the judgment entered thereon.

It is the appellant's position that no jurisdiction could have been acquired prior to service of summons upon the defendant (appellant) at which time the plaintiff in that action had been dead for more than two years, for which reason the default judgment renewing the previous judgment "was absolutely void ab initio and * * * a mere nullity." On the other hand, the respondent maintains that the judgment, so entered, "is a mere irregularity which does not render the judgment void but, at most, merely voidable"; that equity will not act to prevent enforcement except upon equitable grounds, and that the debtor (appellant) seeking equitable relief must do equity and "pay what he justly owes." Respondent further argues that the appellant "by his default admitted every fact necessary to en-

able the Clerk to enter judgment as a ministerial act." Appellant's closing brief concedes that the action on the judgment did not abate by reason of the death of Concepcion Avila. This fact is also commented upon by respondent in the following language: "and since it does not abate upon the death of the plaintiff, a ministerial act done in the action after the plaintiff's death, is a mere irregularity."

No case has been cited by either party in which the precise point here involved, was decided; nor is there any code section specifically dealing with the subject matter. The appellant relies in part upon Section 416 of the Code of Civil Procedure providing that "From the time of the service of the summons and a copy of the complaint * * * the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings." Cases are then cited on the question as to which court has jurisdiction where similar actions have been filed in different courts. Such cases, however, are not helpful since the factual situation is entirely different. Nor do cases from states other than California, throw much illumination upon the present controversy, owing to various differences in procedure. Appellant has also cited 14 Cal.Juris. 928 to the effect that "A court has no jurisdiction to render judgment for or against a party who was dead at the time the action or proceeding was begun." However, in the same paragraph occurs the following: "But the death of a party pending suit does not render a judgment for or against him after his death void, although there was no substitution of his representatives; it is merely voidable. This does not mean that a judgment may be really rendered for or against a dead man, but that it may be rendered nominally for or against him, as representing his heirs or other successors, who are the real parties intended." The latter part of the quotation is taken verbatim from *Todhunter v. Klemmer*, 134 Cal. 60, 66 P. 75, which held that the death of one of the coplaintiffs in an ejectment suit prior to the judgment rendered therein, did not deprive the court of jurisdiction nor render the judgment absolutely void. In *Martin v. Wagner*, 124 Cal. 204, 56 P. 1023, it was

held that a reversal by the Supreme Court after death of the respondent, was not void but at most, erroneous, although there had been no motion to substitute the decedent's representatives, nor suggestion of the respondent's death. The case of *Tyrrell v. Baldwin*, 67 Cal. 1, 6 P. 867, held that the death of a defendant after answer had been filed but before the trial, did not render a judgment against such defendant void as to those who had purchased, *pendente lite*, the defendant's interest in the property involved. As pointed out by appellant none of these cases present exact parallels to the present situation. They do, however, clearly indicate that the California courts are not committed to the position advanced by appellants that the death of a party, *ipso facto*, renders absolutely void, a judgment for or against such party. Such a judgment is, at most, a mere irregularity.

It is difficult to see how the appellant, in the instant case, has suffered prejudice by reason of the non-suit in the court below. The appellant there sought to restrain the collection of a judgment regularly obtained with the one exception that the plaintiff therein had died and no substitution of representatives had occurred. The action in which such judgment against appellant was obtained, was, it may be noted, the conventional procedure utilized for the purpose of renewing a previous judgment obtained in 1919. In the original action brought by Concepcion Avila, the fact of appellant's liability and the amount of damages due the plaintiff therein, had, of course, been judicially determined. At the time the action to renew such judgment was commenced by the filing of the complaint, the plaintiff Concepcion Avila was still alive. When the summons and complaint were personally served on appellant some two years later, default was entered in the customary manner upon appellant's failure to appear. Nor did appellant take any steps in reference to the action or the judgment until an attempt was made to collect the same. Obviously then, collection of the judgment will merely mean that the appellant is satisfying, willingly or unwillingly,

an obligation established in the original judgment of 1919. "It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts." *Demens v. Huene*, 89 Cal.App. 748, 753, 265 P. 389, 391.

[1-5] It seems clear that equity should not lend its aid towards restraining collection of this or any judgment except upon a satisfactory showing of equitable grounds. There is no such showing in this case. In this particular an analogy is found in those cases holding that equity will not give relief because of extrinsic fraud, defective service, or the like, unless it is made to appear that the judgment is unjust and that the defendant had a meritorious defense thereto. Such a case was *Bell v. Thompson*, 147 Cal. 689, 82 P. 327. Likewise in *Lee v. Colquhoun*, 175 Cal. 16, 164 P. 894, plaintiff seeking equitable aid, was obliged to affirmatively allege not only the want of legal service and fraud, but also that there existed a defense on the merits. Other cases reiterate the same rule. In the present case the appellants' complaint seeking equitable aid, did not and presumably could not, allege the existence of any meritorious defense. In like manner it may be observed that the appellants' complaint did not, and presumably could not, allege a willingness to do equity and pay the amount of the judgment or any part thereof, since the only purpose of the action was to avoid the necessity of doing this very thing. Apropos this subject, the following is found in 2 *Pomeroy's Jurisprudence*, 393c: "Proceedings for relief against judgments and void judicial sales are like other suits in equity subject to the rule that he who seeks equity must do equity." And in 3 *Freeman on Judgments*, Section 1188, occurs the following: "There must be a concurrence of fraud, accident, mistake or other basis of equitable jurisdiction and the *injustice of the judgment itself*."

For the reasons hereinbefore stated, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

75 Cal.App.2d 687

COONS v. THOMPSON et ux.

Civ. 15323.

District Court of Appeal, Second District,
Division 2, California.

Aug. 6, 1946.

objection of defendants at time of hearing could not have properly been considered by the trial court.

1. Quieting title ⚡37(1)

In quiet title action, denial in defendants' answer of plaintiff's ownership and right of possession of property involved raises issues of fact requiring a trial.

2. Pleading ⚡208

A special demurrer to a pleading on ground that several counterclaims have been improperly joined and not separately stated is insufficient unless demurrer specifies wherein alleged misjoinder exists.

3. Pleading ⚡208

A special demurrer on ground that an answer is ambiguous, unintelligible, or uncertain is insufficient unless demurrer points out specifically wherein pleading is ambiguous, uncertain, or unintelligible.

4. Pleading ⚡223

After a demurrer is sustained to an answer, defendant is practically out of the action and his objection to subsequent proceedings in the trial court cannot be considered.

5. Quieting title ⚡41

In quiet title action, sustaining general demurrer to third amended answer which denied specifically the allegation of complaint that plaintiff was the owner of and entitled to possession of realty described was error.

6. Appeal and error ⚡1040(6)

Where, by sustaining demurrer without leave to amend, defendants were practically eliminated from the action, fact that defendants had notice of hearing and were present when evidence was received on behalf of plaintiff did not prevent trial court's ruling on demurrer from being prejudicial to rights of defendants, since any

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Ruby L. Coons against J. V. Thompson and wife to quiet title to land. From a judgment in favor of plaintiff after sustaining without leave to amend a demurrer to the third amended answer of defendants, defendants appeal.

Reversed with directions.

James G. Whyte, of Claremont, for appellants.

Arlo E. Rickett, Jr., of Pomona, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after the sustaining without leave to amend of a demurrer to the third amended answer of defendants in an action to quiet title to real property, defendants appeal.

These are the conceded facts:

On May 24, 1945, plaintiff filed a complaint to quiet title to certain real property. In Paragraph III of the complaint it was alleged "that plaintiff [was] the owner of and entitled to possession of the real property described as follows:" (Hereafter there was a detailed description of the property claimed by plaintiff.) After demurrers of plaintiff had been sustained to two answers of defendants, a third amended answer was filed by them which read in part as follows:

"Deny generally and specifically each and every allegation contained in Paragraph III of plaintiff's complaint."

In addition the answer contained numerous allegations by which defendants unartfully endeavored to allege that they had certain equities in the property described in the complaint. To this answer plaintiff demurred* (1) generally and (2) specifically on the grounds (a) that several

to the third amended answer of J. V. Thompson and Mrs. J. V. Thompson and for grounds of demurrer alleges:

"I. That the answer does not state

* Omitting the title of the court and cause the demurrer read as follows:

"Demurrer to Third Amended Answer
"Comes now the plaintiff and demurs

causes of counterclaim had been improperly joined and not separately stated, (b) of ambiguity, (c) of unintelligibility and (d) of uncertainty. This demurrer was sustained without leave to amend on October 19, 1945.

On October 24, 1945, plaintiff served on defendants a notice of "Hearing of Proof of Title and Rights of Plaintiff to Immediate Possession", which hearing was set for November 2, 1945. On the latter date defendants were represented by counsel, at which time the trial court took evidence and found that the plaintiff was the owner and entitled to possession of the real property in question. The defendants made no objection to the introduction of evidence. A judgment was thereafter entered in favor of plaintiff pursuant to the trial court's findings and the present appeal ensued.

Defendants rely for reversal of the judgment on the proposition that *the trial court committed prejudicial error in sustaining the demurrer to their third amended answer.*

This proposition is tenable and is governed by these established rules of law:

[1] 1) In a quiet title action the denial in defendants' answer of plaintiff's ownership and right to possession of the property in question raises issues of fact requiring a trial of the action. (*Hinds v. Clark*, 173 Cal. 49, 50 et seq., 159 P. 153; *Reese v. Gross*, 2 Cal.App.2d 384, 385, 37 P.2d 1058; *Weyse v. Biedebach*, 86 Cal.App. 712, 717, 261 P. 1086; *Carman v. Ross*, 64 Cal. 249, 29 P. 510.)

[2] 2) A special demurrer to a pleading upon the ground that several counterclaims have been improperly joined and not separately stated is insufficient unless the demurrer specifies wherein the alleged misjoinder exists. (*See Miller v. Dyer*, 20 Cal.2d 526, 531, 127 P.2d 901, 141 A.L.R.

1428; *Healy v. Visalia & Tulare R. Co.*, 101 Cal. 585, 593, 36 P. 125.)

[3] 3) A special demurrer on the ground that an answer is (a) ambiguous, (b) unintelligible, or (c) uncertain is insufficient unless the demurrer points out specifically wherein the pleading is ambiguous, uncertain or unintelligible. (*See Johnson v. Clark*, 7 Cal.2d 529, 536, 61 P. 2d 767; *Muraco v. Don*, 79 Cal.App. 738, 741, 250 P. 1109.)

[4] 4) After a demurrer is sustained to an answer a defendant is practically out of the action and his objection to subsequent proceedings in the trial court cannot be considered. (*Ramsey v. Flournoy*, 58 Cal. 260, 262. *See also Carman v. Ross*, 64 Cal. 249 et seq., 29 P. 510.)

[5] Applying the foregoing rules to the facts of the instant case it appears that since the third amended answer denied specifically the allegation of the complaint "that plaintiff [was] the owner of and entitled to possession of the real property described" in the complaint, under rule 1 supra the answer raised material issues of fact requiring a trial of the action. It was therefore error to sustain the general demurrer to the third amended answer.

Likewise since the special demurrer failed to point out wherein several causes of counterclaim had been improperly joined and not separately stated or wherein the answer was ambiguous, unintelligible or uncertain, the special demurrer on such grounds under rules 2 and 3 supra was insufficient and it was error to sustain the demurrer on all or any one of the grounds mentioned.

[6] Lastly, since by sustaining the demurrer without leave to amend defendants were practically eliminated from the action, the fact that they had notice of the hearing and were present when evidence was received on behalf of plaintiff did not pre-

facts sufficient to constitute a defense or counterclaim.

"II. That several causes of counterclaim have been improperly joined, or not separately stated.

"III. That the answer is ambiguous.

"IV. That the answer is unintelligible.

"V. That the answer is uncertain.

"Wherefore, demurring plaintiff prays that the answer be set aside and plaintiff be given judgment as prayed for in her complaint.

"Dated: October 13, 1945.

"Arlo E. Rickett, Jr.

"Attorney for Plaintiff"

vent the trial court's ruling on the demurrer from being prejudicial to the rights of defendants, as under rule 4 supra any objection of defendants at the time of the hearing could not have properly been considered by the trial court.

For the foregoing reasons the judgment is reversed and the trial court is directed to overrule plaintiff's demurrer to the third amended answer and to take such other proceeding as may be consonant with the views expressed in this opinion.

MOORE, P. J., and WILSON, J., concur.



75 Cal.App.2d 551

**MEDINA et al. v. VAN CAMP SEA
FOOD CO., Inc., et al.**

Civ. 3384.

District Court of Appeal, Fourth District,
California.

July 31, 1946.

Rehearing Denied Aug. 19, 1946.

Hearing Denied Sept. 19, 1946.

1. Shipping ⇐149

Where a number of fishing vessels were requisitioned by the Navy and fish on board requisitioned vessels were transferred to plaintiffs' vessel, which had not been requisitioned, and by it taken to San Diego and defendants, who owned requisitioned vessels, were paid by canning companies for fish, defendants were indebted to plaintiff under an implied contract or quasi contract to pay proportionate cost of operation of plaintiffs' vessel. Civ.Code, §§ 1619-1621.

2. Contracts ⇐4

An "implied contract" is one that is inferred from the conduct, situation or mutual relations of the parties and enforced by law on the ground of justice. Civ.Code, § 1621.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Contract".

3. Contracts ⇐28(1)

The making of an agreement may be inferred by proof of conduct as well as by proof of use of words. Civ.Code, § 1621.

4. Work and labor ⇐4(2)

Where one performs for another with the other's knowledge a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of service is implied. Civ. Code, § 1621.

5. Contracts ⇐4

The law never implies an obligation to do that which it forbids a party to agree to do. Civ.Code, § 1621.

6. Appeal and error ⇐1008(1)

The existence of an implied contract is usually a question for trier of fact.

7. Appeal and error ⇐996, 1011(1)

Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question is presented for trier of fact.

8. Appeal and error ⇐996

Where reasonable conflicting inferences might have been drawn from evidence showing the requisition of defendants' fishing vessels, the placing of fish on plaintiffs' vessel, the shipment thereof to port and sale of fish for the account of respective defendants, decision of trial court as a fact that there existed an implied contract to pay plaintiffs the reasonable value of service rendered was conclusive on appeal. Civ.Code, § 1621.

9. Appeal and error ⇐931(1)

Reviewing court must draw all reasonable inferences in favor of judgment.

10. Appeal and error ⇐996

Where trial judge resolved conflicting inferences in favor of plaintiffs and there were reasonable inferences supporting judgment, judgment would not be disturbed on appeal.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Joe M. Medina and others against Van Camp Sea Food Company, Inc., and others for the reasonable value of services as plaintiffs in transporting fish and shark livers, belonging to defendants, from the Canal Zone to San Diego. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Charles C. Crouch, of San Diego, for appellants.

Clarence Harden, of San Diego, and Henry F. Walker, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment against defendants for the reasonable value of the services of plaintiffs in transporting fish and shark livers, belonging to defendants, from the Canal Zone to San Diego. The recoveries against the various groups of defendants total \$5,857.61.

The facts are not in dispute. Plaintiffs were owners of the tuna boat Queen Mary. Van Camp Sea Food Company, Inc., Wm. A. Magellan and others were owners of the Anna M. Mariano and Sam Crivello were owners of the Europa. Guy H. Silva was the owner of the Emma R. S. Salvador Carlos and others were the owners of the Sao Joao.

These boats were fishing in waters off Central and South America. On December 8, 1941, they received orders, via radio, from the Commandant of the Fifteenth Naval District, with headquarters in the Canal Zone, to proceed there immediately. The five boats, and others, arrived about December 12, and their commanding officers, who were owners or part owners of their respective boats, went into conference with officers of the United States Navy. The captains of the fishing boats were told that their ships were to be requisitioned immediately by the United States Government. The question of the disposition of the fish then on board came up. The Naval officers seemingly lacking authority to decide the question, consulted the Admiral in command of the District, returned to the conference and told the owners of the fishing boats which had been

requisitioned that each would receive pay from the United States for fish to the full capacity of each ship, less the fish already caught and on board. It was decided that the fish on board the smaller boats would be loaded onto the larger boats, returned to the United States and sold. This would leave the greater number of boats for use by the Navy and would preserve the fish and shark livers already on board.

The Queen Mary had about three tons of tuna on board. The fish and shark livers on defendants' boats were unloaded onto the Queen Mary's deck by the crews of the other boats. They were stowed by the Queen Mary's crew which separated the fish with nets so the identity of each catch was preserved. The fish were taken by the Queen Mary to San Diego where the canneries for which defendants' boats were fishing, demanded and received delivery of the fish, for which they paid the respective defendants.

It was stipulated that after deductions for spoilage, which was normal for transshipped fish, the Queen Mary delivered to the canneries the following quantities of fish and shark livers: Off the Anna M., 81.562 tons; the Europa, 79.865; the Emma R. S., 85.594 tons, and the Sao Joao, 45.6595 tons. The respective boat owners were paid an average of about \$150 a ton for the fish and an average of about \$1.50 a pound for the shark livers.

[1] The evidence shows there was a Government refrigeration plant in the Canal Zone but no market for the fish south of San Diego. The expense of the Queen Mary in making a round trip between San Diego and the Canal Zone was \$12,000. Her capacity was 300 tons, so the expense per ton, if she were fully loaded, was \$40. The trial judge allowed \$20 per ton for transporting fish and shark livers from the Canal Zone to San Diego. The evidence is undisputed that the commercial rate for similar services was \$25 per ton. The four boats belonging to defendants were requisitioned and placed in government service immediately after December 12, 1941, at a daily charter rate of slightly less than \$40 per day, manned by government crews. The Queen Mary was

not requisitioned until April 22, 1942. The fish on the boats were not requisitioned and Naval Officers of the Eleventh Naval District, with headquarters in San Diego, expressly disclaimed any governmental interest in the fish upon the arrival of the Queen Mary there. The fish were delivered to the canneries on defendants' demand (or on demand of some of them). Thus defendants reaped a benefit from the services of plaintiffs which benefit was evidently contemplated when the fish were transferred to the Queen Mary for delivery and sale in San Diego. Thus defendants have profited from the transaction to the extent of the market value of the fish and shark livers and the plaintiffs have received nothing except the selling price of about three tons of fish caught, prior to the outbreak of war, to credit against the \$12,000 cost of the round trip to the fishing grounds. If we read the record correctly the promise of the Naval Officers made at the time of the requisition of defendants' boats, to the effect that the Government would pay the owners for full cargoes of fish less the value of the fish on board, had not been kept up to the time of the trial.

It is clear there was no express contract made to the effect that defendants would pay plaintiffs for transporting the fish from the Canal Zone to San Diego. Plaintiffs admit this and rely on the doctrine of quasi contracts to support their judgment.

[2, 3] "A contract is either express or implied." Sec. 1619, Civ.Code. "An express contract is one, the terms of which are stated in words." Sec. 1620, Civ.Code. "An implied contract is one, the existence and terms of which are manifested by conduct." Sec. 1621, Civ.Code. An implied contract is one that "is inferred from the conduct, situation, or mutual relations of the parties, and enforced by law on the ground of justice." *Jennings v. Bank of California*, 79 Cal. 323, 21 P. 852, 853, 5 L. R.A. 233, 12 Am.St.Rep. 145. "The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words." *Dunham, Carrigan & Hayden Co. v. Thermoid Rubber Co.*, 84 Cal.App. 669, 258 P. 663, 664.

[4] As said in *Young v. Bruere*, 78 Cal. App. 127, 248 P. 301, 302: "Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied. 6 Cal.Jur. 23; *Semi-Tropic, etc., Ass'n v. Johnson*, 163 Cal. 639, 642, 126 P. 488; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623." See, also, *Grant v. Long*, 33 Cal.App.2d 725, 92 P.2d 940.

It is undisputed that the Van Camp Sea Food Company, Inc., prior to December 7, 1941, frequently shipped fish via commercial steamships from Punta Arenas, north of the Canal Zone, to its cannery in San Diego and paid \$25 per ton for the service; that the same rate applied between the Canal Zone and San Diego.

Defendants argue that the doctrine of quasi contracts cannot apply here for several reasons. These arguments all center around the proposition that there must be a freedom of choice of the parties to be bound by the implied contract. It is argued that the captains of defendants' boats were ordered by Naval Officers to load the fish already caught onto the Queen Mary; that the officers of the Queen Mary were ordered to receive the fish and transport them to San Diego; that both parties were acting under compulsion of superior authority, had no freedom of choice in the matter so that no agreement to pay for the services rendered by plaintiffs can be inferred from these facts.

The following quotations from *Zottman v. City and County of San Francisco*, 20 Cal. 96, 81 Am.Dec. 96, furnishes the foundation for this argument: "There must not only be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied; but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere *retention and use* of the benefit resulting from the work

—where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of the acceptance that the law will imply therefrom a promise of payment.”

[5] The Supreme Court also held in that case that the Charter of San Francisco prescribed certain necessary formalities as prerequisites to the making of contracts for public improvements which were not complied with thus limiting the power of the city officials to accept and pay for the work in question. The real ground for the holding in that case is found in 20 Cal. on page 105, 81 Am.Dec. 96, in the statement that “the law never implies an obligation to do that which it forbids the party to agree to do.”

However, should we accept the argument of defendants as sound, as it well may be, that there must be freedom of choice on the part of the parties to be bound by an implied contract we cannot reverse the judgment because of the factual situation presented.

It seems from the record that the disposition of the fish in the holds of the ships was first brought up by the ships' officers. It is clear that they wanted these fish sent to market although it is also clear that they would have preferred to have transported the fish in their own boats. It is equally clear that this was prohibited by the requisitioning of the boats. There is nothing to show that they could not have protested the trans-shipment of the fish to the Queen Mary, had they desired to do so. The fish belonged to them and not the Government and the Queen Mary was not requisitioned at that time. There is nothing to prohibit the inference that the captains of defendants' boats did have the freedom of choice of storing the fish in the Government refrigeration plant in the Canal Zone, or of dumping them which was done with the damaged cargo of a ship not involved here, which had been hit by gun fire, or of consenting to the trans-shipment

on the Queen Mary. If the defendants were not willing to have their fish trans-shipped on the Queen Mary or did not intend to pay for the transportation the least they could have done was to protest the transfer or announce that they did not intend to pay transportation charges. They did neither.

The Queen Mary was not requisitioned but was left in command of her own officers and was operated by her own civilian crew. Her captain was given sealed orders to be opened after she was at sea. These orders were not available at the trial and we are not informed as to their contents. Thus the extent that the Queen Mary was sailing under compulsion, if any, from the Navy does not appear.

[6-8] It is generally held that the existence of an implied contract is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court. Here, reasonable conflicting inferences might have been drawn from the evidence. As the trial judge drew the reasonable inference in favor of plaintiffs, and as the existence of an implied contract was a question of fact for the trial court, its decision on that question is conclusive here. *Caminetti v. National Guar. Life Co.*, 56 Cal.App.2d 92, 132 P.2d 318; *Silva v. Providence Hospital of Oakland*, 14 Cal.2d 762, 97 P.2d 798.

[9,10] Further, on appeal we must draw all reasonable inferences in favor of the judgment. *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; *In re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689. As the trial judge resolved the conflicting inferences in favor of plaintiffs, and as there are reasonable inferences supporting the judgment, we cannot disturb it here.

Judgment affirmed.

BARNARD, P. J., concurs.

75 Cal.App.2d 787

AMERICAN ALLIANCE INS. CO. v. CAPITAL NAT. BANK OF SACRAMENTO.

Civ. 7246.

District Court of Appeal, Third District,
California.

Aug. 17, 1946.

1. Insurance ⇨606(5)

Where bank paid fraudulent drafts presented by employee, upon which employee had forged names of payees and appropriated the proceeds to his own use, employer was not entitled, by subrogation, to maintain action against bank in behalf of surety on employee's fidelity bond who had indemnified employer, since, in equity, satisfaction of surety's contractual liability did not entitle it to recover against bank which was innocent in the transaction in which it sustained a liability totally different from that of surety.

2. Insurance ⇨606(5)

Where surety company paid claim on employee's fidelity bond for money obtained by employee by presenting fraudulent draft to bank, but instead of taking a receipt from employer took a so-called loan agreement which recited that employer had received specified sum as a loan to be repaid only from such recovery as might be had from any other party, the transaction was a "payment" and not a "loan" in spite of the designation, as regards issue whether employer had already been compensated for its loss so that it could not maintain action in its own behalf against bank which cashed the drafts.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan" and "Payment".

3. Insurance ⇨606(5)

If transaction whereby surety company paid claim on employee's fidelity bond for money obtained by employee by presenting fraudulent drafts to bank and took a receipt which recited that employer had received specified sum as a loan to be repaid only from such recovery as might be had from any other party was a mere loan and not a payment of surety's liability, surety would

not be entitled to be subrogated to employer's claim against bank which cashed the drafts and it therefore would have no cause of action which it could assign to employer for collection.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by American Alliance Insurance Company against the Capital National Bank of Sacramento for damages allegedly sustained as a result of having paid several fraudulent drafts presented by an agent of the plaintiff. From a summary judgment on the pleadings in favor of defendant under Code Civil Procedure, § 437c, plaintiff appeals.

Affirmed.

Elliott, Atkinson & Sitton, of Sacramento, for appellant.

Treadwell & Laughlin, of San Francisco, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a summary judgment which was rendered against it under Section 437c of the Code of Civil Procedure, in a suit against the Capital National Bank of Sacramento, for damages sustained as a result of having paid several fraudulent drafts presented by an agent and employee of plaintiff, upon which the agent had forged the names of the payees and appropriated the proceeds to his own use. The names of the payees were certified by the agent of plaintiff as genuine. The plaintiff was insured against the dishonest conduct of its agent by a surety company, which is not a party to this action. Upon demand the surety company paid plaintiff the amount of its losses before the commencement of this suit. Plaintiff then brought suit against the bank for wrongfully paying the forged drafts. After the pleadings were filed the defendant moved for a summary judgment thereon, which was granted.

The complaint is couched in twenty-three counts, based on separate insurance claims for losses sustained in the aggregate sum of \$19,889.20, alleged to have been wrongfully

ly paid by the defendant bank to one Ernest C. Dietz, upon bills of exchange drawn against plaintiff by E. D. Petrie and other named insurance adjusters in favor of various named payees; that said claims were sent by plaintiff to the said Dietz at Sacramento for delivery to the payees for their approval; that said claims were not delivered to, nor signed by any of the payees, but their names were forged thereon by the said Dietz and the instruments were then delivered to the defendant bank and endorsed by it, thereby guaranteeing all prior endorsements, including the forged names of the payees, and then forwarded by the bank to Clifford Conly, the managing agent of plaintiff, or to plaintiff itself and accepted in reliance on the guarantee of signatures, whereupon the bank paid them to Dietz without previous knowledge of said forgeries; that the bank wrongfully paid said claims to Dietz who misappropriated the proceeds thereof; that plaintiff did not learn of said forgeries or misappropriations until June, 1942, and that upon demand the defendant refused to repay any portion of said money, and still wrongfully retains the same.

The answer denies the essential allegations of the complaint and pleads laches and the statute of limitations, asserting that plaintiff had information which furnished or imputed knowledge of the forgeries and misappropriations of money by Dietz "long before the commencement of this action." The answer affirmatively alleges that the bills of exchange were entrusted to Dietz as the agent and employee of plaintiff; that plaintiff was fully insured and protected "against any dishonesty, misappropriation or wrongdoing of its employees, including the said Dietz," by a policy issued by the Fidelity and Casualty Company of New York, which company had fully indemnified and paid plaintiff all of said losses mentioned in the complaint; that plaintiff, before the commencement of this action, assigned said claims to the casualty company which is not a party to this action, and that plaintiff is not a proper party plaintiff.

The defendant moved for summary judgment under Section 437c of the Code of Civil Procedure, based on affidavits of Messrs. Holmes, an officer of the defendant

bank, and Treadwell, together with the records and files in this case. The affidavit of Mr. Holmes averred that the bank paid the drafts to Ernest C. Dietz in the regular course of banking business, without knowledge of the forged signatures of the payees and in reliance upon the endorsement of plaintiff's agent in the following language, "O. K. Signature at bank. Ernest C. Dietz, Special Agent"; and that Dietz had full authority of plaintiff to present the drafts to the bank and to receive payments thereof.

The affidavit of Mr. Treadwell averred that Ernest C. Dietz acted as the agent and employee of plaintiff in all his transactions mentioned in the complaint, and was authorized by plaintiff to present the claims and to collect the drafts; that plaintiff was insured against the dishonesty and misappropriations of its agents, including those of Mr. Dietz, by a policy issued by the Fidelity and Casualty Company of New York, which casualty company "paid to the plaintiff the full amount of said instruments set forth in the complaint, and that plaintiff had been fully indemnified for all losses suffered"; that, before the commencement of this action, plaintiff assigned its choses in action to said casualty company, as shown by the photostatic copies of instruments which are contained in the transcript, and which were made a part of said affidavit.

To said motion for summary judgment, Wm. A. Sitton filed a counter affidavit in behalf of plaintiff, in which he averred that the drafts were paid by the defendant bank without the endorsement of Dietz, and merely upon his "O. K." of the signatures of said payees, to each of which drafts Mr. Holmes added his personal "O. K." before it was presented to the teller and paid without previously inquiring as to the genuineness of the signature of the payee. Mr. Sitton further averred that, upon inspection of the records he ascertained that "there was no 'Assignment' from plaintiff to The Fidelity & Casualty Company of New York of any rights of plaintiff, nor any other agreement other than the 'loan receipt'" attached to the affidavit of Mr. Trobridge. From that exhibit it appears that on October 5, 1942, the plaintiff did re-

ceive from the casualty company the aggregate sum of \$19,889.20, for which sum plaintiff then receipted in writing. There is no other evidence of either an assignment of the choses in action, or of payment of the losses sustained by plaintiff.

The receipt in question reads in part:

"New York, N. Y., October 5, 1942

"Received from The Fidelity and Casualty Company of New York, (Hereinafter called the 'Company'), Nineteen Thousand Eight Hundred Eighty Nine and 20/100 Dollars (\$19,889.20), as a loan, without interest, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss sustained by the undersigned through the acceptance and payment of the following described drafts: * * * [Here follows the dates, numbers, names of payees and amounts of the several fraudulent claims in the aggregate sum of \$19,889.20]

"The undersigned hereby agrees to promptly present claims and, if necessary, to commence, enter into and prosecute suit against such person or persons, corporation or corporations, or other parties, through whose negligence or other fault, the aforesaid loss was caused, with all due diligence at the expense and under the exclusive direction and control of the Company.
* * *"

Upon the foregoing evidence the trial court granted the motion and rendered judgment that plaintiff take nothing by its action. From that judgment the plaintiff has appealed.

The respondent contends that the receipt previously mentioned is a mere subterfuge on the part of the surety company, and that, properly construed in the light of the weight of authorities, it shows that plaintiff was fully compensated for its losses before the commencement of this suit and therefore has no valid cause of action against the bank, and that the surety company was not entitled to be subrogated to plaintiff's rights against the bank upon payment of its losses and therefore has no right of action against the bank which it could have assigned to plaintiff or maintained in its own name.

The appellant contends that the surety company did not pay plaintiff its losses in satisfaction of its surety liability, but, on the contrary, that it merely *loaned* plaintiff the money which it paid, as the receipt therefor clearly indicates, and that said receipt authorized plaintiff to, and it did, institute this action in behalf of the surety company.

We are of the opinion that, since the plaintiff was fully compensated for its loss on account of the forgeries of the drafts and the misappropriations of funds by Dietz before the commencement of the action, it could not maintain this suit in its own behalf, for to do so would result in plaintiff's receiving double pay for its losses, and that it could not maintain the action in behalf of the surety company, the indemnitor of plaintiff, since it was not entitled to be subrogated to the rights of plaintiff. *Meyers v. Bank of America, etc., Ass'n*, 11 Cal.2d 92, 77 P.2d 1084.

We are of the opinion the trial court properly granted the motion for summary judgment under the circumstances of this case.

The case of *Meyers v. Bank of America*, supra, appears to be determinative of the issue in this case against this appellant. It holds that if the Fidelity and Surety Company paid plaintiff the full amount of the losses sustained on account of the forged drafts in satisfaction of its liability on that account, while, in accordance with the recent decision of *Anheuser-Busch, Inc. v. Starley*, Cal.Sup., 170 P.2d 448, a separate suit might be maintained against Dietz, the principal tort-feasor, neither the plaintiff nor the surety company may maintain an action against the bank on the theory of subrogation or otherwise.

In the *Meyers* case numerous bank checks were received at plaintiff's office payable to him. He employed a managing agent who forged the name of the payee and negotiated the checks with one of the defendants, Wascher, who paid them and deposited them to his account in a bank. The managing agent fraudulently converted the funds to his own use. The bank presented the checks to the drawees and received full payment. The plaintiff was insured with

the United States Guarantee Company against dishonest conduct of his manager and agents. Upon demand, the surety company reimbursed plaintiff for his loss, whereupon plaintiff assigned to the surety company his cause of action against the bank. Acting in behalf of the assignee, surety company, plaintiff brought suit against the bank. Judgment was rendered for plaintiff. On appeal, that judgment was reversed. The court held that [11 Cal.2d 92, 77 P.2d 1089]:

"The right to maintain an action of this kind and to a recovery thereunder involves a consideration of, and must necessarily depend upon the respective equities of the parties. Here, the indemnitor has discharged its primary contract liability. It has paid what it contracted to pay, and has retained to its own use the premiums and benefits of such contract. It now seeks to recover from the bank the amount thus paid. It must be conceded that the bank is an innocent third party, whose duty to the employer was based upon an entirely different theory of contract, with which the indemnitor was not in privity. Neither the indemnitor nor the bank was the wrongdoer, but by independent contract obligation each was liable to the employer. In equity, it cannot be said that the satisfaction by the bonding company of its primary liability should entitle it to recover against the bank upon a totally different liability. The bank, not being a wrongdoer, but in the ordinary course of banking business, paid money upon these checks, the genuineness of which it had no reason to doubt, and from which it received no benefits. The primary cause of the loss was the forgeries committed by the employee, whose integrity was at least impliedly vouched for by his employer to the bank. We cannot say that as between the bank and the paid indemnitor, the bank should stand the loss. Under the facts of this case, as stated in *Northern Trust Co. v. Consolidated Elevator Co.*, 142 Minn. 132, 171 N.W. 265, 268, 4 A.L.R. 510: 'The right to recover from a *third person* does not stand on the same footing as the right to recover from the *principal*.' (Italics added.)

"Our conclusion, as hereinbefore has appeared, is that since the bonding company

had no superior equities, it was not entitled to be subrogated to any claim plaintiff might have had against the bank."

The court also quoted with approval, 11 Cal.2d at page 101, 77 P.2d at page 1089, from *In re Estate of Whitney*, 124 Cal.App. 109, at page 117, 11 P.2d 1107, with respect to the application of the doctrine of subrogation, as follows: "'While section 2848 of the Civil Code provides that a surety, upon satisfying the obligation of his principal, is entitled to be subrogated to that extent to all remedies which the creditor has against the principal, the question whether the obligation which is satisfied is in fact the obligation of the particular principal is to be decided in accordance with the rules of law and principles of equity. As was said in *Southern Surety Co. v. Tessum*, 178 Minn. 495, 228 N.W. 326, 66 A.L.R. 1136: 'Subrogation is equity's second method of compelling the ultimate payment by one who in justice and good conscience *ought* to make it—of putting the charge where it justly belongs. *Emmert v. Thompson*, 49 Minn. 386, 52 N.W. 31, 32 Am.St.Rep. 566. It is not an absolute right, but depends upon the superiority of the equities of him who asserts it over those of the one against whom it is sought. 'It will never be enforced when the equities are equal or the rights not clear.'""

The decision in the *Meyers* case further quotes with approval from *First & Tri State Nat. Bank & Trust Co. v. Massachusetts Bonding & Ins. Co.*, 102 Ind.App. 361, 200 N.E. 449, as follows: "'The doctrine of (subrogation) has been applied most frequently in the courts to certain types of insurance cases. It has with almost unanimity been held not to apply *in favor of a surety on a fidelity bond*, except only against persons who participated in the wrongful act of the wrongdoer.' (Citing numerous authorities.)"

The *Meyers* case also determines that unless the record discloses facts which would entitle one to subrogation, "an assignment will not confer upon him the right to be substituted in an action at law upon the assignment." The court said in that regard, 11 Cal.2d at page 96, 77 P.2d at page 1086: "* * * the conclusion seems inevitable that one who asserts a right of subroga-

tion, whether by virtue of an assignment or otherwise, must first show a *right in equity* to be entitled to such subrogation, or substitution, and that where such right is clearly shown by the application of equitable principles, *an assignment adds nothing to his right thereto*. Otherwise stated, *where by the application of equitable principles, a surety has been found not to be entitled to subrogation, an assignment will not confer upon him the right to be so substituted in an action at law upon the assignment*." (Italics added.)

[1] On the authority of the Meyers case we conclude that the Fidelity and Casualty Company of New York, under the circumstances of this case, was not entitled to be subrogated to the rights of plaintiff in the present suit against the bank.

The case of Anheuser-Busch, Inc. v. Starley, supra, is clearly distinguishable upon the facts involved from the present suit. In that case the plaintiff shipped a cargo of yeast with Denver-Chicago Trucking Company, a common carrier. The carrier was insured against loss of goods occurring in transit. The yeast was destroyed in transit as a result of a collision on the highway between the carrier's truck and Starley's automobile. Before the commencement of the action the carrier paid Anheuser-Busch, Inc., the amount of its loss, without reference to the alleged tortious act of Starley. No release was given to the carrier upon that payment. Anheuser-Busch, Inc., then commenced suit against Starley, the alleged tort-feasor, for damages for loss of said yeast on account of the collision alleged to have resulted from negligent operation of his automobile. On motion of the defendant, the trial court directed a verdict against plaintiff on the ground that it had been fully compensated for the loss by the carrier and that it was not a proper party in that action. The Supreme Court reversed the judgment, holding that plaintiff was a proper party in a suit for damages *against the principal tort-feasor* in spite of payment of its loss from a source wholly independent of the wrongdoer. Numerous authorities are cited in support of that declaration of law. The court said in that

regard [170 P.2d 450]: "Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action *against the wrongdoer* for the damages suffered is not precluded nor is the amount of damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer." (Italics added.)

The Anheuser-Busch case is distinguishable from the present action since this case is not against the tort-feasor but is based on a different liability of the bank for approving and paying forged drafts without previous knowledge of the forgeries.

The principal wrongdoer in this case was the forger, Ernest C. Dietz. He was the agent and employee of plaintiff, who, by implication at least, vouched for his honesty to the bank. Dietz is not a party to this suit. The liability of the surety company, which paid plaintiff the losses sustained, was contractual and absolute independently of the separate liability of the wrongdoer Dietz for his forgeries and misappropriations. Meyers v. Bank of America, supra. The bank was not a party to the fraudulent transactions of Dietz, but it was an innocent third party who paid the drafts in reliance upon the certificate of plaintiff's agent that the signatures of the payees were genuine. The bank paid the drafts to Dietz in the regular course of banking business without knowledge of the forgeries. The equities of the transactions are all favorable to the bank. Neither the surety company nor the bank was a party to the forgeries. But the bank was misled by the certificate of the genuineness of the payees' signatures by plaintiff's agent and employee.

This brings us to a determination of whether the receipt by plaintiff of the sum of \$19,889.20 from the Fidelity and Casualty Company constituted payment of the liability of the surety company and therefore a discharge of its indebtedness under the bond, or whether it was a mere loan of money to plaintiff. The only evidence to support the theory that it was a loan is the language contained in the previously quoted portion of the written receipt which plaintiff signed. It does recite that plain-

tiff received the money "as a loan, without interest, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss sustained by the undersigned through the acceptance and payment of the following described drafts." It further provides that plaintiff will promptly commence and prosecute an action against such person or persons, corporation or corporations causing the losses "at the expense and under the exclusive direction and control of the [surety] Company." The respondent contends that the language, in spite of the fact that the receipt designates the transaction "as a loan", indicates the money was received by plaintiff from the surety company in payment of its bonded liability for the forgeries and misappropriations of plaintiff's agent, Dietz; that the receipt clearly infers that no money is to be returned to the surety company except to the extent that plaintiff may recover from others; that the balance of said money is to be deemed to be in payment of the surety company's liability in discharge of its indebtedness upon the bond, and that such suit against the persons causing the losses is to be maintained in behalf of the surety company "at the expense and under the exclusive direction and control of the [surety] Company."

[2,3] We are of the opinion the receipt of said money by plaintiff was in payment of the surety company's bonded liability in discharge of its indebtedness, and not as a mere loan. If it was not a payment of the liability the surety company would not be entitled to subrogation and it therefore had no cause of action which could be assigned to plaintiff for collection, as we have previously held. Moreover, as the respondent asserts, the surety company which was organized under the statutes of New York was not authorized to make such an unsecured loan without interest. *Simpson v. Hartranft*, 157 Misc. 387, 283 N.Y.S. 754; *Scarborough v. Bartholomew*, City Ct., 22 N.Y.S. 2d 635; *Scarborough v. Bartholomew*, 263 App.Div. 765, 30 N.Y.S.2d 971; *Purdy v. McGarity*, 262 App.Div. 623, 30 N.Y.S.2d

966. In the *Scarborough* case first above cited, wherein an asserted loan receipt similar to the one which is here involved was construed, the court, quoting with approval from *Simpson v. Hartranft*, supra [157 Misc. 387, 283 N.Y.S. 757], said: "If the transaction between the Home Insurance Company and the defendants could be considered a loan, in my opinion it would be illegal and void, because such a loan is not one permitted to be made, in this state, by insurance companies within the meaning of section 16 of the Insurance Law" of the State of New York.

In several New York cases, wherein the liability of insurers were absolute, as it was in the present case, in construing language of asserted loan receipts similar to the one here involved, it was held that the receipt of losses from the insurer where there were no provisions for repayment of the moneys *except upon condition that it be recovered from other parties*, and neither interest nor security for the asserted debts were provided for, they constituted payments of the liabilities and not mere loans, in spite of recitals in the written receipts that they were intended as mere loans of money. *Yezek v. Delaware, L. & W. Ry. Co.*, 176 Misc. 553, 28 N.Y.S. 2d 35; *Purdy v. McGarity*, App.Div., supra; *Simpson v. Hartranft*, supra; *Scarborough v. Bartholomew*, City Ct., supra; *Scarborough v. Bartholomew*, App.Div., supra; *Par-X Uniform Service Corp. v. Emigrant Industrial Savings Bank*, 183 Misc. 126, 49 N.Y.S.2d 557; *Automatic Sprinkler Corp. v. Robinson-Slagle Lumber Co.*, La.App., 147 So. 542. Construing a similar receipt for money, it was said in the *Yezek* case, supra, 28 N.Y.S.2d at pages 37 and 38, that: "The insurer's liability to the insured is *absolute* when the loss occurs. No shipper or other third party is involved. The insured is entitled to prompt payment without resort to a loan. The transaction is held to be a payment. * * * it was 'payment without regard to its form.' The so-called loan was a fiction, a subterfuge unnecessary either to protect the insurer or to secure prompt payment to the insured."

Construing a similar purported loan receipt in the *Purdy* case, supra, 30 N.Y.S.

YURKAS v. ZAMPATTI.

Civ. 7248.

District Court of Appeal, Third District,
California.

July 24, 1946.

Hearing Denied Sept. 16, 1946.

2d at page 970, the court said: "It strains our credulity too far to treat that agreement as one for a loan."

Likewise in construing a similar purported loan receipt in almost the exact terms of the one here involved, in the Par-X Uniform Service Corporation case, supra, 49 N.Y.S.2d at page 559 the court said:

"The proofs of loss and the checks indicate unequivocally that the plaintiff has been paid in full and is no longer interested in this action. The only evidence negating this conclusion are the loan agreements attached to the checks. It appears therefrom that the plaintiff acknowledges the sums received as loans without interest, repayable to the extent of any recovery herein. Such recovery is pledged to the insurers and plaintiff agrees to co-operate to that end and prosecute the action in its own name at the expense of the insurers and under their absolute control.

"On this record, I cannot but find that this is an empty device to avoid the necessity of the insurers suing in their own names as subrogees, and that the plaintiff is not the real party in interest but has assigned the cause of action and may not maintain it. * * *

"It follows that the defendant may have judgment dismissing the complaint on the merits."

The cases cited and relied upon by appellant are distinguishable and several of them have been distinguished in the cases previously herein cited from the facts of this record.

We conclude that the Fidelity and Casualty Company was not subrogated to the rights of plaintiff under the circumstances of this case; that said surety company fully paid the losses of plaintiff in discharge of its indebtedness, and that plaintiff was not entitled to maintain this action in its own behalf or as a substituted party for the surety company. It follows that the trial court did not err in granting summary judgment on the pleadings.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

1. Judgment ⇨11, 504(3)

Generally, a premature judgment of court having jurisdiction is not void, but merely erroneous or irregular and hence merely voidable, whether on collateral or direct attack.

2. Judgment ⇨435, 443(1)

In equity suit to set aside judgment for extrinsic fraud or mistake, mere errors or irregularities other than those based on such fraud or mistake are no more subject to attack than in collateral proceeding.

3. Appeal and error ⇨1195(3)

A decision of District Court of Appeal, affirming premature judgment of dismissal, on appeal taken on judgment roll alone, because defect in original proceeding was not apparent from inspection of judgment roll, became law of case, so as to preclude trial court from setting aside judgment in subsequent suit.

4. Evidence ⇨43(4)

The District Court of Appeal may take judicial notice of date on which appeal thereto from judgment dismissing action was filed.

5. Limitation of actions ⇨100(4)

An action, instituted over three years after filing of plaintiff's appeal from judgment dismissing her previous action against defendant, to set aside such judgment on ground of extrinsic fraud or mistake, was barred by limitation as brought over three years after plaintiff discovered facts constituting alleged cause of action. Code Civ.Proc. § 338, subd. 4.

6. Judgment ⇨460(1)

In suit to set aside judgment of dismissal on ground of extrinsic fraud or mistake, complaint failing to show that plaintiff could or would amend complaint in prior action, so as to make it state valid cause of action, was fatally defective.

7. Judgment **379(1)**

A judgment will not be vacated merely in order that party complaining thereof may vindicate his contention that judgment was improvidently made, but he must also show, at least prima facie, that, if judgment were set aside and proceedings reopened, a different result would probably follow.

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Action in equity by Rosalie Yurkas against Victor Zampatti to vacate and set aside a judgment dismissing plaintiff's previous action against defendant for breach of contract. From an order sustaining defendant's demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Rosalie Yurkas, of Eureka, in pro. per.

Victor Zampatti, of Eureka, in pro. per.

PEEK, Justice.

This is an appeal from an order sustaining without leave to amend a demurrer to a complaint filed by appellant in propria persona for equitable relief against a default judgment rendered in favor of respondent.

It is the second time the parties hereto have been before this court. In the former case, appellant filed a complaint on January 17, 1941, wherein she alleged she had suffered damages by reason of defendant's breach of contract in failing to represent her as agreed. Defendant's demurrer thereto was sustained, and plaintiff was granted twenty days in which to amend. On the eighteenth day after notice of said order had been mailed by defendant to plaintiff, the trial court, on the motion of defendant, rendered judgment dismissing said action with prejudice. Plaintiff did not move to vacate said judgment, although she did file an appeal therefrom on the ground that it was prematurely made. However, as said appeal was taken on the judgment roll alone, this court, in affirming the judgment of the trial court, held that "in view of the fact that the only part of the record which is properly before this

court is the judgment roll, as defined in said section 670 [Code Civ.Proc.], there is nothing upon which the court can act to set aside or reverse the judgment." *Yurkas v. Zampatti*, 49 Cal.App.2d 95, 96, 97, 121 P.2d 17, 18.

In the present case, plaintiff's first amended complaint is designated as an action in equity to vacate and set aside a void judgment. In addition to the facts previously mentioned, she further alleges that on or about August 25, 1944, by a motion in writing she moved said court to vacate and set aside said judgment on the ground that the same was null and void in that it had been made and entered without the jurisdiction of said court; that being a layman she did not know that the correct procedure would have been for her to have made a motion to set aside the default and order of February 19, 1941 (which was the order sustaining the demurrer granting leave to amend within twenty days), and in the event of a denial thereof to have appealed from such order; that "no effective appeal, in fact or in law, existed or does now exist from the ruling of the said Court of February 17, 1941, as upon such an appeal, the record showing the date said demurrer was sustained, the date of service of notice sustaining the said demurrer upon plaintiff cannot be adequately, properly, legally, or in fact at all shown to the Appellate Court, said Appellate Court cannot at all determine whether said ruling of February 17, 1941, is jurisdictional and within the power of said Court to make it, on such an appeal; nor can it be determined on any such appeal whether the time to amend said complaint had expired when the ruling of February 17, 1941, was made"; and that at no time had she, nor does she now have, a remedy by way of appeal from said ruling of February 17, 1941. The complaint concludes with a prayer that said judgment of dismissal be set aside, that she be permitted to file her amended complaint, and for such other relief as may be proper.

The trial court, in ruling upon the demurrer interposed by defendant to said complaint, observed that it was necessary to consider only two of the questions

raised by defendant: (1) Whether the complaint states a cause of action, and (2) whether the action is barred by the lapse of time and laches. With regard to the first question, the court concluded, on the authority of *In re Newman's Estate*, 75 Cal. 213, 16 P. 887, 7 Am.St.Rep. 146, that the premature judgment previously entered was merely erroneous and not void, and as to the second question, that, although fraud was not sufficiently pleaded, yet, even if it had been, the record affirmatively shows that more than three years have elapsed since the discovery by plaintiff of the facts constituting the alleged fraud, and therefore the action would be barred in any event, citing *Estudillo v. Security, etc., Co.*, 149 Cal. 556, 565, 87 P. 19.

On appeal from said order, two contentions are advanced by appellant: (1) That the judgment under attack was without the jurisdiction of the court and therefore void, and (2) that her first amended complaint states facts sufficient to constitute a cause of action and the court erred in ruling otherwise.

In support of her first contention, appellant cites *Pinon v. Pollard*, 69 Cal.App. 2d 129, 158 P.2d 254, a case holding that a judgment rendered prior to the expiration of the time for completing service by publication of the summons on which it is based is a mere nullity, as the court never obtained jurisdiction over the person of the defendant. However, the distinction between such a case and one where a court having regularly obtained jurisdiction, makes an erroneous ruling in the exercise thereof, is obvious.

[1] Under the authorities generally, a premature judgment made by a court having jurisdiction is not void but merely erroneous or irregular. This is the direct holding in the case of *In re Newman's Estate*, 75 Cal. 213, 16 P. 887, 7 Am.St.Rep. 146, relied upon by the trial court as above noted. Subsequent decisions have followed the same rule. See *McGrath v. Langford*, 35 Cal.App. 215, 169 P. 424; *California C. C. Co. v. Crescent City Light, Water & Power Co.*, 30 Cal.App. 619, 621, 159 P. 209; *May v. Hatcher*, 130 Cal. 627, 63

P. 33; *Gray v. Hall*, 203 Cal. 306, 265 P. 246.

Appellant seeks to distinguish the rule of those cases by urging that they deal with a collateral and not a direct attack, such as the one herein involved. However, this contention takes too narrow a view of the purport of said decisions and too broad a view of the scope of this proceeding. A careful reading of the cases referred to, such as *May v. Hatcher*, supra, 130 Cal. at pages 628, 629, 63 P. at page 34, and *Gray v. Hall*, supra, 203 Cal. at pages 313-319, 265 P. at pages 250-253—the former an appeal from an order denying a new trial, the latter an action in mandamus—shows that no such limitation can be read into them. This incontestably appears from an examination of the case of *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 P. 1158, 1160, relied upon and discussed in *Gray v. Hall*, supra, 203 Cal. at pages 315, 316, 265 P. at pages 251, 252. Said case is described in the opinion therein as an action "to set aside a judgment [for] irregularity or fraud in its procurement." The Washington supreme court stated:

"But whatever the rule may be in suits in equity to set aside judgments absolutely void for lack of service, that rule is not essentially controlling here, since the judgment here involved was not a void judgment. Though the copy of the summons which was served upon respondent as defendant in the original action was not signed, the complaint in this action does not attempt to assert that fact as a ground for vacating the judgment. Moreover, respondent actually appeared in response to that service by serving upon appellant's then attorneys in that action a motion to require the complaint to be made more definite and certain and a demand for a bill of particulars, thus effectually waiving any defect in the service and submitting to the jurisdiction of the court. The court thereafter had jurisdiction. If through fraud or concealment practiced upon it, or through inadvertence or mistake, it thereafter entered a judgment prematurely or while a motion was pending undisposed of and without notice, the judgment was ir-

regularly entered. It was voidable, not void. 1 Freeman on Judgments (4th Ed.) § 126; *Marshall & Ilsley Bank v. Hyman*, 84 Wis. 23, 53 N.W. 1126; *Salter v. Hilgen*, 40 Wis. 363; *Davison v. Brown*, 93 Wis. 85, 67 N.W. 42; *In re Estate of Newman*, 75 Cal. 213, 16 P. 887, 7 Am.St.Rep. 146; *Ballinger v. Tarbell*, 16 Iowa 491, 85 Am. Dec. 527; *McAlpine v. Sweetser*, 76 Ind. 78. It is the rule in such a case with which we are here concerned."

[2] This decision is squarely in point, and constitutes a logical application of the rule as announced by our supreme court. Such rule conforms to the general principle, likewise well established in this state, to the effect that in a suit in equity to set aside a judgment on the ground of extrinsic fraud or mistake, mere errors or irregularities other than those based on such fraud or mistake are no more subject to attack than they would be in a collateral proceeding. *Le Mesnager v. Variel*, 144 Cal. 463, 465, 77 P. 988, 103 Am.St. Rep. 91; *Harvey v. Griffiths*, 133 Cal.App. 17, 22, 23 P.2d 532.

[3] The other propositions advanced by appellant in connection with the same point, to the effect that a judgment void on its face may be set aside at any time, and that a judgment is void on its face when an inspection of the judgment roll so indicates, are sound principles of law but they have no application here. That the asserted defect in the original proceeding was *not* apparent from an inspection of the judgment roll, is the very essence of the decision by this court on the former appeal (49 Cal.App.2d 95, 121 P.2d 17), and said decision has become the law of the case. See *Nelson v. Robinson*, 73 Cal.App.2d 263, 166 P.2d 76, and cases cited. In fact, were our former opinion not based on said ground, then appellant would be confronted by the circumstance that the prior judgment, when affirmed, constituted a conclusive adjudication against her asserted right to relief. Since her entire case depends upon a showing that our former decision was not an adjudication on the merits, she may not successfully urge a contention predicated upon a contrary assumption.

[4,5] With regard to the second ground on which she assails the judgment herein, viz., extrinsic fraud or mistake, appellant likewise fails to make a case for equitable relief. Assuming for the sake of the discussion that she has sufficiently pleaded the requisite extrinsic factors, it nevertheless appears from the face of the complaint that she has failed to institute this action within the time prescribed by section 338, subdivision 4, of the Code of Civil Procedure, namely, three years from the time of the discovery of the facts constituting the alleged fraud or mistake. The complaint specifically alleges that the judgment under attack was entered on February 17, 1941, and that "within the time permitted and allowed by law to appeal from said Order, Judgment and Decree of Dismissal, the said plaintiff (appellant) did appeal from said Order, Judgment and Decree of Dismissal * * *." We may take judicial notice of the fact, as the trial court did, that said appeal was filed March 4, 1941. The complaint herein was filed on November 13, 1944. It therefore conclusively appears that this action was instituted more than three years after appellant discovered the facts constituting her alleged cause of action. While the "Special Demurrer" which respondent has interposed to the complaint is not a model of pleading, it does adequately present this issue.

[6,7] Finally, the complaint herein is likewise defective in that it makes no attempt to show that appellant could or would amend her complaint in the prior action so as to make it state a valid cause of action, if she were permitted to do so. It is well established that the solemn judgment of a court will not be vacated merely in order that a complaining party may vindicate the contention that it was improvidently made. In addition, it must be made to appear, at least prima facie, that if the judgment were set aside and the proceedings reopened, a different result would probably follow. *Wattson v. Dillon*, 6 Cal. 2d 33, 43, 56 P.2d 220; *Hite v. Mercantile Trust Co.*, 156 Cal. 765, 768, 106 P. 102; *Davis v. Chalfant*, 81 Cal. 627, 630, 631, 22 P. 972; *Machado v. Machado*, 66 Cal. App.2d 401, 405, 152 P.2d 457; *Wilson v.*

Wilson, 55 Cal.App.2d 421, 427, 130 P.2d 782; Hogan v. Horsfall, 91 Cal.App. 37, 41, 42, 266 P. 1002. Such a showing appellant has failed to make.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



75 Cal.App.2d 621

RAFTER v. DUBROCK'S RIDING
ACADEMY.
Civ. 15204.

District Court of Appeal, Second District,
Division 3, California.

Aug. 1, 1946.

Hearing Denied Sept. 19, 1946.

1. Negligence ☞121(2)

For application of doctrine of "res ipsa loquitur" accident must be of a kind which ordinarily does not occur in the absence of some one's negligence, it must be caused by an agency or instrumentality within defendant's exclusive control, and it must not have been due to any voluntary action or contribution on part of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Negligence ☞121(2)

The doctrine of res ipsa loquitur may be applied, though agency or instrumentality causing the accident was not in defendant's actual control, on theory that defendant had constructive control because in actual control at time of negligent act, provided plaintiff proves that condition of instrumentality or agency had not been changed after it left defendant's possession.

3. Livery stable keepers ☞11

In action for injuries sustained by plaintiff when she fell from horse rented from defendant when saddle became loose and turned, whether defendant was negligent was for jury under doctrine of res ipsa loquitur, though defendant was not

in actual control of horse at time of accident, where plaintiff did not handle horse improperly and saddle was not adjusted by any one after leaving defendant's hands.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Doris Rafter, a minor, by Pauline Rafter, her guardian ad litem, against Dubrock's Riding Academy, a corporation, to recover damages for injuries sustained by the plaintiff when the saddle on a horse rented from defendant fell off, precipitating plaintiff to the ground. From a judgment of nonsuit, the plaintiff appeals.

Judgment reversed, and cause remanded for a new trial.

Anderson & Adam, of Los Angeles, for appellant.

Reed & Kirtland, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Plaintiff, a minor twenty years of age, brought suit by her guardian ad litem to recover damages for personal injuries sustained by her on March 31, 1944, when the saddle on the horse which had been rented from the defendant corporation fell off, carrying her with it and precipitating her to the ground. The hearing was begun before a jury and at the conclusion of plaintiff's case defendant moved for a nonsuit. This motion was granted, the trial judge saying that he did not think plaintiff had "proven either a res ipsa loquitur case or a case of simple negligence." From this judgment of nonsuit plaintiff prosecutes the instant appeal.

The complaint charged that on March 31, 1944, the defendant corporation was engaged in the business of operating a riding academy at 3224 Riverside Drive in the city of Los Angeles to which the public was invited for the purpose of renting and riding saddle horses for a certain price per hour; that on that date plaintiff rented from defendant a saddle horse equipped for pleasure riding; that defendant through its employees "so carelessly and negligently harnessed, saddled and equipped said horse

rented by the plaintiff, that while plaintiff was riding said horse on the bridle paths in Griffith Park, the saddle on the horse turned and fell off, throwing plaintiff to the ground with great violence," causing her to sustain serious injuries, etc.

Plaintiff testified that about 5 o'clock in the evening of March 31, 1944, she was one of a party of approximately 20 employees of the Lockheed Aircraft Corporation who had rented riding horses from the defendant, the riding party having been previously organized and arranged for by Miss Lila Reaves, a coemployee of plaintiff. Plaintiff had never ridden a horse prior to this occasion. On the date mentioned the horses, already saddled and fully equipped, were brought out into the courtyard, where the group had congregated, plaintiff being assigned the mare, "Harmony Ann," on which was equipped a Western saddle, a type customarily used by beginners. With the assistance of an officer of the defendant corporation, Stanley West Dubrock, plaintiff mounted her horse. She testified that no one gave her any instructions as to how to handle the mare before mounting but that "after I was on the horse * * *

[t]he man that helped me showed me how to put my feet in the stirrup," he adjusted the stirrup and then "did something to the saddle underneath the horse." After the entire group had mounted they proceeded across the street from defendant's riding academy and onto the bridle paths of Griffith Park. Plaintiff rode for approximately "a half hour" without any trouble, during which period she did not run her horse, the pace being "more than a walk but less than a run." In relating the details of her fall, the plaintiff stated that she noticed the saddle slipping shortly before she was thrown from the horse; that "right before I fell, the horse started to going pretty fast and * * * I pulled on the reins and held on to the horn and he wouldn't stop, so it just started to turn * * *. He just kept running. * * *

Q. * * * When did you first feel the saddle start to turn? A. About five minutes before it did turn completely. * * * Q. Did your body go with the saddle? A. Yes." The court inquired, "Well, were you aware of the fact that the saddle was

slipping for the full five minutes before you hit the ground?" The witness answered, "No," and finally testified that she felt the saddle slipping for approximately ten seconds. Plaintiff testified further that she was unable to get up and that certain members of the party picked her up and immediately took her to the hospital; that the horse ran away and she never saw it after that. She further testified that at no time during the riding trip did she get off the horse, nor did any one adjust or do anything to the saddle or any other portion of the horse's equipment; that while certain members of the party stopped and dismounted once during the trip at a drinking fountain she remained on her horse. On cross-examination plaintiff testified that she never "ran the horse"; that when she became aware that the saddle was slipping, the horse "just kept on running"; that she did not call to any one. "Q. And the only explanation you have for falling off was that the saddle slipped to the right? A. That's right. Q. You observed nothing else wrong in your equipment; is that right? A. No"; that her horse at no time appeared to be warm or perspiring.

Mrs. Melva Dubrock Bellard, office manager of the defendant corporation, called under section 2055, Code of Civil Procedure, testified that "Harmony Ann", ridden by plaintiff, was saddled with a Western saddle and that the saddle was equipped with a cord cinch made of cotton cord "with a loop on either end, or a ring on either end"; that it had no buckle on it but "was tied in a regular knot"; that the cinch holds the saddle on the horse's back; that a cord cinch was used by her organization on all Western saddles.

Plaintiff called as an expert witness, Nathan Alonzo Meck, who testified he had had forty years experience with horses and saddles. In describing a cinch this witness stated that some are "made of leather and some are made of mohair; some are made of hair, horse's hair and some are made of cord 23 or 24 inches with a buckle at one end and if you leave the latigo drop—The Court: You place the saddle on the horse's back over the blanket and then you reach underneath and pull the cinch strap through the righthand side

of the hook or ring to the left hand side and then cinch it up tight. A. Pull the latigo strap through the ring of the cinch and to the rigging of the saddle and that has a buckle and you have the strap fastened to the rigging of your saddle. Q. And the thing is to get it reasonably tight so the saddle will remain firm but not so tight as to have the horse in pain? A. That's right." In explaining the process of cinching a horse, this witness stated that "a horse taken from the barn or the corral, that has been fed and watered will have a tendency to bloat and when the saddle is put on them and they are cinched relatively tight, anywhere from maybe five minutes to one hour that horse will go back to normal and that will have a tendency to loosen the cinch. Q. In other words, the belly of the horse shrinks. A. That's right; after a horse has been moved or rode, some horses have a tendency to swell up with air after you cinch them. * * *. Q. * * * What is the natural conduct of a horse when he feels the saddle slipping? * * * Q. Well, various horses act in various ways; one horse may become frightened and go to bucking and another one may go to running and another one may stop and stand still so that what a horse will do nobody knows. Q. If the cinch is tight on the horse will the saddle slip? * * * Q. Well, there is a lot of things will enter into that depending on the shape of the horse's back, the shape of the tree of the saddle and how tight the animal was cinched."

Stanley West Dubrock, called under section 2055, Code of Civil Procedure, stated that he was an officer of the defendant corporation and in the "business of renting saddles and horses to people for their riding" and "teaching pupils how to ride"; that on this particular day he rechecked the saddle and equipment on "Harmony Ann" when plaintiff was on the horse; that he checked every horse in the group; that a cord cinch was used on "Harmony Ann"; that he tested the cinch after plaintiff got on the horse and that it was in "perfect shape." In answer to the query, "And does she ["Harmony Ann"] have a broad back or a narrow back?" answered, "Well, she just has a nice combination that any

horseman would like," and that she was not deformed in any way whatsoever.

Miss Reaves, called by the plaintiff, stated that she had organized the party; that during the ride, so far as she knew, none of the party raced his or her horse; that during the ride plaintiff "was in sight where I could see her"; that plaintiff did not race, run or gallop her horse; that she did not see plaintiff fall off the horse, "there's a little curve after that point where we left and she was just past that curve and I came around the point just after she fell," but "saw her when she was on the ground and the boys were just about to pick her up"; that she saw the horse "running and one of the fellows was going after it"; that the saddle was on the ground and one of the boys picked it up and put it on the fence; that Mrs. Ballard was the lady at defendant's riding academy from whom she rented the horses and to whom she gave the names of the members of the party; that Mrs. Ballard "asked me those that had not ridden"; that she told Mrs. Ballard that plaintiff was an inexperienced rider.

Plaintiff contends that under the doctrine of *res ipsa loquitur* she presented a *prima facie* case and was, therefore, entitled to have defendant put to its defense. Respondent claims that the doctrine has no application, the principal argument being that the "vital element of *control* is absolutely lacking in the case at bar."

[1] In the recent case of *Ybarra v. Spangard*, 25 Cal.2d 486, at page 489, 154 P.2d 687, at page 689, it is said: "The doctrine of *res ipsa loquitur* has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' Prosser, Torts, p. 295."

[2] As to condition (1), it is apparent that in the instant case the accident ordinarily would not have occurred in the absence of negligence on the part of some one. As to condition (3), there is nothing

in the record to indicate that this accident was due in any degree to the voluntary action or contribution on the part of plaintiff. She did not race the mare or otherwise improperly use her; she did not handle the saddle or interfere with it in any way; the saddle was not adjusted by any one after leaving defendant's hands; and plaintiff's only explanation for her fall was that the saddle suddenly slipped off the horse, taking her with it. As to condition (2), the question arises as to whether the instrumentality, the saddle, can be said to have been under the exclusive control of the defendant. Since the defendant corporation was not present by any of its officers when the ride took place or when the saddle broke or slipped the only control which may be attributed to it might be called "constructive control," a term used by the court in *Ybarra v. Spangard*, supra, citing *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436. At page 458 of 24 Cal.2d, at page 438 of 150 P.2d, in the latter case, the following appears: "Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that the defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. See cases collected in *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 617, 618, 140 P.2d 369. * * * The reason for this prerequisite is set forth in *Prosser on Torts*, supra, at page 300, where the author states: 'Allied to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible.'"

In *Ybarra v. Spangard*, supra, where the doctrine was held applicable in a situation where an unconscious patient on an operating table sustained injuries to a healthy part of his body not subject to treatment,

we find the following statement (25 Cal.2d at page 493, 154 P.2d at page 691): "An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. Thus, *the test has become one of right of control rather than actual control.* [Italics ours.] See *Metz v. Southern Pac. Co.*, 51 Cal.App.2d 260, 268, 124 P.2d 670. In the bursting bottle cases where the bottler has delivered the instrumentality to a retailer and thus has given up actual control, he will nevertheless be subject to the doctrine where it is shown that no change in the condition of the bottle occurred after it left the bottler's possession, and it can accordingly be said that he was in constructive control."

[3] Defendant maintains that it can be successfully argued that the accident could have been due to one of several causes for which the defendant is not responsible, saying that the "evidence demonstrates from the mouth of plaintiff's own witness that the horse, by his own conduct, could have been a causative factor in permitting the saddle to become unloosened." But since operators of riding academies, holding themselves out to the public as having horses properly equipped for pleasure riding must, indeed, be aware of any peculiar propensities of their own horses and, in the exercise of due care for the safety of their patrons, must take into consideration such matters as the proper time when their horses should be fed and watered as related to the time of saddling the horses, we believe the argument is without merit. In any event the question whether the defendant had taken proper measures before saddling and had exercised the degree of care required of it, was a matter of defense, properly determinable by the jury.

In the ordinary course of things a saddle does not slip and fall if proper care has been used in cinching it on the horse. The fact that the saddle became loose in some way, causing it to fall, carrying plaintiff with it, under the peculiar circum-

stances of the instant case, we think gives rise to an inference that the saddling was done either in a careless or improper manner or that the equipment was in some way defective. See *McComas v. Al. G. Barnes Shows Co.*, 215 Cal. 685, 697, 12 P.2d 630, where the doctrine was held applicable in an action for damages for personal injuries sustained by plaintiff when the howdah in which she was sitting on an elephant's back slipped and fell to the ground.

The judgment is reversed and the cause remanded for a new trial.

SHINN and WOOD, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.



75 Cal.App.2d 528

In re DAVIS' ESTATE.

DAVIS et al. v. WITCHER et al.

Civ. 15016.

District Court of Appeal, Second District,
Division 3, California.

July 26, 1946.

1. Trusts ⇐272(2)

Where stocks, bonds or other property belonging to the trust estate is sold, the money received, including profits, if any, ordinarily constitutes a part of the corpus of the estate.

2. Wills ⇐466

When used in a document "income" ordinarily means returns from investments or earnings of property as distinguished from appreciations in value of the property, or profits from buying and selling.

See Words and Phrases, Permanent Edition, for all other definitions of "Income".

3. Wills ⇐466

When the words "income" or "net income" are used in a document they must be given the meaning commonly attributed

to them unless it can be seen that the maker of the document intended them to have a different meaning.

4. Wills ⇐684(3)

Where testator gave \$75,000 to trustees in trust and directed that it be invested and reinvested and that net income be paid to named person for life with remainder over, and in disposing of remainder, testator consistently used the expression the "said sum of seventy-five thousand dollars" the quoted phrase was intended to identify the trust estate and not to limit it so that profits realized by trustees from sales of trust assets constituted "capital" payable to remaindermen, and not "income" payable to life beneficiary.

See Words and Phrases, Permanent Edition, for all other definitions of "Capital".

5. Trusts ⇐172

Where decree of distribution did not purport to state the duties of trustees, nor interpret the will, the will was controlling as respects powers and duties of trustees and rights of life tenants and remaindermen.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Proceeding in the matter of the estate of John Warner Davis, deceased, on petition of Ray S. Witcher, as trustee, for instructions to which Lila C. Witcher, Ella Davis, Lida D. Kirkbride, Elaine Davis Payne, Joan Davis Barron and John Warner Davis, 2d were made parties. From the judgment entered, Ella Davis, Lida D. Kirkbride, Elaine Davis Payne, Joan Davis Barron and John Warner Davis, 2d, appeal.

Reversed for further proceedings in conformity with opinion.

J. E. Simpson, of Los Angeles, and Manley C. Davidson, of Hollywood, for appellants.

Edward R. Young and E. L. Searle, both of Los Angeles, for respondent Ray S. Witcher, as trustee.

Lillick, Geary, McHose & Adams, of Los Angeles, for respondent Lila C. Witcher.

SHINN, Justice.

The question for decision upon this appeal is whether, under the will of John Warner Davis, profits realized from the sale of trust assets constitute income or capital. The trial court, upon petition of the trustee for instructions, ruled that the profits, consisting of the value of trust assets above their value when received in the trust, constitute income, and ordered them distributed to the life beneficiary; the remaindermen have appealed. Lila C. Witcher, the life beneficiary, will be referred to as respondent.

The will made cash bequests in the total sum of \$329,500; the estate was first appraised in 1932 at \$539,881.61. In 1938-39, no distribution having been made, the remaining assets, many of which had come into the estate through foreclosures, were reappraised at a much smaller figure. After the payment of taxes, expenses of administration and claims, and allowing for property specifically devised and bequeathed, there was available only \$18,818.76 in cash, and real and personal property of the appraised value of \$212,950, or a total of \$231,764.76, as against cash bequests of \$329,500. The interested parties entered into an agreement for distribution of the estate. Under the agreement certain bequests were to be paid in full. These do not concern us. There were three bequests of \$75,000 each to a sister, Ella Davis, a sister, Lida D. Kirkbride, and a brother, Francis B. Davis, now deceased, and who was the father of Elaine Davis Payne, Joan Davis Barron and John Warner Davis, 2d, all of the above named being remaindermen of the trust herein-after mentioned and the appellants herein. There was also a bequest of \$10,000 to Robert W. Harper and one of \$75,000 to trustees who have been succeeded by respondent Ray S. Witcher, the present trustee. Lila C. Harper, now Lila C. Witcher, is the life beneficiary under the trust and entitled to the net income thereof. A contingent life beneficiary named in the will has deceased. By the terms of the agreement, the property available to meet the above bequests, which totaled \$310,000, was to be distributed, by decree of

partial and ratable distribution, to the several claimants proportionately and each share was to be made up of specific properties at their appraised value. The four bequests of \$75,000 each to the two sisters, the brother, and the trustees were reduced to \$65,145.95 each, less taxes and advances; the trustees were to receive the net amount of \$59,483.05, consisting of \$49.71 in cash and certain described properties, and the agreement provided for a distribution of the specific properties to the several claimants, including the trustees, instead of the cash which they were to receive by the terms of the will. Distribution was made in accordance with the terms of the agreement, and the decree has become final. The several properties which went to each distributee, whether of cash, real or personal property, were specifically described in the decree.

The trustees took title to thirteen parcels of real property, eleven of which were income producing, and this income has been paid to respondent Lila C. Witcher, as life beneficiary. In 1944 three of these parcels were sold by the surviving trustee at a profit of \$8,576.55, that is to say, they had been received at their appraised value of \$14,750 and were sold for \$23,326.55. The life tenant lays claim to these profits and to any profits that may be realized from future sales, contending that they constitute income, and the remaindermen, as we have stated, contend that such profits should be retained by the trustee as corpus. The parties are in substantial agreement as to the general principles of law which determine whether profits from the sale of trust property constitute capital or income. The life beneficiary contends that the case is taken out of the general rules by the specific provisions of the will; that under those provisions the capital is limited to a certain amount and all in excess of that must be treated as income. This construction was adopted by the trial court and is contended by appellants to be erroneous.

[1] The general rule, supported by numerous decisions, is stated in 65 C.J. 859, § 736, as follows: "Where stocks, bonds or other property belonging to the

trust estate are sold, the money received, including profits, if any, ordinarily constitutes a part of the corpus of the estate."

Comment b of section 233(1) of the Restatement, Trusts, p. 682, says:

"Other receipts. Subject to the allocation of receipts from unproductive or wasting property (see secs. 239-241), and except as stated in Comment c, money or other property received by the trustee as the proceeds of a sale or exchange of the principal of trust property is principal. Similarly, where trust property is taken on eminent domain, the proceeds received by the trustee are principal. If trust property is destroyed by fire or other casualty, the proceeds of insurance thereon received by the trustee are principal.

"Subject to the allocation of receipts from unproductive or wasting property (see secs. 239-241), and except as stated in Comments c and d, profits arising from the sale or exchange of the principal of trust property or any enhancements in the value of the principal of trust property are allocable to principal, not income; and losses incurred by the sale or exchange or destruction of or damage by casualty to the trust property are chargeable to principal."

The rule is also stated in 4 Bogert on Trusts and Trustees, § 823; 2 Scott on Trusts, sections 233, 233.01; 3 Page on Wills, Lifetime Ed., section 1159; 33 Am. Jur. p. 849, sec. 340; Perry on Trusts, sec. 547, and has been followed in California. In re Estate of Gartenlaub, 185 Cal. 648, 198 P. 209, 16 A.L.R. 520; In re Estate of Gartenlaub, 198 Cal. 208, 244 P. 348, 48 A.L.R. 677; and In re Estate of Canfield, 104 Cal.App. 181, 285 P. 363, 364. In the last case it was said: "In view of the decision rendered by the Supreme Court of California in Re Estate of Gartenlaub, 198 Cal. 204, 244 P. 348, 48 A.L.R. 677, it seems to be settled beyond further doubt that in an instance like that now before us, where the increase in assets realized upon a sale of stocks or bonds of the trust estate did not include any accumulation of income and resulted solely from increased market value of the property, a gain so realized remains a part of the corpus of the trust

estate. While the particular application of this rule in the Gartenlaub case was not identical with that presented in the case at bar, the views expressed by our Supreme Court fully cover the subject."

The trust in question was created by Article Sixteenth of the will, reading as follows: "I give and bequeath unto my brother, Francis B. Davis, of Woodbury, New Jersey, and Robert W. Harper, of No. 2355 Luzerne Avenue, Los Angeles, California, Trustees, or the survivor of them, and such trustee as may be appointed and constituted in the place and stead of either of them, the sum of seventy-five thousand dollars, In Trust, nevertheless, for the following purposes: To invest and reinvest and keep the same invested, and pay the net income thereof, in monthly installments as near as may be, unto my friend, Lila C. Harper, for and during the term of her natural lifetime, and upon her death, should her mother, Mary B. Harper, survive her, then said income shall be paid unto her said mother, Mary B. Harper, during her lifetime, and upon the death of said Mary B. Harper in case she should survive the said Lila C. Harper, or upon the death of said Lila C. Harper, in case she should survive the said Mary B. Harper, I give and bequeath said sum of seventy-five thousand dollars unto my sisters, Ella Davis and Lida D. Kirkbride, and my brother, Francis B. Davis, in equal shares, should they then be living, but if either of my said sisters should then be deceased, then to my surviving sister and brother in equal shares, and in case both of said sisters should then be deceased, then to my said brother, Francis B. Davis, but should my said brother predecease me or the said Lila C. Harper, she having survived me, and the said Mary B. Harper, she having survived the said Lila C. Harper, then I give and bequeath such part or parts of said sum of seventy-five thousand dollars which he would be entitled to receive if surviving either or both me and the said Lila C. Harper, and the said Mary B. Harper, as aforesaid, unto his children, Elaine S. Davis, Joan W. Davis, and John Warner Davis, 2nd, in equal shares, but should any of said Elaine S. Davis, Joan W. Davis, and John Warner

Davis, 2nd, be deceased, his or her share shall go to the survivor or survivors of them, unless he or she shall have left lawful issue, in which event such lawful issue shall take the parent's share."

[2, 3] We do not understand respondent to contend that profits from sales of capital are income under the commonly used and accepted meaning of the word, nor could that argument be expected to prevail. As commonly used, the word "income" means returns from investments or earnings of property, as distinguished from appreciations in value of the property or profits from buying and selling. When the words "income" or "net income" are used in a document, they must be given the meaning commonly attributed to them, unless it can be seen that the maker of the document intended them to have a different meaning. There was no definition of "net income" in the will nor was anything more than the net income given to the life beneficiary. Notwithstanding the fact that the life beneficiary was to receive only the net income, respondent argues that the testator intended her to have all the trust estate which did not go to appellants as remaindermen, and she says that this amount was to be \$75,000, no more and no less, and that therefore it must have been the intention of Mr. Davis that if the trust assets came to have a value in excess of that sum, the amount of the excess should be paid over to the life beneficiary. By this line of reasoning respondent reaches the conclusion that Mr. Davis intended the words "net income" to have a meaning which would include increases in value of the trust estate above the amount originally placed in trust. Respondent places emphasis upon the fact that the testator used the phrase "sum of seventy-five thousand dollars" three times in Article Sixteenth, saying: "The first time it was used he bequeathed 'the sum of seventy-five thousand dollars' to the Trustees in Trust; the second and third time that the phrase was used he was disposing of the corpus of the Trust, and in those instances he referred to it as 'said sum of seventy-five thousand dollars,'" and it is said: "There is no indication whatever that the

Testator had in mind that the Trustees should hold more than seventy-five thousand dollars for ultimate distribution to his sisters and brother," and therefore it is insisted that only the principal sum should be paid to the remaindermen and that the life tenant is entitled to all of the accretions or profit. In other words, the designation of what the remaindermen were to take as "said sum of seventy-five thousand dollars" is claimed to limit their rights to the original capital of the trust, and it is then argued that the trustor must have intended that any excess, from whatever source derived, should be paid to the life beneficiary as income. In support of this construction of the will, respondent cites *In re Park's Estate*, 173 Pa. 190, 33 A. 884, in which it was held that the rule that extraordinary profits realized from stocks or other profit belong to corpus has been greatly modified by the modern cases and has been distinctly repudiated in Pennsylvania. This holding was against the great weight of authority and must be considered to have been overruled by the later case of *In re Graham's Estate*, 198 Pa. 216, 47 A. 1108, which affirmed the prevailing rule and held it to be the one which obtains in Pennsylvania. Respondent also cites *In re Sherman Trust*, 190 Iowa 1385, 179 N. W. 109. The will set aside a sum of money in trust for the trustee's son; \$2,200 was invested by the trustees in bank stock at a price of \$110 per share. At the time of the son's death the value of the stock had risen from \$110 to \$225 per share, "due to the fact that the bank paid but relatively small dividends. If it had been willing to let the shares remain at the price they were worth when the trustees bought them, a much larger dividend than was paid to the life tenant could have been paid to him." The increased value, amounting to \$4,500, was claimed by the remaindermen and by the estate of the deceased son. The opinion refers but briefly to the language of the will, saying: "The direction to the executors is to pay income annually to the son during life, and that at death of grantor 'said trustees or their successors are to pay the principal sum to the trustees of Iowa College, and to the American Home Missionary Society, to each one-half, for the

general uses of said institutions.'” The court construed the will to mean that the remaindermen took only the original investment of \$2,200, and that the estate of the son was entitled to the balance, and the court said (179 N.W. at page 112): “‘Principal sum’ means the ‘main’ sum, being the amount left in trust—the amount originally paid for and invested in the stock. 31 Cyc. 1173. Principal sum means also the ‘original gift,’ being once more the amount invested in the bank stock and not its present value. 31 Cyc. 1174.” Relying upon this reasoning, respondent argues that if a direction to the trustees to pay over to the remaindermen the “principal sum” means that the remaindermen are to take no part of the increased value of investments or profits from sales, the will of Mr. Davis should be construed as a bequest to the remaindermen of the sum of \$75,000, no more or no less. It is apparent from a study of the opinion in *Re Shermans Trust* that the decision was influenced to a considerable degree by the fact that the increase in value of the stock reflected earnings which could have been distributed by the bank as dividends. The effect of the decision was to stamp the increased value of the stock as income and not capital, although it was not so designated in the opinion. The decision must be construed as one which departed from the current of authority because of the unusual situation brought about by the action of the bank of paying only nominal dividends out of large earnings. It is out of harmony with the better reasoned cases to which we shall refer.

Appellants say the use of the phrase “seventy-five thousand dollars” was merely descriptive of the trust estate and was not intended as a limitation of the amount they would receive upon termination of the trust, and they say further that profits from sales are not to be treated as income unless the trustor has declared in the trust instrument that they should be so treated, that the profits clearly belong to corpus, and if such profits do not go to them under the Sixteenth Article of the will, they would constitute property not specifically disposed of and would go to some of the appellants under the residuary clause of

the will, or if not to them, then to the heirs of Mr. Davis. In no event, they say, would the profits be payable to respondent as income.

Appellants cite *Chase v. Union National Bank of Lowell*, 275 Mass. 503, 176 N.E. 508, 509, in which the same question of interpretation was involved. The will read in part: “First, I give, devise, and bequeath to Roscoe L. Chase, the sum of ten thousand dollars in trust, nevertheless, to be invested and to pay over to my daughter, Laura J. Chase, all the net income, proceeds and profits to her sole use, during the term of her natural life. At her death said trust shall cease and be determined and said amount to revert to my estate, and distributed as hereinafter mentioned.” The sum of \$10,000 was invested in securities and upon a sale of certain of them a profit of \$11,507.47 was realized. The question on appeal was “whether the gains arising from the sales of securities or the proceeds of rights to subscribe for new stock constitute capital and belong to the remaindermen or constitute ‘net income, proceeds and profits’ and belong to the estate of the life tenant.” The court said: “We are of opinion that in the case at bar the testatrix, in referring to the trust property to go into the residue at the termination of the trust as ‘said amount,’ intended to designate the trust fund as it existed at that time, whether it was then \$10,000 or had either decreased in value by reason of losses or appreciated in value from gains from sales or from the proceeds of sales of rights. She [testatrix] made no provisions to enable the trustee to turn into the residue \$10,000 at the termination of the trust in case the fund had then depreciated in value or for some other reason suffered a loss.” And the court said further (176 N.E. at page 510): “The use of the words ‘net income, proceeds and profits’ does not seem to indicate an intention that the trustee was expected to pay the beneficiary anything more than the net income of the trust property. They do not naturally mean that gains on the sale of the trust property or from the proceeds of the sale of rights were also to be paid to her. It is the income, proceeds and profits of the trust fund that are to be paid, not the gains

in the fund from an appreciation in its value or those derived from reinvestment or from the sale of rights. We, therefore, are of opinion that these accretions were a part of the corpus of the trust estate to be divided among remaindermen."

In *McElwain v. Allen*, Attorney General, 241 Mass. 112, 134 N.E. 620, 621, the court was considering the same question, namely, whether the increase in value of investments belonged to the life beneficiaries or the remaindermen. The will "created a fund of \$112,500 to be held in trust * * * the net annual income thereof * * * to be divided and paid to beneficiaries who are specifically named." The court said: "If the excess or increment consisted of 'undistributed interest' the terms of the will would be exactly applicable. The testator created and endowed a charity. While he may not have contemplated that by a rise in value of the securities or other property of which the fund consisted at his death, or in which it might be subsequently invested, he intended that portion of his estate to be devoted to the purpose designated. It is a single fund, the whole of which constitutes the principal named in the will" and the increase of the capital fund was held to belong to the remaindermen.

In accord are *In re Gerry*, 103 N.Y. 445, 9 N.E. 235; *In re Houston's Will*, 19 Del. Ch. 207, 165 A. 132. In the former case sums of money were placed in trust, "The annual interest, income, and dividends thereof" to go to the testator's daughter during her life and upon her death leaving no issue, the trustee was to divide the "principal or capital sum aforesaid" among the testator's other children in equal proportions. Upon a sale of the investments, a \$23,000 profit was realized, the same being claimed by the representatives of the life tenant and the remaindermen. The court held (9 N.E. at page 236) that the increase belonged to capital, saying: "In the case in hand the will provides specifically for the interest which the legatee for life was to take in the fund, and it is limited to the 'annual interest, income, and dividends thereof.' All beyond this must, from necessity, have been intended to go to the remainder-men, for there are no other per-

sons who could lawfully take it." In the latter case the testator gave "the profits and income" from a fund to his widow for life and the trustees were directed after her death "to 'pay the principal sum' to his nephew." The court said of this language: "His reference to the 'principal sum' does not reveal an intent that the sum when paid over should not exceed the original amount and therefore that accretions which the law would ordinarily allow should be withheld from the remaindermen."

In *Re Eger's Will*, 139 Misc. 59, 247 N.Y. S. 527, 528, the testator had left the sum of \$50,000 in trust to be invested and had directed that "all the profits, interest and income of the said fund as the same shall be received by my executors and trustees, shall, during her life, be paid by my said trustees to my said wife, Pauline Eger." The fund having been invested and a profit of some \$4,000 having been realized from sales of securities, the question arose whether the same was distributable to the life tenant or to the remaindermen. The court was considering the significance of the use of the word "profits" with the words "interest and income" and reached the conclusion that it was not intended by the use of that term to include profits from sales of corpus, and said (247 N.Y.S. at page 530): "However this may be, it has repeatedly been determined that in the ordinary case, a testator does not contemplate that his trustees will indulge in speculation with the investments composing the principal fund, in consequence of which strong evidence is required to demonstrate that any enhancement in value of the trust res is not to be added to and become a part of such principal fund (*Matter of Gerry*, 103 N.Y. 445, 9 N.E. 235; *Matter of Stevens*, 46 Misc. 623, 636, 637, 95 N.Y.S. 297; *Matter of Proctor*, 85 Hun 572, 573, 33 N.Y.S. 196); it further following as a natural sequence that enhancement in value of the trust res is not 'profit' within the usual meaning of the phrase (*Cross v. Long Island Loan & Trust Co.*, 75 Hun 533, 534, 27 N.Y.S. 495)." The profits from sales were held payable to the remaindermen.

[4] As we read the Sixteenth Article, the words "said sum of seventy-five thou-

sand dollars" were intended to identify and describe the trust estate and not to limit it. By employing that phraseology, Mr. Davis was not designating a certain sum of money which would go to the remaindermen. There would not be the sum of \$75,000 in the trust estate at the time of the termination of the life estate. It was intended that the trustees would take \$75,000 in cash, and the will made provision for the conversion of assets into cash by the executors for that purpose. The trustees were "to invest and reinvest and keep the same invested" and at the termination of the life estate the fund would consist not of cash but of investments, which would have been selected by the trustees in their discretion, uncontrolled by any specific provision of the will. Clearly, Mr. Davis did not intend the remaindermen to take \$75,000 in cash, for there would be no such sum nor any considerable amount of cash in the trust, once the original sum had been invested. There was no direction that upon the death of the life beneficiary the assets should be converted into cash and that the remaindermen were to receive thereof the sum of \$75,000, nor was there any provision that they should receive trust property to the value and extent of \$75,000. It seems clear that the phrase "seventy-five thousand dollars" was used to identify the trust estate, which would be in the form of securities and other property, rather than to designate a definite sum of money which would not be on hand unless the trust assets should be liquidated. While under this construction the trust provisions are simple and workable, under respondent's construction the trust administration would be a confused and complicated affair. In determining whether the testator intended the appellants to receive exactly \$75,000, either in cash or in investments, and the life beneficiary all above that amount, we should consider how such a scheme would work out. Unless it can be said that he wished to bring about the consequences which the plan would lead to, it cannot reasonably be said that it was his plan. To begin with, the trustees were to keep the money invested "and pay the net income thereof in monthly installments as near as may be, unto my friend, Lila C. Harper, for and

during the term of her natural lifetime," etc. What are the rights of Lila C. Harper (Witcher) if she be entitled to receive also all accretions of capital, including profits from sales? Should the trustee account to her monthly, or as near as may be? Can he be compelled to cause the assets to be appraised periodically upon demand of Mrs. Witcher? Must he, upon her demand, sell any asset whenever it has acquired a value in excess of its cost and pay her the profit? Must he manage the trust with a view to increasing the value of the corpus, a course which necessarily would be inconsistent with the conservative management which is demanded of trusteeships? Or, in other words, has he the double duty of preserving the estate against loss and that of speculating for profits? Again, assuming the soundness of the argument of respondent that the remaindermen were to take no more than \$75,000, how could it be argued that Mr. Davis intended that, in any event, they would receive less than that amount? And if the life beneficiary was to receive from time to time sums equal to the excess of the current value of the estate above cost, how would the capital be restored in the event of subsequent losses? Manifestly it could not be done by the withholding of income from the life beneficiary, since the will gives no such direction. The remaindermen would suffer the loss. Under conventional trusteeships, capital losses fall upon the remaindermen, and the life beneficiary suffers through diminution of income, and they benefit in the same manner and to the same extent by additions to the corpus.

Mr. Davis was a man of broad business experience. He must have anticipated that there would be variations in value of the trust assets, that there would be gains and losses. It is reasonable to suppose that he expected that they would be maintained in substantial balance. He made no provision for separating gains from the trust estate nor for making up capital losses from income or any other source. He made generous provision for the life beneficiary, believing, no doubt, that the income would be sufficient to meet her needs. Had he been in doubt about it, would he not have made provision for a more ample in-

come rather than to provide for the distribution to her of capital gains? Furthermore, as already noted, the will made no provision for liquidation of the assets upon termination of the life estate and the payment to the remaindermen of \$75,000 in cash or the delivery to them of \$75,000 worth of trust assets, in whatever form they might be. Nor was provision made for the delivery of the surplus to the estate of the life tenant or to the residuary legatee.

We are of the opinion that Mr. Davis intended to create a trust along conventional lines and not one which would involve the intricacies of administration and the insecurity and uncertainty of maintaining the capital intact which we have pointed out as inevitable under the construction argued for by respondent. Much would have to be written into the will to make it conform to the interpretation placed upon it by the trial court. We think this is manifest from what we have said, but it is further illustrated by the order instructing the trustee as to the disposition that should be made of the sum in question and of all future profits.

The value of the estate received by the trustee was \$59,483.05, although all but an insignificant portion consisted of real property. By the order, the court instructed the trustee to invest \$59,483.05 in securities approved by the court, directed that all sums derived from the sale of trust assets, including net profits, and including the profits from the three sales, of \$8,576.55, should be held and invested to the full amount of \$59,483.05, and further directed that all sums coming into the hands of the trustee from time to time in excess of \$59,483.05, whether derived from sales or other disposition of assets, should be deemed income subject to immediate distribution to the life beneficiary. This order purported to be based upon the Sixteenth Article of the will. It was based upon a construction of the will, and not the agreement, although the figures used were those of the agreement. The only theory of interpretation of the will which would furnish support for the order is the one we have discussed, namely, a construction under which the original trust capital would be invested and

there would be payable to the life beneficiary thereafter, as received, all amounts by which the current value of the trust estate exceeded the original cost. If such had been the scheme of the will, the order would have been an appropriate one under the circumstances. It was not, however, in our opinion, the plan of the testator as stated in the will.

Thus far we have discussed the will independently of the agreement and as if the agreement wrought no changes in the basic plan of the testamentary plan. There are arguments pro and con as to the effect of the agreement. Appellants contend that we must look only to the decree of distribution, which followed the terms of the agreement and distributed to the trustees \$49.71 in cash and the thirteen parcels of real property, and that we should construe the trust provisions as if the testator had placed in the trust the specific properties which the trustees took under the agreement and by the distribution. Their contention is that if these several specific properties had been placed in the trust, there could have been no question but that all profits and losses from sales would have been capital gains and losses, and they say that the agreement to that extent has superseded the will.

[5] We think there has been no abandonment of the plan of the will. The decree of distribution did not purport to state the duties of the trustees nor to interpret the will, and the will therefore is controlling.

It may be added by way of explanation that the major part of the real properties came to the estate through foreclosures of securities held by Mr. Davis. The will, as we have stated, provided for sales to be made by the executors in order to accumulate sufficient cash to meet the bequests. Through unanticipated circumstances, the trustee finds himself in a position where he must make the conversion under the directions of the court. When he has done so and the funds are invested, Lila C. Witcher will be entitled to receive the net income therefrom, as provided in the will. Whatever the gains or losses may be, they will belong to the corpus of the trust; the income may not be used to make up for

losses, and the gains may not be distributed to Lila C. Witcher, in whole or in part, as income.

The order instructing the trustee is reversed for further proceedings in accordance with the views herein expressed.

DESMOND, P. J., and WOOD, J., concur.



75 Cal.App.2d 600

Ex parte KLEIN.
Cr. 2410.

District Court of Appeal, First District,
Division 2, California.
Aug. 1, 1946.

1. Criminal law ⚔987

The 1941 statute permitting court which releases defendant on probation to sentence defendant, in absence of defendant, after commission of defendant to prison for a subsequent offense, did not permit Los Angeles Superior Court, which had convicted defendant for a crime committed in 1937 and had paroled defendant, who had been convicted and imprisoned in 1939 by San Francisco Superior Court for a subsequent offense, to sentence defendant in 1942 on the 1937 conviction, without defendant being present, since the statute is inapplicable where the subsequent commitment occurs prior to the effective date of the statute. Pen.Code, § 1203.2A.

2. Criminal law ⚔13

When authority is given to make the punishment fit the crime, the penalty must be imposed before the crime is committed.

3. Criminal law ⚔991(1)

The words "conviction" and "judgment" are used interchangeably in statute relating to time of running sentences on conviction of two or more crimes. Pen. Code, § 669.

See Words and Phrases, Permanent Edition, for all other definitions of "Conviction" and "Judgment".

4. Criminal law ⚔991(1)

Under statute relating to time of running of sentences upon conviction of two or more crimes, the court may make the sentence on a later conviction run consecutively with the sentence on a prior conviction. Pen.Code, § 669.

5. Criminal law ⚔991(1), 1216(2)

Under statute relating to time of running of sentences upon conviction of two or more crimes, Los Angeles Superior Court, in entering judgment in 1942, on a conviction for a crime committed in 1937, could make the sentence run concurrently with but not consecutively with a judgment entered in San Francisco Superior Court in 1939 upon a conviction for a crime committed in 1939 subsequent to the Los Angeles conviction, and hence defendant would be entitled to release from prison at end of a term running concurrently with the 1939 commitment. Pen.Code, § 669.

Proceeding in the matter of the application of Samuel Klein, alias Irving E. Reid, for a writ of habeas corpus.

Prisoner discharged.

Samuel Klein in pro per.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Petitioner Samuel Klein was charged in Los Angeles county with the crime of forgery and on November 4, 1937, he entered a plea of guilty. In December, 1937, he was granted three years probation with the first three months to be served in the county jail. Thereafter Klein was convicted in the Superior Court in San Francisco of a violation of Penal Code, sec. 476a—issuance of a check without sufficient funds with intent to defraud—and was sentenced to San Quentin prison for the time provided by law. On July 14, 1939, petitioner was received at San Quentin where his imprisonment was fixed by the Board of Prison Terms and Paroles at six years with the last two years on parole. He was released on parole on August 12,

1941, but was returned to Folsom prison on December 30, 1941, as a parole violator. Petitioner was thereupon notified that the Los Angeles probation order had been revoked on July 7, 1939; on March 15, 1942, a judgment-commitment was issued against him to run consecutively with the San Francisco judgment. This was sent to the warden of Folsom prison where he was confined and it is under this judgment that he is now held in custody. He was not present in the Superior Court when this judgment was entered. Upon Klein's completion of imprisonment on the San Francisco judgment he was given a new number at Folsom and was informed that he was thereafter to serve under the Los Angeles commitment.

The prisoner heretofore filed a petition for a writ of habeas corpus with the District Court of Appeal of the Third District. The petition was granted, but as a result of a promise of a light sentence and immediate parole by state officials the petitioner withdrew his petition. This promise was not observed by the state. He was paroled on May 22, 1944, and later that year was inducted into the armed forces. In 1945, petitioner was given an honorable medical discharge from the service. His petition states that because of his discharge from the armed forces petitioner believed that he would not be required to report on parole to the California authorities. He was taken into custody in Massachusetts and returned to San Quentin on March 20, 1946, as a parole violator.

It is petitioner's contention that the Superior Court in Los Angeles county had no jurisdiction to enter the judgment-commitment of March 15, 1942, under these circumstances—that, if section 1203.2a applies, the judgment of March 15, 1942, was not entered within time—that, if that section does not apply, his presence in court was mandatory.

Section 1203.2a enacted in 1941 and amended in 1943 reads in part as follows: "If any person who has been released on probation is committed to a State prison for another offense, it is hereby made mandatory upon the probation officer of the county from which he was released on pro-

bation to report the commitment to the court within 30 days after being advised in writing of the commitment. Within 30 days thereafter the court shall revoke probation and impose sentence. The sentence of the court may be imposed in the absence of the defendant in such cases. In the event the probation officer fails to report such commitment to the court or the court fails to impose sentence as herein provided, such person may not thereafter be sentenced under any authority retained in the granting of the probation."

A great deal has been written and re-written in reference to the "jurisdiction" of the superior court in revoking orders of probation and entering judgments of commitment. Sections 1191, 1193, and 1202 et seq. have been held "procedural" and not jurisdictional. *People v. Williams*, 1944, 24 Cal.2d 848, 151 P.2d 244, 247, cites and reaffirms the earlier cases in the majority opinion. To overcome the uncertainty of the law as expressed in these early cases the Legislature in 1941 enacted section 1203.2a to make mandatory the imposition of sentence within thirty days after notice of a second commitment, and to relieve the court of the necessity of bringing the prisoner before it at the time of sentence.

In the *Williams* case the majority brushed this section aside with the single statement that "it applies only to a probationer who is subsequently committed in this state." Whether the statement is based on the fact that in the *Williams* case the subsequent commitment occurred in another state or on the fact that the second commitment occurred prior to the effective date of the statute is not clear. But it is clear to us, and no citation of authority is necessary to interpret the plain language of the code sections, that if section 1203.2a does not apply here because the subsequent commitment occurred prior to the effective date of the statute then that statute, in so far as it relieves the superior court of requiring the presence of the prisoner at time of sentence is likewise without application.

In the *Williams* case, 24 Cal.2d at page 853, 151 P.2d at page 247, the court said:

"Generally, judgment must be pronounced in the presence of the defendant, unless after the exercise of reasonable diligence to procure the presence of the defendant the court shall find that it will be in the interest of justice that judgment be pronounced in his absence. Pen.Code, § 1193. Under this section a defendant must be personally present, and if he is not the court cannot pronounce judgment unless a proper showing of diligence is made as required therein. And even then the court may, in its discretion, find that it would not be in the interest of justice to pronounce judgment in the absence of the defendant. There are, of course, many reasons why a court might desire to have the defendant present when sentence is pronounced, and in a case such as we have here, where because of his confinement elsewhere it is not possible to produce the defendant at the time probation is revoked, the court may consider that, in the interests of justice, judgment should not be imposed until defendant can be brought before the court."

This language was used as explaining the delay in entering the judgment while the prisoner was confined in a penitentiary of another state. No such circumstances are present here. The superior court in Los Angeles county revoked the probation in 1939. The respondent has produced no information on this action other than the copy of the Clerk's minutes reading: "Violation of probation is filed. Probation is revoked. Bench warrant is issued." This entry is dated July 7, 1939, just seven days before the prisoner was delivered to the penitentiary under the San Francisco commitment. If the "proper showing of diligence" to procure his presence, as required by the Williams case, was made that fact would appear on the face of the record. It is a fair inference from all the circumstances that when the order of revocation was made the superior court knew or, with reasonable diligence could have learned, the petitioner was received at the penitentiary and could have been brought into the court for the purpose of sentence. When judgment was finally entered in 1942 the petitioner was again in custody, the superior court was so notified by the

warden, and the prisoner could have then been brought before the court.

[1] The respondent excuses the absence of the petitioner solely on the ground that section 1203.2a of the Penal Code dispenses with his presence. But, as we have heretofore stated, if the ruling of the Supreme Court in *People v. Williams*, supra, means that this section is not applicable in a case where the second "commitment" was made prior to the effective date of the statute then it is certainly not applicable as to the necessity of producing the prisoner for sentence. This conclusion follows the plain language of the statute which, with our emphasis added, reads: "If any person who *has been* released on probation is committed to a State prison for another offense, it is hereby made mandatory upon the probation officer * * *. *Within 30 days* thereafter the court *shall* revoke probation and impose sentence. The sentence of the court may be imposed in the absence of the defendant *in such cases.*" This can mean nothing else but that when, within the thirty day period, the court revokes probation and imposes sentence it may then dispense with the presence of the prisoner in court.

[2-5] Since the petitioner has appeared in propria persona and was not permitted to argue the writ in open court, it should also be noted in fairness to him that there is serious doubt whether under the provisions of section 669 of the Penal Code the superior court in Los Angeles County, in entering its judgment in 1942 on a conviction for a crime made in 1937, could make the sentence run consecutively with a judgment entered in the superior court in San Francisco in 1939 based upon a conviction for a crime committed subsequent to the Los Angeles conviction. It is a well settled doctrine of American jurisprudence as recognized in this state that when authority is given to "make the punishment fit the crime" the penalty must be imposed before the crime is committed. Hence, when petitioner was convicted in 1937 of a crime committed in that year, it would seem logical that the sentence or judgment should be based upon and follow the con-

viction and should not be influenced by subsequent events. The code section uses the words "conviction" and "judgment" interchangeably and it is a fair interpretation of the section as a whole that it is on a *later* "conviction" that the court may make the sentence run consecutively with a sentence on a *prior* conviction. If the Los Angeles judgment of 1942 had been based wholly upon the conviction of 1937, assuming that it was valid for any purpose, that judgment would automatically become concurrent under the terms of the section, and the petitioner would be entitled to his release at the end of a term running concurrently with the San Francisco commitment.

The prisoner is discharged.

DOOLING, J., concurs.



75 Cal.App.2d 499

HARBINSON et al. v. AFFELDT et al.
Civ. 7251.

District Court of Appeal, Third District,
California.

July 24, 1946.

1. Venue ☞72

Upon a motion for a change of venue the merits of an action will not be gone into except, perhaps, to determine whether or not a party to the action has been joined in good faith and not solely for the purpose of fixing the venue in a certain county. Code Civ.Proc. § 395.

2. Venue ☞72

In transitory action on a contract for sale of realty defendant's averments that the contract was invalid were matters of defense to be alleged in their answer, and filed in county in which written contract was allegedly entered into and was to be performed, where defendants filed a demurrer and a motion for change of place of trial. Code Civ.Proc. § 395.

3. Appeal and error ☞1024(3)

In so far as conflict in the allegations of plaintiffs in their complaint and affidavits, and the allegations of defendants in their affidavits on issue of venue, are concerned, the determination of the trial court is conclusive upon an appellate court. Code Civ.Proc. § 395.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by J. E. Harbinson and Maryvee Harbinson against Julius Affeldt and Caroline Affeldt, for breach of contract for sale of realty. From an order denying defendants' motion for a change of place of trial to the county of their residence, defendants appeal.

Order affirmed.

Fred M. Bollinger, of Stockton, for appellants.

Downey, Brand & Seymour, of Sacramento, for respondents.

ADAMS, Presiding Justice.

This is an appeal from an order denying defendants' motion for a change of place of trial to the county of their residence.

The complaint, which was filed in Sacramento County, alleges that plaintiffs and defendants entered into a written contract by which defendants agreed to buy from plaintiffs certain real property in Sacramento County, and also agreed to care for the premises and irrigate same; that defendants defaulted in their payments, and plaintiffs resumed possession; that defendants also failed to care for and irrigate said land, with the result that the land and a crop growing thereon were damaged; and that plaintiffs also were compelled to employ labor to restore said damage. A judgment for damages totaling \$3,837 was prayed.

Defendants filed a demurrer to the complaint and also notice of motion for change of place of trial. Affidavits of defendants and counter-affidavits of plaintiffs were filed. Eventually the motion was denied.

Defendants' grounds for change of venue were, first, that there never was a contract between the parties, and, second, that de-

fendants were residents of San Joaquin County and were entitled to have the action tried in the county of their residence.

That the action is a transitory one is apparently conceded by both parties. The place of trial is therefore governed by section 395 of the Code of Civil Procedure which provides that "In all other cases" (other than those provided for in the preceding sections of said title) "the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action." But, after making special provision for certain kinds of actions of which this is not one, the section provides that "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant * * * resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

Respondents argue that there was a written contract in this case which was entered into in the county of Sacramento, and was to be performed there, and therefore the change of venue was properly denied. Appellants, though admitting that they signed a document entitled "Agreement for Sale of Real Estate" (copy of which is appended to their affidavits), set up in their affidavits in support of their motion for change of venue that at the time they signed the contract the purchase price set forth therein was \$21,000, and that said price was subsequently changed to \$26,000 without the knowledge or consent of defendant Caroline Affeldt (though it was known to and initialed by defendant Julius Affeldt); also that after the execution of the writing by defendants there was inserted therein by plaintiffs a provision reading: "A personal agreement between seller J. E. Harbinson and purchaser Julius Affeldt of Lodi. That purchaser Julius Affeldt is take over all irrigation and hay work from this date on till ranch is paid for in full, June 1st, 1944.

Julius Affeldt is to pay all expenses. May 10-1944"; that defendants did not know that this insertion was in the document until June 6, 1944. The affidavits also aver that as a part of the negotiations leading up to the execution of the agreement for the sale of the land, one of the conditions was that the realtor through whom negotiations were carried on was to sell a ranch belonging to defendants for \$20,000 net, which sale was never consummated. Appellants also aver that they never took possession of the property in Sacramento County, and that they never agreed to irrigate same. In short, their contention is that the contract upon which plaintiffs base their action is invalid, that therefore there is no contract in writing within the meaning of section 395, supra, and that such being the case, defendants have a right, under said section, to have the action transferred to the county of their residence. They state in their brief that "It is the appellants' contentions that on a motion for change of venue that even though the complaint states a cause of action showing that the venue is in Sacramento County, that the defendant may show that no action exists, and therefore, that venue must be in the county of residence of the defendant"; and that on this motion the trial court should have determined that there is in fact no contract that can be enforced and ordered the cause transferred to the county of defendants' residence.

[1] Neither party has cited any decision of the courts of this state in a case involving the exact question raised herein. However, it has long been stated by our courts over a period of years that upon a motion for a change of venue the merits of an action will not be gone into except, perhaps, to determine whether or not a party to the action has been joined in good faith and not solely for the purpose of fixing the venue in a certain county. *O'Brien v. O'Brien*, 1911, 16 Cal.App. 193, 116 P. 696, was such a case, and an order denying a motion for change of venue was there sustained by this court where the averments of the complaint were sufficient to show that both defendants were proper parties to the action though one of them stated in his affidavit in support of the motion that

he was a nominal party only and had no interest in the defense thereof. The court said, 16 Cal.App. at page 197, 116 P. at page 698: "The court will not go into the merits of the action on a motion to change the place of trial." In *Mitchell v. Kim*, 1919, 42 Cal.App. 111, 183 P. 368, a similar situation was presented and this court again stated that courts will not go into the merits of an action on a motion to change the place of trial; and that where there is a conflict between the averments of the complaint and the allegations of an affidavit in support of the motion for a change of venue, the decision of the trial court will not be disturbed on appeal. In *Sourbis v. Rhoads*, 1920, 50 Cal.App. 98, at page 101, 194 P. 521, at page 522, a similar decision was rendered, and this court then said: "Of course, upon a hearing of this character it is not proper to have a trial of the cause upon its merits. This has been clearly decided, and must be deemed settled beyond controversy." But it was further stated that it was proper in such proceeding to permit a defendant who was moving for a change of venue, to make sufficient showing to convince the court that he, in connection with the plaintiff, was the only real party in interest in the controversy, and that another had been joined as a defendant solely for the purpose of having the action tried in the county where the complaint was filed. A petition to have the action heard in the supreme court was denied.

In *Pacific Coast Automobile Ass'n v. Ahlf*, 1931, 115 Cal.App. 21, 300 P. 841, it was urged that the complaint did not show the possibility of a cause of action against certain defendants and that they had been joined for the fraudulent purpose of depriving the real defendants of their right to have the action tried in the place of their residence. The court stated the rule that upon a hearing of a motion for change of place of trial it is not proper to go into the merits of the action; and though recognizing that this rule does not extend to the point of precluding a showing that a plaintiff has actually no cause of action against one of the parties who was made a defendant for the fraudulent purpose of depriving a real defendant of his right to have the action tried in the place of his residence,

said that where there was a direct conflict in the evidence the conclusion of the trial court could not be disturbed. Citing *McKenzie v. Barling*, 101 Cal. 459, 36 P. 8, and *Richmond Terminal Corp. v. Parr Terminal Co.*, 96 Cal.App. 152, 273 P. 845. Also see *California Collection Agency v. Fontana*, 61 Cal.App.2d 648, 143 P.2d 507, and cases therein cited.

Greenland v. Carter, 219 Iowa 369, 258 N.W. 678, is, however, similar in its facts to the case before us. There a motion for change of place of trial, made by defendant in an action on a promissory note, was based in part upon defendant's affidavit that he had never signed the note or authorized any one else to sign it for him, etc., and that he was not liable thereon. The motion was denied, the court saying, 258 N.W. at pages 679, 680: "The further statements of the affidavit to the effect that the petitioner never signed the note and never authorized any other person to sign it for him, and that he never ratified, confirmed, or approved the note, or did anything to make him liable thereon, are not such matters as may be determined by the court on a motion to change the place of trial, in the face of the clear provisions of the written contract sued upon. These are plainly defensive matters and are such as can be determined only upon the trial of the case upon its merits. It may be that upon such trial the plaintiff in the action in the district court will be unable to present evidence that L. T. Greenland ever signed the note in question, or consented that his signature be placed thereon, or did anything that would make him liable thereon. On the other hand, the plaintiff may present sufficient evidence on the trial of the case to make a question for the jury. The plaintiff has a right to have these questions determined in the regular way by a trial to a jury, and cannot be compelled to have them disposed of summarily upon a motion to change the place of trial."

As the statutes of that state were similar to section 395 of our Code of Civil Procedure the case appears to be directly in point here.

Appellants quote *Nakanishi v. Policy Holders' Life Insurance Ass'n*, 129 Cal.App. 747, 19 P.2d 287, 288, to the effect that "the practice permits and encourages a full hear-

ing of the facts determinative of the venue." But in the Nakanishi case the affidavits involved the question of where the contract of insurance sued upon was to be performed and not whether the contract itself was a valid one, or, as contended here, whether there was or was not a valid contract at all. The issue was solely one relative to the place of trial and did not involve the merits of the action. *Brown v. San Francisco Savings Union*, 122 Cal. 648, 55 P. 598, is also relied upon by appellants, but also in that case the question presented on motion for change of place of trial was where was the agreement sued upon made or to be performed. The affidavits were conflicting and the order denying the motion was affirmed. Other cases cited by appellants go no further; and none is cited that upholds their statement in their brief that "the trial Court must first determine that a contract existed before it can retain venue. If none existed, the trial of the action is at appellants' residence." Appellants' very statement defeats them, for it would seem to follow that if no contract exists no change of venue should be granted for there will be no issue left to be tried.

[2, 3] Appellants do not allege in their affidavits nor contend here that if the contract sued upon is a valid one, it was not entered into in Sacramento County and to be performed there. Whether it is or is not in fact a valid and enforceable contract is a matter to be determined upon a trial of the action; and appellants' averments that it is invalid are matters of defense to be alleged in their answer, and are not such as are proper to be determined on this motion. We are unable to follow the reasoning of appellants that they are entitled to have these questions determined in the county of their residence, while they argue, at the same time, that the court in which the action was brought must first determine them. Furthermore, this court cannot say that the trial court did not in fact determine them, for, in so far as conflicts in the allegations of plaintiffs in their complaint and affidavits, and the allegations of defendants in their affidavits, are concerned, the determination of the trial court is conclusive upon an appellate court. See *Mitch-*

ell v. Kim, supra; *Pacific Coast Automobile Ass'n v. Ahlf*, supra; *McKenzie v. Barling*, supra; *Lakeshore Cattle Co. v. Modoc Land & Livestock Co.*, 108 Cal. 261, 41 P. 472.

The order appealed from is affirmed.

THOMPSON and PEEK, JJ., concur.



75 Cal.App.2d 436

**SACRAMENTO COUNTY v. CITY OF
SACRAMENTO.**

Civ. 7203.

District Court of Appeal, Third District,
California.

July 19, 1946.

Hearing Denied Sept. 16, 1946.

1. Statutes ⇨205

In construing section of the Municipal Court Act dealing with division of costs for maintenance of a municipal court between county and city of the second and three-eighths class, and in arriving at Legislature's intention, the scope and purpose of the measure as a whole was required to be considered. *Gen.Laws, Act 5238, § 11c.*

2. Statutes ⇨188, 205

In analysis of statutes to find legislative intent, regard is to be had, not so much to exact phraseology in which intent has been expressed as to general tenor and scope of entire scheme embodied in statutes.

3. Municipal corporations ⇨262

Under Municipal Court Act providing that a city of the second and three-eighths class must reimburse county for expenses of maintenance of municipal court in excess of \$25,000, overall expenses should first be paid by county, and, regardless of whether some of the expenses were incurred in connection with matters for benefit of county alone, city should reimburse county for all expenses in excess of \$25,000. *Gen. Laws, Act 5238, § 11c; Const. art. 6, § 11, as amended in 1934.*

4. Municipal corporations ⚡262

A city of the second and three-eighths class was required under the Municipal Court Act to reimburse county for costs of maintenance of municipal court after deduction of sum of \$25,000, including the cost of reporters', interpreters' and witnesses' fees in preliminary examinations of persons accused of crime in the municipal court, though such costs may have been incurred for the benefit of the county alone. Gen.Laws, Act 5238, § 11c; Const. art. 6, § 11, as amended in 1934.

5. Statutes ⚡181(2)

A statute should never be construed so strictly as to render it absurd or nugatory.

6. Statutes ⚡194

The rule of ejusdem generis, in statutory construction, is not a rule of universal application, and its use is to carry out, not to defeat the legislative intent.

7. Statutes ⚡194

When it can be seen that particular word by which general word in statute is followed was inserted, not to give a coloring to the general word, but for a distinct object, and when, to carry out purpose of statute, general words ought to govern, the ejusdem generis rule cannot be permitted to pervert the construction.

8. Constitutional law ⚡43(2)

City of second and three-eighths class which adopted municipal court system by a vote of the people of the city, could not question the constitutionality of that section of the act imposing on city the cost of the maintenance of the court in excess of the sum of \$25,000. Gen.Laws, Act 5238, § 11c.

9. Constitutional law ⚡43(1)

The right to question the constitutionality of a statute may be waived.

10. Constitutional law ⚡43(2)

One who receives the benefit of an unconstitutional law is estopped from asserting its unconstitutionality.

11. Constitutional law ⚡48

The courts presume that legislative acts are valid, and all doubts are to be resolved in favor of their validity.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Sacramento County, a body politic and corporate and political subdivision of the State of California, against the City of Sacramento, a municipal corporation, to recover the amount paid out by the plaintiff for reporters', interpreters' and witnesses' fees in preliminary examinations of persons accused of crime in municipal court in the defendant city. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment reversed.

John Quincy Brown, Dist. Atty., William A. Green, Asst. Dist. Atty., and John B. Heinrich, Deputy Dist. Atty., all of Sacramento, for appellant.

Richard J. Lawrence, City Atty., of Sacramento, for respondent.

PER CURIAM.

Article VI of Section 11 of the Constitution of the State of California, adopted in the year 1924, provides for the establishment of municipal courts. Subsequent to the adoption of said constitutional provision, Chapter 358 of the Statutes of 1925 (Act 5238, Deering's Gen. Laws) was enacted, which set forth the procedure for establishing such courts. Prior to the first day of July, 1942, a municipal court was established in the city of Sacramento, then a city of the second and three-eighths class, which became effective as of the 1st day of July of that year.

Section 11c of the Municipal Court Act, as same read at the time the city elected to adopt the municipal court system, and during the fiscal year July 1, 1942-July 1, 1943, provided: "Whenever a municipal court is established in a city of the second and three-eighths class, the salaries of the judges, clerk, marshal, and other attaches, and the cost of all supplies, books, furniture and suitable quarters, except as hereinafter otherwise provided in this section, for carrying out their duties, including supplies and equipment for the preparation and maintenance of duplicate records of the court, or a division thereof when sessions are held at more than one place with-

in the city wherein the court is established, shall be paid by the county in which the court is situated out of the municipal court fund, or, if there be no such fund, out of the county general fund. However, if *such* charges upon the county for maintaining the municipal court exceed the sum of twenty-five thousand dollars (\$25,000) per annum, the city shall reimburse the county in the amount of such excess from such municipal court fines and forfeitures as by law would otherwise become the property of the city." (Italics added.)

During the fiscal year under consideration the county paid out for the maintenance of the municipal court the sum of \$61,271.91. It deducted from this the sum of \$25,000, and demanded from the city payment of the difference, or the sum of \$36,271.91. Of this amount the city declined to pay the sum of \$6,270.91, claiming that the same did not represent expenditures for maintaining said court for said fiscal year. This action followed. The trial court rendered judgment in favor of the city.

The bill of exceptions upon which this appeal is presented shows that the case was presented to the trial court upon a stipulation. It was admitted therein that the sum of \$54,720.46 was "a proper and legal expenditure for maintaining said Court." It was also stipulated that the amount in controversy, to wit, \$6,270.91, was the cost of reporters', interpreters' and witnesses' fees in preliminary examinations of persons accused of crime in said court before the judges thereof sitting as committing magistrates, "which said sum plaintiff claims but defendant denies was a legal and proper expenditure in maintaining said Court for said fiscal year."

In its written opinion filed in the case the trial court appears to have based its decision in favor of defendant on the ground that payments for the fees of reporters, interpreters and expert witnesses are not specifically provided for in section 11c, supra, and that such functionaries cannot be considered as "other attaches," since those words follow the words "judges", "clerk", and "marshal", and, under the rule of ejusdem generis, must be construed as

applying only to such attaches as are of a like kind with judges, clerks and marshals. Also, it held that the rule of *expressio unius est exclusio alterius* was applicable, and as section 11c enumerates the things upon which it is to operate, it is to be construed as excluding from its effect those not expressly mentioned. And the conclusion was that for the aforesaid reasons the city cannot be held liable for the fees in controversy.

Appellant argues that the overall expenses of maintaining the court, whether incurred while the judges thereof are sitting as committing magistrates or otherwise, are comprehended by section 11c, supra, and that the county should be reimbursed by the city for all of such expenditures in excess of the \$25,000 per annum provided therein.

Respondent contends that the fees of court reporters, expert witnesses, and interpreters occasioned by preliminary examinations are not costs of maintaining the court and that the legislature did not intend that such costs should be considered in determining the amount the city should pay the county. It further asserts that section 11c, in so far as it seeks to charge upon the city any part of the cost of maintaining a municipal court, is special legislation and therefore unconstitutional and void, and that it violates the Municipal Affairs Amendment to the Constitution.

Respondent's argument upon the first of these contentions is that a judge of the municipal court when sitting as a committing magistrate is not sitting as a court or performing any function of the court as such; and that therefore the costs here in controversy are not costs of "maintaining the court"; that the legislature did not intend, by section 11c, supra, to fix upon the city any charges which previously had been paid by the county, and that the costs in controversy were such as had previously been paid by the county. Reliance is also placed upon the use of the word *such* in the sentence reading: "However, if *such* charges upon the county for maintaining the municipal court," exceed the sum of \$25,000, "the city shall reimburse the county," etc.; and respondent says that only

“such charges” as are specifically designated are to go into the total in excess of \$25,000 for which the city must reimburse the county.

[1,2] We think that respondent takes too narrow a view of the act, and that, in construing section 11c, and arriving at the intention of the legislature, the scope and purpose of the measure as a whole must be considered. It was said in *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 639, 122 P.2d 526, 529, that “In the analysis of statutes for the purpose of finding the legislative intent, regard is to be had not so much to the exact phraseology in which the intent has been expressed as to the general tenor and scope of the entire scheme embodied in the enactments,” quoting from *Palache v. Pacific Ins. Co.*, 42 Cal. 418, 430. Also see *In re Sing*, 14 Cal. App. 512, 513, 514, 112 P. 582; *Gallagher v. Campodonico*, 121 Cal.App.Supp. 765, 769, 771, 5 P.2d 486; *Welch v. Williams*, 96 Cal. 365, 367, 31 P. 222.

Article VI, section 11, of the constitution of this state, which authorizes the establishment of municipal courts, as adopted in amended form in 1934, provides:

“In any city or city and county which is governed under a charter framed and adopted under the authority of this Constitution containing a population of more than forty thousand inhabitants, * * * a municipal court may be established as in this article provided, anything in this Constitution to the contrary notwithstanding.
* * *

“The Legislature shall provide by general law for the establishment of such municipal courts in cities or cities and counties in this section specified, and for the constitution, regulation, government, procedure and jurisdiction thereof.

* * * * *

“In any city or city and county where such municipal court has been established * * * there shall be no other court inferior to the superior court, except that the Legislature may provide for the establishment of such inferior courts.

“Pending actions, trials, and all pending business of inferior courts within a city or city and county or township, upon the es-

tablishment of any such municipal court therein, shall, unless otherwise provided by law, be transferred to and become pending in such municipal court, and all records of such inferior courts shall be transferred to, and thereafter be and become records of, such municipal court.

* * * * *

“The compensation of the justices or judges of all courts of record shall be fixed, and the payment thereof prescribed, by the Legislature.”

The Municipal Court Act, as in effect in 1941 when the City of Sacramento elected to adopt the municipal court system, provided in section 3 thereof for determination of the question of the establishment of a municipal court by a city by an election held therein. Section 4 provided that whenever and wherever a municipal court should be established there should be no other court inferior to a superior court (except a small claims court), and that all existing inferior courts should be superseded by the municipal court and all proceedings pending in such inferior courts should become proceedings in the municipal court. Section 26 provided, as to the powers and duties of municipal courts and judges, that “The municipal court and each judge thereof shall have and exercise all of the powers and shall do and perform all of the acts which were conferred upon, or required of, any police court, justice’s court, police judge or justice of the peace, by law, whenever any such inferior court shall have been superseded by a municipal court and whenever any such police judge or justice of the peace shall become a judge of the municipal court by reason of any of the provisions of this act, and all such laws, not inconsistent herewith, are made applicable to any such municipal court and to each judge thereof.” Section 28 provided that “Each municipal court shall have such jurisdiction in criminal cases as is now provided in section 1462 of the Penal Code of California, or as may hereafter be determined by the legislature”; and section 29 provided that municipal courts should have jurisdiction of civil cases and actions as provided in section 89 of the Code of Civil Procedure. Section 1462 of the Penal Code, as amended in 1933, extended the jurisdic-

tion of municipal courts to crimes within the county but outside the city, in certain cases. See *In re Application of Luna*, 201 Cal. 405, 410, 257 P. 76; *In re Leach and Huggins*, 99 Cal.App. 645, 648, 279 P. 157. Such municipal courts also have jurisdiction in certain civil actions brought against residents of the county residing outside the boundaries of the city. See *Burge v. Municipal Court*, 84 Cal.App. 425, 258 P. 164; *Borden v. Thomas*, 85 Cal.App. 646, 259 P. 1008.

[3, 4] We think, from the general tenor and scope of the entire scheme embodied in the constitutional provision and the Municipal Court Act, that the legislature intended, when it provided in section 11c that the city should reimburse the county for expenses of maintenance of such court in excess of \$25,000, that the overall expenses should first be paid by the county, and that, regardless of whether some of those expenses were incurred in connection with matters which it might be argued were for the benefit of the county alone, the city should, nevertheless, reimburse the county for all of the expense in excess of the \$25,000 (now \$33,000). While the disputed items of expense which were incurred in connection with preliminary examinations in which the judges sat as committing magistrates may be said to have been incurred for the benefit of the county alone, it is equally true that when the judges of the municipal courts sat as committing magistrates the services performed by them, their clerks, marshals and other attaches, were performed for the county, but no attempt was made by the legislature to allocate a proportionate part of their salaries to the county alone, and there is no reason to assume that if they had intended that other expenses incident upon preliminary hearings should be borne by the county alone, they would not have so provided. Other items of expense may well have been incurred which, it might be contended, were for the benefit of the county only. It might well be argued that the city of Sacramento has no interest in crimes committed outside city limits and that the county alone should bear the total expense of prosecution in the municipal court of crimes committed in the county but outside the city limits. Also that

when trying civil actions involving parties residing outside the city limits the county is the beneficiary since otherwise it would have to bear the total expense of courts trying them. But the legislature has not made any provision for payment of same by the county alone. Apparently the legislature believed that the \$25,000 to be furnished by the county for the expenses of the court would be sufficient to meet all of the expenses attributable to service performed by such courts and the judges and other functionaries thereof for the benefit of the county, and that it was more practicable to provide a lump sum to be contributed by the county than to attempt to segregate the items of expense attendant upon services which might be said to be rendered for the county alone. That this was their intention is evidenced by the increase in 1943 of the amount to be borne by the county, which, it is proper to assume, was made on a showing that the \$25,000 previously allocated was insufficient, and cast upon the city an inequitable proportion of the overall expenses. This conclusion is fortified by the language used in the 1943 amendment of section 11c, wherein it was provided that the city "shall reimburse the county for the costs upon the county for maintaining the court," in excess of \$33,000 per annum. While the section previously read "such costs" instead of "the costs," the change in the wording may properly be construed as one for clarification only. See *Koenig v. Johnson*, 71 Cal. App.2d 739, at pages 753-755, 163 P.2d 746, and cases cited at pages 753, 754.

As for the argument that the questioned fees were not intended to be included in the \$25,000 and were not to be considered as a part of the amount paid by the city because of the wording of section 11c, as was said in *Palache v. Pacific Insurance Co.*, *supra*: "Mere philology often sticks in the bark, and so becomes an obstruction rather than an aid to a correct exposition of the meaning of the statute." If the fees of court reporters, etc., are not to be considered as a part of the overall expenses for which the city is liable in excess of \$25,000, by reason of the application of the rules of construction applied by the trial court and contended for by respondent, by the same

line of reasoning they are not payable by the county in the first instance; for the statute (§ 11c) does not use the disputed language directly in connection with the city, but provides what costs shall be paid by the county. Therefore, if the costs provided for by the section are limited so as to exclude the disputed items, then the county, by the same token, is not thereby charged with their payment in the first instance, and neither is made liable therefor. Such an intention cannot be attributed to the legislature in the absence of language to that effect. The application of the rules of ejusdem generis and expressio unius est exclusio alterius does not tend to clarify the situation.

[5-7] It is said in *Walters v. Bank of America, etc., Ass'n*, 9 Cal.2d 46, 52, 69 P.2d 839, 842, 110 A.L.R. 1259, that "A statute should never be construed so strictly as to render it absurd or nugatory." And in *Hunt v. Manning*, 24 Cal.App. 44, 48, 140 P. 39, 41, the court quoted from *State v. Broderick*, 7 Mo.App. 19, to the effect that: "The rule 'ejusdem generis,' in statutory construction, 'is by no means a rule of universal application, and its use is to carry out, not to defeat, the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give a coloring to the general word, but for a distinct object, and when, to carry out the purpose of the statute, the general word ought to govern, it is a mistake to allow the ejusdem generis rule to pervert the construction.'"

At the time the legislature enacted the Municipal Court Act it knew that the judges of the municipal courts and the other officers and attaches thereof would act in hearings for commitments to the superior court; and it may be presumed that when it provided that the expenses of maintaining such court should be borne by the county to the extent of \$25,000 it assumed that said sum would cover the proportion of the total expenses of the court in the performance of duties for the county which were performed by its functionaries in the performance of all of the duties formerly performed by the inferior courts which it superseded. No good rea-

son appears why, if the expenses of preliminary hearings were to be borne by the county alone, it should not have so provided. It is not shown by the record that the sum of \$25,000 was not ample to cover all of the expenses attributable to preliminary hearings held in said courts. For all that appears a lesser sum may have been adequate for such purpose, in which event the county might, by paying \$25,000, be bearing some of the expense which, it might argue, was attributable to duties performed solely for the city. And if the 1941 provision proved inequitable it was open to the legislature to increase the amount to be borne by the county, as it did in the amendment of 1943.

In *Dickey v. Raisin Proration Zone No. 1*, 24 Cal.2d 796, at page 802, 151 P.2d 505, 508, 157 A.L.R. 324, the court said: "In attacking the problem of statutory interpretation here presented it is essential to remember the basic principle unqualifiedly declared by this court on numerous occasions and well stated in 23 Cal.Jur. section 107, page 725, as follows: 'It is a cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose, of the lawmakers. Such intention controls, if it can be reasonably ascertained from the language used. Indeed, it has been said that the legislative intent in enacting a law is the law itself. Accordingly, the primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained if possible, and, when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute. In other words, as is declared by the code, "in the construction of a statute the intention of the legislature * * * is to be pursued, if possible."' (Code Civ. Proc., § 1859.) Certainly the language of a statute should never be so construed as to nullify the will of the legislature, or to cause the law to conflict with the apparent purpose had in view by the lawmakers.'" Citing *In re Haines*, 195 Cal. 605, 612, 234 P. 883; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 639, 122 P.2d 526. Also

see *Department of Motor Vehicles v. Industrial Accident Commission*, 14 Cal.2d 189, 195, 93 P.2d 131.

Coming now to respondent's contention that appellant cannot recover because section 11c, "in so far as it seeks to charge upon the city of Sacramento a part of the cost of maintaining a municipal Court, is unconstitutional and void since it is special legislation," and "violates the municipal affairs amendment to the constitution," respondent is in the untenable position of asserting, first, that the legislature has imposed something upon the city; second, that, though it has stipulated that a portion of the expense of maintenance of the court is a proper and legal charge even though it covers some of the expense of preliminary hearings, the act is none the less invalid; and, third, that while the city has obtained and still retains the benefits of such act it may still attack its validity.

Let it be noted first that section 11c was in effect in 1941 when the city, by the vote of the people, elected to adopt the municipal court system, to abolish the inferior courts theretofore in existence in the city and transfer the functions of such inferior courts to the municipal court. It cannot therefore be said that the legislature imposed anything upon the city; rather the city elected to take advantage of the provisions of the act as then in effect. It thereby accepted the benefits and assumed the burdens provided therein. Therefore, if the city was the loser it was such, not by reason of any action by the legislature, but by reason of its own action. It took this action charged with knowledge that the judges of its municipal court would perform the functions of committing magistrates, not only by reason of the act itself but by virtue of section 808 of the Penal Code, and with knowledge that its clerks, marshals and other attaches would become obligated to perform such duties as had theretofore been performed by the clerks and other attaches of said inferior courts in whatever capacity the judges thereof had acted. It also elected to and assumed to pay its share of the salaries of such judges, clerks, etc., without allocation of any portion of such salaries to the per-

formance of duties in matters involving preliminary hearings as such, as distinguished from their duties in connection with civil actions or those involving the prosecution of crimes triable in such courts. It is not contended by the city that any portion of the salaries of the judges, clerks, marshals and other attaches of the court earned by them in the performance of duties in connection with preliminary hearings should be borne by the county alone, though it might with equal logic so contend.

Respondent states in its brief that the inferior courts previously existing in the city which were absorbed by the municipal courts consisted of a police court and two justices' courts, and that the entire cost of maintaining the police court was paid by the city, while the costs of the justices' courts were borne by the county. When the city adopted the municipal court system, then, it is obvious that it elected that functions for which it had formerly paid, and functions for which the county had formerly paid, would be performed thereafter by the municipal court and that the expenses would thereafter be shared by both, but as provided for in section 11c of the act.

[8] Reference to the city charter, sections 141 to 148, shows that its police court had jurisdiction "of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by Justices' Courts and Courts of Justices of the Peace and Police courts under the Constitution and laws of the State of California," of "the examination and commitment of persons charged with the commission of any offense that may be prosecuted by indictment or information"; and "such other criminal jurisdiction as is, or may hereafter be conferred by law upon Police Courts, Justices' Courts, or Justices of the Peace, * * *." It was further provided that the Police Court as organized under the charter should take over and proceed with all actions and proceedings pending and undetermined in the Police Court as it existed prior to the taking effect of the charter. Since it is admitted that the entire cost of maintaining the police court was borne by the city, the cost of

said court while its judges and other functionaries were engaged in preliminary hearings, were, we must assume, borne by the city. It therefore cannot be said that it obtained no benefit from the statutes which it now assails as unconstitutional. It must be presumed to have weighed the advantages of the new system as against its disadvantages, if any, and concluded in favor of the adoption of the system. We cannot assume that it was acting for other than what it presumed would be its own advantage; and having accepted the benefits of the statute it is now in no position to question its constitutionality.

[9,10] It is said in *Hershey v. Reclamation District No. 108*, 200 Cal. 550, 564, 254 P. 542, that the right to question the constitutionality of a statute may be waived, citing 12 C.J. 785; and that one who receives the benefit of an unconstitutional law is estopped from asserting its unconstitutionality, citing *Vickery v. Blair*, 134 Ind. 554, 32 N.E. 880. In the cited case, plaintiff, a taxpayer, sued to enjoin the commissioners of a county from levying a tax to pay the bonds issued by the county to pay for a toll road which the voters had duly voted to purchase, it being contended by plaintiff that the act under which the tax was levied was unconstitutional. The court said that plaintiff had waited until the road had been conveyed to the county and it had paid for it; that he had received all the benefits contemplated by the law, and now sought to avoid payment for such benefits; and that one who receives a benefit under an unconstitutional law is estopped from denying its constitutionality.

In *Foster v. Superior Court*, 26 Cal. App.2d 230, 234, 79 P.2d 144, 146, the court said that "a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality," citing 12 C.J. 769; 11 Am.Jur. 766, 767; *Gregory v. Hecke*, 73 Cal.App. 268, 284, 238 P. 787; *Ison v. Western Vegetable Distributors*, 48 Ariz. 104, 59

P.2d 649, 654, 655; *Nuckolls v. United States*, 10 Cir., 76 F.2d 357, 360.

In *Booth Fisheries Co. v. Industrial Commission of State of Wisconsin*, 271 U.S. 208, 46 S.Ct. 491, 70 L.Ed. 908, it was contended that a provision of the state Workmen's Compensation Act which limited the review of findings of fact of the Commission was unconstitutional; that it deprived appellant of his day in court to which he was entitled under the 14th Amendment. The court said (271 U.S. at pages 210, 211, 46 S.Ct. at page 492, 70 L.Ed. at pages 910, 911):

"A complete answer to this claim is found in the elective or voluntary character of the Wisconsin Compensation Act. That act provides that every employer who has elected to do so shall become subject to the act. * * * If the employer elects not to accept the provisions of the Compensation Act, he is not bound to respond in a proceeding before the Industrial Commission under the act, but may await a suit for damages for injuries or wrongful death by the person claiming recovery therefor, and make his defense at law before a court in which the issues of fact and law are to be tried by jury. In view of such an opportunity for choice, the employer who elects to accept the law may not complain that in the plan for assessing the employer's compensation for injury sustained, there is no particular form of judicial review. * * *

"More than this, the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint. *Daniels v. Tearney*, 102 U.S. 415, 26 L.Ed. 187; *Grand Rapids & I. R. Co. v. Osborn*, 193 U.S. 17, 24 S.Ct. 310, 48 L.Ed. 598."

In *Grand Rapids & Indiana R. Co. v. Osborn*, 193 U.S. 17, 24 S.Ct. 310, 48 L.Ed. 598, it was held that the railway company, having voluntarily accepted the privileges and benefits of the incorporation laws of Michigan, was bound by the provisions of the then existing laws regulating rates of

fares upon railroads, and was estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body.

United States v. Golden Gate Bridge and Highway District of California, D.C., 37 F.Supp. 505, 511, involved a permit from the government to the district for rights of way over government land as approaches to the bridge, which permit provided for toll free traffic of certain military and governmental employees and their dependents. The district contended that the "toll free" provision was void as violating the "equal protection of the laws" clause of the Federal Constitution. Amend. 14, § 1. The court said, 37 F.Supp. at page 510: "Defendant also argues that any act on the part of the Legislature depriving defendant of the right to impose tolls was unconstitutional and void, and deprived defendant of its property without due process of law. One cannot avail himself of the benefits of a statute or law and at the same time challenge its constitutionality. *Buck v. Kuykendall*, 267 U.S. 307, 316, 45 S.Ct. 324, 69 L.Ed. 623, 38 A.L.R. 286; *Daniels v. Tearney*, 102 U.S. 415, 421, 26 L.Ed. 187; *Grand Rapids & Indiana Railway Co. v. Osborn*, 193 U.S. 17, 29, 24 S.Ct. 310, 48 L.Ed. 598."

In *Buck v. Kuykendall*, cited supra [267 U.S. 307, 45 S.Ct. 326], Justice Brandeis said: "It is true that one cannot in the same proceeding both assail a statute and rely upon it. *Hurley v. Commission of Fisheries*, 257 U.S. 223, 225, 42 S.Ct. 83, 66 L.Ed. 206 [207]. Compare *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 411, 37 S.Ct. 609, 61 L.Ed. 1229 [1230]. Nor can one who avails himself of the benefits conferred by a statute deny its validity. *Pierce Oil Corp. v. Phoenix Ref. Co.*, 259 U.S. 125, 42 S.Ct. 440, 66 L.Ed. 855; *St. Louis [Malleable Casting] Co. v. [George C.] Prendergast Const. Co.*, 260 U.S. 469, 472, 43 S.Ct. 178, 67 L.Ed. 351." Also see *County of Contra Costa v. American Toll Bridge Co.*, 10 Cal.2d 359, 366, 367, 74 P.2d 749; *Higbie v. County of Los Angeles*, 47 Cal.App.2d 281, 289, 117 P.2d 933; *Slick v. Hamaker*, 8 Cir., 28 F.2d 103; *United States v. Hawthorne*, D.C., 31 F.Supp. 827, 829, and cases cited;

Tovrea Packing Co. v. Live Stock Sanitary Board, 44 Ariz. 151, 34 P.2d 420, 422; 11 Am.Jur. 767-769. And that a governmental agency, as well as an individual, may be estopped in a proper case was stated in *Farrell v. County of Placer*, 23 Cal.2d 624, 627, 628, 145 P.2d 570, 153 A.L.R. 323.

[11] As for the constitutionality of the statutory provisions attacked by respondent, the courts presume that legislative acts are valid; and all doubts are to be resolved in favor of their validity. 23 Cal. Jur. 757, 758. And we are not disposed to say, in this action, that the very statutes upon which the existence of the municipal court of the city is based, are unconstitutional.

The judgment is reversed.



75 Cal.App.2d 595

VAN NORDEN v. METSON et al.

Civ. 13055.

District Court of Appeal, First District,
Division 2, California.

Aug. 1, 1946.

Rehearing Denied Aug. 31, 1946.

I. Contracts ⇐221(3)

Where civil engineer was employed by stockholders to evaluate their holdings and damage to their interests in corporation, with a view to presenting their claims adequately in proposed arbitration, and contract for compensation provided that after arbitration was completed, engineer was to receive a percentage of the total amount recovered by stockholders, but stockholders' proposal to submit their claims to arbitration were refused, and after extensive litigation stockholders received a settlement of their claims, engineer was not entitled to recover a percentage of the amount so received.

2. Contracts ⇐221(3)

Where a payment is agreed to be made on the occurrence of a future event and

through no fault of the promisor the event does not occur, there can be no recovery on the promise.

3. Contracts ⇨129(2)

A civil engineer who rendered services in preparation for trial at which he appeared as a witness was not entitled to a percentage of amount recovered in settlement of the litigation by those for whom he had testified, since such an agreement is against public policy and void.

4. Contracts ⇨138(7)

Where civil engineer, employed to evaluate claims in proposed arbitration, was to be paid a percentage of amount recovered by his clients in the arbitration but no arbitration took place through no fault of his clients, and clients after extensive litigation received certain sum in settlement of their claims and paid a third over as attorneys fee to their attorney who agreed to pay balance due engineer for his services, engineer was not entitled to recover the percentage referred to in the contract from the attorneys under rule that money delivered to a third party by one party to an illegal contract to be paid by the third party to the other party to the illegal contract can be recovered from the third party.

5. Contracts ⇨138(1)

The test of whether a demand connected with an illegal transaction may be enforced at law is whether plaintiff requires the aid from or must rely on the illegal transaction to establish his case.

6. Appeal and error ⇨877(2)

Where civil engineer employed to evaluate claims in proposed arbitration was to be paid a percentage of amount recovered by his clients in the arbitration but no arbitration took place through no fault of the clients, and clients after extensive litigation received a settlement of their claims and paid a third over as attorney's fees to their attorneys who agreed to pay balance due engineer for his services, engineer, in suit against attorney to recover percentage referred, could not complain that portion of attorney fees were awarded to two attorneys associated with the defendant attorney in the litigation, since engineer was not injured by such awards.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Rudolph W. Van Norden against Wilfred G. Metson, administrator, etc., and others to recover for services rendered by plaintiff as a civil engineer. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Marion Vecki, of San Francisco, for appellant.

A. B. Dunne and Dunne & Dunne, all of San Francisco, for respondent Gertrude Hind, executrix of last will of E. B. Mering, deceased.

P. H. McCarthy, Jr., of San Francisco (Joseph Gans, of San Mateo, of counsel), for respondent McCarthy.

DOOLING, Justice.

In 1935 appellant (a civil engineer) was employed by Mr. and Mrs. MacKenzie Gordon and Mrs. Gordon's mother (hereinafter called the Gordons). The Gordons were minority stockholders of the Santa Cruz Lime Company. They were asserting a claim, as such minority stockholders, against the Santa Cruz Portland Cement Company for encroachments by the latter company upon the property of the former. The Gordons had discussed the possibility of arbitrating this claim with officers of the Santa Cruz Portland Cement Company and appellant was employed by the Gordons to evaluate their holdings and the damage to their interest in the Santa Cruz Lime Company, with a view to presenting their claims adequately in the proposed arbitration. It was contemplated at the time of his employment that appellant, after completing his evaluation, should act as the Gordons' representative in the anticipated arbitration.

On November 21, 1935, appellant wrote a letter to Mr. MacKenzie Gordon in which he proposed that he be paid for his services either a per diem compensation of \$25 or a flat monthly rate of \$300.

The letter opened with this language: "Relative to the work in which you have asked me to act as arbitrator in the matter of an accounting and settlement, acceptable to Mrs. Gordon and yourself, by the Santa

Cruz Portland Cement Company and Santa Cruz Lime Company * * *."

After proposing the alternatives of \$25 per day or \$300 per month the letter continued with this paragraph (numbered "C"): "After the arbitration is completed and a final agreement has been arrived at as between yourselves and the Cement company, either for the payment of cash, or other equivalent consideration of value, I am to receive a percentage of the total amount in excess of \$50,000, based on a straight line increase in the percentage commencing at 6.4% and increasing to 8.4% on \$50,000 excess, or where the total amount is \$100,000. For any total settlement over \$100,000 the same straight line percentage increase shall apply."

In view of the argument made by appellant it may be well to notice at this point that the proposal made in this letter contemplated that appellant was "to act as arbitrator in the matter of an accounting and settlement" and that the percentage compensation on any amount received by the Gordons in excess of \$50,000 was to be received only "after the arbitration is completed and a final agreement has been arrived at."

Appellant commenced his work of evaluation but the proposal to submit the Gordons' claim to arbitration was refused by the Cement company and appellant knew that the arbitration had been refused on January 21, 1936. Thereafter appellant continued his work of evaluation in preparation for litigation between the Gordons and the Cement company. Suit was commenced by the Gordons on July 20, 1936. Appellant assisted the attorneys for the Gordons in the preparation for trial of this action and testified for the Gordons on the trial. Judgment in this action went against the Gordons. They appealed and the District Court of Appeal affirmed the judgment. They petitioned the Supreme Court for a hearing after judgment and their petition was granted by the Supreme Court. While the appeal was pending in the Supreme Court the Gordons' attorneys effected a settlement with the Cement company as a result of which the Gordons

received \$60,650 in settlement of their claim for damages and sold their stock in the Santa Cruz Lime Company for \$39,932.

The Gordons had employed Mr. William H. Metson to act as their attorney in this litigation. After the settlement Mr. Metson proposed to the Gordons that they pay him as his fee one-third of the amounts received by them in the settlement and for the sale of their stock. The Gordons agreed to this on condition that Mr. Metson should pay all unpaid costs of the litigation including the balance due to appellant for his services. Mr. Metson agreed to do so and received from the Gordons \$33,572.33. Upon Mr. Metson's death \$27,527.33 of this amount was in the form of cashier's checks of the Crocker First National Bank of San Francisco.

Appellant commenced an action asserting his right to be paid out of the amount represented by these checks the balance due him for his services on a per diem basis, plus a percentage of the total amount received by the Gordons both in settlement of their claims for damages and for the sale of their stock. The latter claim was based upon paragraph "C" of appellant's letter of November 21, 1935, quoted above. The court gave judgment to appellant for his services on a per diem basis but denied him a recovery on the percentage basis. From the portion of the judgment denying recovery on the percentage basis plaintiff has taken this appeal.

In his brief counsel for appellant assumes, without any supporting argument or authorities, that the provision for a percentage of any amount received by the Gordons over \$50,000 contained in paragraph "C" of his letter of November 21, 1935, is applicable to the amount finally received by the Gordons in settlement of their litigation and as the purchase price of their stock.

[1,2] We can find no justification for this assumption. The percentage proposal was made in contemplation of appellant's services in an arbitration in which he was to act as an arbitrator representing the Gordons. It was expressly provided to be paid "after the arbitration is completed." Through no fault of the Gordons the ar-

bitration was never completed. It is elementary that where a payment is agreed to be made on the occurrence of a future event and, through no fault of the promisor, the event does not occur there can be no recovery on the promise. *Lynch v. Keystone Con. Min. Co.*, 163 Cal. 690, 126 P. 968; *Nelson v. Dutton*, 63 Cal.App. 717, 220 P. 12; *Detwiler v. Clune*, 77 Cal.App. 562, 247 P. 264; *Carpenter v. Elmer R. Sly Co.*, 109 Cal.App. 539, 293 P. 162; *Cantwell v. Gage*, 111 Cal.App. 209, 295 P. 375; *Martin v. Martin*, 5 Cal.App.2d 591, 43 P.2d 314; *Stern v. Franks*, 35 Cal.App.2d 676, 96 P.2d 802; *De Aryan v. Akers*, 49 Cal.App.2d 714, 122 P.2d 57.

[3] There is no evidence that after the arbitration was refused there was any agreement made by the Gordons with appellant that the percentage provision of paragraph "C" would be applicable to the amount, if any, recovered by them in the litigation or in settlement of the litigation. But if there had been appellant's position would be no better. He testified that the work done by him after the arbitration was abandoned was done in preparation for the trial at which he appeared as a witness. An agreement with a witness to pay him a fee contingent on the success of the litigation is against public policy and void. *Pelkey v. Hodge*, 112 Cal.App. 424, 296 P. 908; *Von Kesler v. Baker*, 131 Cal.App. 654, 21 P.2d 1017.

[4] Appellant is not helped by the rule referred to in *Wise v. Radis*, 74 Cal.App. 765, 779, 780, 242 P. 90, that money delivered to a third party by one party to an illegal contract to be paid by the third party to the other party to the illegal contract can be recovered from the third party. The evidence here is not that Metson promised the Gordons to pay any specific sum to appellant, but only that he promised to pay appellant's fee. If, in order to establish his right to recover the percentage appellant must prove an illegal agreement, he clearly cannot recover.

[5] In *Asher v. Johnson*, 26 Cal.App.2d 403, 404, 414, 79 P.2d 457, 463, the court quotes with approval the text of 6 Cal.Jur. 160, that "the test is declared to be whether

the contract sought to be enforced can be separated from the illegal acts or contracts relied upon as avoiding it, and whether the plaintiff requires any aid from, or must in any way rely upon the illegal transaction in order to establish his case." Cf. *Kyne v. Kyne*, 16 Cal.2d 436, 440, 441, 106 P.2d 620.

[6] Appellant cannot complain that portions of the fund were awarded to two attorneys associated by Mr. Metson in the litigation, since he is in no way injured by such awards.

Judgment affirmed.

NOURSE, P. J., concurs.



75 Cal.App.2d 711

METCALF v. DREW et al.

Civ. 15357.

District Court of Appeal, Second District,
Division 1, California.

Aug. 8, 1946.

Hearing Denied Oct. 1, 1946.

1. Appeal and error ⇨158(1)

In case of voluntary satisfaction of a judgment, deprivation by statute of right to appeal ensues only when it is shown that payment of judgment was by way of compromise or with an agreement not to take or prosecute an appeal. Code Civ.Proc. § 1049.

2. Appeal and error ⇨158(1)

Where judgment against real estate broker and codefendant in action for secret profits was satisfied against broker's will by codefendant, and broker was faced with revocation of his license on basis of findings of fraud in the action, broker's right of appeal could not be impaired because of the satisfaction under statute providing that an action is pending until final determination on appeal unless judgment is sooner satisfied. Code Civ.Proc. § 1049.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by H. F. Metcalf, as Trustee of F. P. Newport Corporation, Limited, a corporation, bankrupt, against John Drew, J. A. Charlesworth, and others, to recover secret profits, for damages, and for other equitable relief. John Drew gave due notice of appeal in the trial court, but failed to perfect his appeal. From an adverse judgment, J. A. Charlesworth appeals. E. A. Piller, judgment creditor and substituted respondent, moves to dismiss the appeal, and J. A. Charlesworth moves to dismiss the appeal with directions to the superior court to dismiss the action.

Motions denied.

Buel R. Wood, of Los Angeles, for appellant J. A. Charlesworth.

Samuel DeGroot, of Los Angeles, for appellant John Drew.

Max I. Bernstein, of Los Angeles, for E. A. Piller, assignee of plaintiff, and respondent H. F. Metcalf as trustee and substituted respondent.

WHITE, Justice.

On August 16, 1943, plaintiff and respondent herein, H. F. Metcalf, as trustee of F. P. Newport Corporation, Ltd., a corporation, bankrupt, instituted an action in the Superior Court of Los Angeles County against appellants, J. A. Charlesworth and John Drew, and other defendants not now parties, to recover secret profits, for damages and for other equitable relief.

After setting forth that the F. P. Newport Corporation, Ltd., a corporation, was adjudicated a bankrupt on January 12, 1937, by the District Court of the United States for the Southern District of California, Central Division, and that plaintiff was duly appointed the trustee in bankruptcy of the estate of said bankrupt corporation, qualified as such trustee, and at the time of the commencement of the action was qualified and acting trustee in bankruptcy of the estate of said bankrupt corporation, the complaint alleged that plaintiff, since his appointment as such trustee in bankruptcy,

was the owner and in possession of certain real property situate in the city of and county of Los Angeles. It was then alleged that the defendant J. A. Charlesworth was at all times a duly licensed real estate broker under the laws of the State of California and was actually engaged in the transaction of a real estate brokerage business. During the month of November, 1941, plaintiff informed the defendant Charlesworth that as such trustee he had for sale a 300-acre tract of unimproved land in the San Fernando Valley, of which the property described in the complaint was a portion; that such property was an Asset of the bankrupt estate and that a sale of said property would be made to the highest and best bidder, subject to the approval of the court having jurisdiction of the bankrupt estate. It is then alleged that during the month of November, 1941, and prior to the 28th day thereof, plaintiff as such trustee and defendant Charlesworth in his capacity as a licensed real estate broker made and entered into an agreement whereby it was mutually agreed that defendant Charlesworth should undertake to procure an offer for said entire tract or some part thereof, and it was also agreed that if any sale was made to any purchaser found by Charlesworth, upon approval and confirmation of any such sale by the bankruptcy court, plaintiff would pay Charlesworth for his services in negotiating and consummating any such sale the usual 5% commission, subject to authorization and approval of such payment by the bankruptcy court; that on or about November 28, 1941, defendant Charlesworth submitted to plaintiff an offer signed by defendant John Drew, offering to purchase said real property for a total consideration of \$87,135. The complaint then recites that on December 17, 1941, plaintiff filed in the court having jurisdiction of the bankruptcy proceeding a petition for authority to sell and confirmation of sale of said property to said defendant John Drew for the aforesaid sum and for authority to pay a commission of \$4,357 to defendant Charlesworth if the sale was confirmed; that on January 29, 1942, after said property had been offered in open court to the highest

and best bidder and no bid other than that of defendant Drew had been received, an order was duly made by the court authorizing the sale of the aforesaid property to John Drew as the highest and best bidder for the sum of \$87,135, payable \$20,000 in cash and the balance to be represented by a promissory note for \$67,135 secured by a deed of trust on the said property. The sum of \$20,000 was paid to plaintiff by defendant John Drew and the latter and his wife executed and delivered to plaintiff their promissory note for \$67,135, together with a deed of trust executed by them covering the aforesaid property, securing payment of said promissory note.

The complaint then alleges on information and belief that on or about December 11, 1941, defendant Charlesworth had received from the defendants H. H. Hagge and Lilly J. Hagge an offer in writing to purchase said real property for a total consideration of \$174,270, and that prior to the confirmation of the sale to John Drew the defendant Charlesworth received from the defendants Hagge a revised offer to purchase said property for the last-mentioned sum, a copy of which revised offer was attached to and made a part of the complaint; that said offer was purportedly accepted and approved by defendant John Drew as alleged owner on or about January 16. The complaint then alleges that defendant Charlesworth did not communicate to plaintiff the said offers of December 11, 1941, and January 16, 1942, or either of them, and did not inform plaintiff or the court having jurisdiction of the bankruptcy proceeding of the said offers or either of them, and that plaintiff had no knowledge of the same until about August 4, 1943.

It is then alleged on information and belief that on or about December 11, 1941, defendants Charlesworth and Drew entered into a plan, agreement and conspiracy between themselves to fraudulently conceal from the plaintiff and said bankruptcy court the fact that the defendants Hagge were willing to pay and had offered to purchase said real property for \$174,270, and to prevent defendants Hagge from acquiring knowledge of the pendency of the sale of said property in the bankruptcy proceeding

and to prevent them from becoming bidders for said property at the bankrupt sale thereof; that said defendants Charlesworth and Drew knew at all times of the pendency of said bankruptcy proceedings and of the fact that the property was being offered for sale to the highest and best bidder but did "fraudulently conceal, and with intent to deceive, cheat and defraud plaintiff and the bankrupt estate, the fact that the said defendants H. H. Hagge and Lilly J. Hagge had agreed to purchase the said property for a total consideration of \$174,270.00; all to the damage of plaintiff and said bankrupt estate and the creditors thereof in the sum of \$87,135.00."

The complaint then alleged on information and belief that the \$20,000 allegedly paid to plaintiff on account of the purchase price of said property by John Drew was in fact, without the knowledge of plaintiff, paid by the defendants Hagge, and that said defendants Hagge had executed their promissory note in the sum of \$164,270, dated March 7, 1942, and that certain of the payments, to-wit, \$10,000, credited on said note, constituted a portion of the \$20,000 paid to plaintiff as above mentioned. The complaint further alleged on information and belief that defendant Charlesworth had an interest in the note executed by defendants Hagge to the extent of \$87,135, which amount was to be paid to him out of payments made on said note by defendants Hagge through an escrow which had been established. It was further charged that defendant Charlesworth had received on account a sum in excess of \$10,000.

It was further alleged that prior to the confirmation of the sale of said property in the bankruptcy proceeding to defendant John Drew and subsequent to December 17, 1941, the defendant Charlesworth represented and stated to plaintiff that the offer made by defendant John Drew to purchase the property was the highest and best offer that Charlesworth had received or had been able to obtain for said property; that said representation and statement were false in that defendant Charlesworth had received from defendants Hagge the offers hereinbefore set forth and that "said representation and statement was known by

said Charlesworth to be false and untrue and was made with intent to deceive plaintiff and the bankrupt estate and in furtherance of the said scheme, plan and conspiracy to defraud plaintiff and said bankrupt estate and the creditors thereof."

It is further alleged in the complaint that defendant Charlesworth falsely represented to plaintiff that the offer to purchase said property made by defendant John Drew was in fact made by him and that said John Drew was a responsible person and had the financial ability to carry out the offer, when in truth and in fact "said John Drew was merely a dummy or agent or tool for the defendant Charlesworth; and that said defendant Charlesworth was in reality the party making said offer in the name of John Drew and that the defendant John Drew was not a man of responsibility and was without financial ability to carry out the said offer." It was further alleged that plaintiff believed and relied upon the representation and statement of Charlesworth and had he known the falsity thereof he would not have filed the petition for authority to sell or for confirmation of sale of said real property to defendant John Drew.

The defendants J. A. Charlesworth and John Drew, with whom we are here concerned, by their answers denied each and every allegation of fraud contained in plaintiff's complaint, denied the receipt of any secret profit by defendant Charlesworth, denied that the offer of sale was not actually made by John Drew or that John Drew was "merely a dummy or agent or tool of the defendant Charlesworth," or that defendant Charlesworth was in reality the party making such offer in the name of John Drew.

The cause proceeded to trial before the court sitting without a jury, at the conclusion of which findings of fact were filed wherein the court found that plaintiff's allegations of a conspiracy and the purposes thereof were true; that the charges of fraud and deceit made in plaintiff's complaint were also true; that defendant Charlesworth violated his duty and obligation to fully disclose to plaintiff each and every offer received for said property, and

that in disregard of their duty and obligation the defendants, including defendant Charlesworth, "fraudulently and corruptly entered into the agreement, plan and conspiracy as hereinbefore found." From such findings of fact the court framed conclusions of law whereby judgment was ordered against defendants Charlesworth and Drew and each of them in the sum of \$82,778.75. In accordance with the foregoing, such judgment was duly signed June 25, 1945, and entered and docketed the following day.

From such judgment the defendant J. A. Charlesworth perfected his appeal and caused to be filed in this court the reporter's and clerk's transcripts. Subsequent thereto, on May 2, 1946, said appellant Charlesworth filed in this court his opening brief. The record reflects that while defendant John Drew gave due notice of appeal in the trial court, he failed to perfect the same.

On May 28, 1946, E. A. Piller, the assignee of H. F. Metcalf as trustee of F. P. Newport Corporation, Ltd., bankrupt, plaintiff and respondent, filed in this court a notice of motion to dismiss the appeal filed herein. Said motion to dismiss was predicated on the following grounds: "1. That said judgment against the appellants, J. A. Charlesworth and John Drew was on the 24th day of May, 1946, satisfied in full by the filing of a satisfaction of judgment signed by the attorney for E. A. Piller, the present judgment creditor in said case. 2. By reason of the said judgment being satisfied, the appeals have become moot." The motion to dismiss was based upon the affidavit of said E. A. Piller, filed concurrently with the motion, in which affidavit it was averred that, as the assignee of said H. F. Metcalf, trustee, on the 4th day of May 1946, he caused his attorney to file the aforesaid satisfaction of judgment in said cause. There was also filed in this court, as part of the record on the motion to dismiss the appeal, a certified copy of an assignment of judgment executed by the aforesaid plaintiff and respondent H. F. Metcalf as trustee, under date of October 26, 1945, whereby, pursuant to an order made by the referee in bank-

ruptcy in the matter of F. P. Newport Corporation, Ltd., bankrupt, said H. F. Metcalf as trustee in bankruptcy and as plaintiff and judgment creditor, assigned, transferred and set over unto Emanuel A. Piller all right, title and interest of said trustee in bankruptcy in and to the judgment made and entered in this action in favor of plaintiff and against the defendants John Drew and J. A. Charlesworth in the sum of \$82,778.75. It is noteworthy that the consideration for such assignment was the sum of only \$10,000.

On June 11, 1946, appellant J. A. Charlesworth caused to be filed in this court a "notice of motion for dismissal of appeal and action," in which notice of motion it is set forth that pursuant to the aforesaid order of the referee in bankruptcy, the judgment herein was sold to said Emanuel A. Piller for the sum of \$10,000; that while said Emanuel A. Piller is the nominal holder and owner of said judgment, the real party in interest is appellant Charlesworth's co-appellant, John Drew. It is then set forth that on April 13, 1945, Charlesworth recovered a judgment against appellant Drew in the sum of \$30,699.62 in the Superior Court of Los Angeles County in an action entitled "H. H. Hagge v. John Drew"; that said John Drew appealed from said judgment, and that thereafter said judgment was affirmed in part and reversed in part by Division Three of the Second District Court of Appeal.

Appellant Charlesworth then sets forth that he filed his notice of appeal in the instant case, and duly prosecuted the same at a cost of more than \$1200 for preparation of the transcripts and printing of a brief; that said John Drew also filed his notice of appeal, but took no steps to perfect the same. It is then set forth that subsequent to the rendition of the judgment in the instant case a copy of the findings of fact and conclusions of law were filed with the Real Estate Commissioner of the State of California, who issued an order to show cause directed to appellant Charlesworth to appear before said Real Estate Commissioner and show cause why his real estate broker's license should not be revoked; that said order to show cause in part al-

leges, "That on the 25th day of June, 1945, a fraud judgment was obtained by H. F. Metcalf, as trustee of the H. P. Newport Corporation, Ltd., a bankrupt, in the Superior Court of Los Angeles County in the sum of \$82,778.75 and that Joseph W. Vickers, Judge of the Superior Court of Los Angeles County, signed the findings of fact and conclusions of law in the aforementioned action." Appellant Charlesworth then sets forth "that the hearing under the order to show cause above referred to has been continued from time to time awaiting the disposition of said appeal prosecuted, as aforesaid, by your movant."

Appellant Charlesworth's notice of motion further sets forth in Paragraph VI thereof the following:

"That on or about February 25, 1946, and at a time when the appeals referred to herein were pending, this Movant was approached by Samuel DeGroot, attorney for John Drew, who, at that time, suggested to this Movant that he and John Drew compose their differences by dismissing all pending litigations between them irrespective of the amounts involved.

"That as the attorney for John Drew he controlled the appeal in the instant cause and if Movant would agree to the dismissal of all pending litigations, he, DeGroot, would stipulate with Movant's counsel that the appeal in the instant case would be reversed and subsequently dismissed and Movant would avoid the effect of the fraud charged against him as alleged herein."

Appellant Charlesworth further states in his notice of motion that at all times prior to the conversation just referred to he had no knowledge or information that defendant John Drew was the real party in interest in the ownership of said judgment and that E. A. Piller was but the nominal holder thereof; and further, that he refused the aforesaid request and informed the attorney making the same that "he was in no manner guilty of the fraud found against him * * * and intended to prosecute his appeal to secure his vindication of the fraud. Thereafter, and in good faith, he served and filed his opening brief in said appeal."

On the hearing in this court at the time the motions to dismiss were made pursuant to the aforesaid notices, Attorney Samuel DeGroot appeared before the Court, and with reference to the foregoing conversation allegedly held on February 25, 1946, between himself and appellant Charlesworth, said:

"My only purpose in being here this morning is in connection with the allegations contained in Paragraph VI of the motion" (hereinbefore set forth) * * *

"At that particular time there was a judgment against Mr. Drew by this movant, Mr. Charlesworth, in the sum of thirty or thirty-one thousand dollars, then on appeal. That judgment was reversed in the greatest portion, leaving a judgment of between four and five thousand dollars, with interest and costs. I did approach Mr. Charlesworth and Mr. Hagge at that time in the nature of a compromise only, that if we satisfied one judgment against the other I would cooperate and see that this appeal was dismissed and that they would not have anything to worry about so far as the judgment is concerned, or words to that effect.

"I have not any interest in the motion before the court that Mr. Wood (Charlesworth's attorney) has just presented, because I am not a party to the action any more. I am only interested in making my position clear, that in a spirit of compromise I suggested that to these gentlemen when I met them on the street accidentally * * *."

In his notice of motion to dismiss appellant Charlesworth further sets forth "that the satisfaction of said judgment referred to in respondent Piller's motion to dismiss said appeal was directed to be entered by John Drew or his counsel with his consent. That the said Piller received no money or other thing of value from John Drew for the issuance of said satisfaction and the filing thereof. That the motion to dismiss this appeal, heretofore served upon this movant, was not filed in good faith, and the dismissal of said appeal is sought for the purpose of giving said judgment a finality and making same and the facts and conclusions thereof res adjudicata against this movant

in the matter of the revocation of movant's license as a real estate broker."

When, pursuant to the foregoing notices of motion to dismiss, the parties appeared in court to make their respective formal motions, E. A. Piller, the assignee of respondent H. F. Metcalf, trustee, moved that the appeal be dismissed, while appellant Charlesworth moved "to dismiss said appeal No. 15357 pending in this honorable Court, and when said dismissal is remitted to the lower court an order be made to enter a judgment of dismissal."

Appellant Charlesworth's contentions that E. A. Piller, assignee of the judgment creditor, H. F. Metcalf, trustee, was but a nominal holder of the assigned judgment, and that the real party in interest in the ownership of said judgment was the codefendant John Drew, are not controverted, nor is the claim of Charlesworth that he recovered a judgment against the codefendant in another action in the total amount of \$36,699.62 in the Superior Court of Los Angeles County, disputed (except by the foregoing statement of Attorney DeGroot that it was reduced to four or five thousand dollars). There is no denial of the claim that the findings of fact and conclusions of law in the instant case were filed with the Real Estate Commissioner of the State of California and that the latter issued an order to show cause directed to said appellant Charlesworth to appear and show cause why his real estate broker's license should not be revoked because of the fraud judgment obtained against him in the instant action. We have examined the opening brief filed by appellant Charlesworth, and have no hesitancy in saying that the same presents substantial and debatable questions for determination upon the appeal regularly taken from the judgment herein.

We are therefore confronted with a situation wherein a fraud judgment has been obtained against the holder of a real estate broker's license and a codefendant; the codefendant purchases such judgment, allegedly in the name of another party, but himself being the real party in interest; the real estate broker has a judgment in another action against his codefendant; when said codefendant in the instant action

purchased from the judgment creditor therein all right, title and interest in and to such judgment, he caused a satisfaction thereof to be entered in the superior court, and thereupon, as successor in interest of the original respondent, in the name of the nominal assignee of said respondent, he causes to be made a motion to dismiss an appeal taken by the codefendant real estate broker upon the ground that by reason of the satisfaction of the judgment the appeal presents a moot question; and where the real estate broker is faced with charges preferred against him by the real estate commissioner on the basis of the findings of fact made against him in the trial of the case in which he has taken and prosecuted an appeal to this court.

All present parties to this litigation concede that when a question on appeal becomes moot the appeal should be dismissed, but appellant Charlesworth contends that in a case presenting the facts here set forth substantial justice requires a consideration of the consequences to follow a mere dismissal of the appeal; that in the instant case a mere dismissal would give the judgment a finality binding on him and would preclude him from defending himself against the charges made against him by the real estate commissioner as a basis for the revocation of his license. In other words, were this appeal to be dismissed and the judgment of the court below to become final, a denial by appellant of the charges made against him before the real estate commissioner would be of no avail. He therefore requests that in our order of dismissal we direct a dismissal of the action in the court below, thereby enabling him to present a defense to the charges made against him before the real estate commissioner.

In support of his motion to dismiss the appeal with directions to the court below to dismiss the cause therein, appellant Charlesworth directs our attention to the case of *City of San Antonio v. Brown*, Tex.Civ.App., 50 S.W.2d 344, wherein the court said:

"It appears that the question presented in this appeal is moot.

"Ordinarily, in such cases it would be sufficient to dismiss the appeal. To do so in

this case, however, would leave the judgment appealed from intact, so that it could be pleaded in future as *res adjudicata* of the right, authority, and power of the city of San Antonio to legislate by ordinance relating to the use and occupation of public places such as that here involved, to the prejudice of one or both parties.

"In such cases the better practice seems to be to dismiss the cause from the court below as well as this court. * * * (Citing Texas cases.)"

[1,2] However, we do not deem it necessary to here determine the question of whether the appellate tribunal can dismiss an appeal with directions to the trial court to dismiss the action, because it is the established law in this state that the general rule that the voluntary satisfaction of a judgment deprives a party of the right of appeal is subject to certain well established principles of law. *Hartke v. Abbott*, 106 Cal.App. 388, 391, 289 P. 206. In a case of voluntary satisfaction, deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal. *Warner Bros. Co. v. Freud*, 131 Cal. 639, 63 P. 1017, 82 Am. St.Rep. 400. In the instant case we are not confronted with a voluntary satisfaction of a judgment in the superior court, but a case wherein, without either the consent or knowledge of appellant Charlesworth, the judgment was satisfied by the substituted respondent. Under circumstances such as we have here, clearly showing as they do that the judgment was satisfied against the will of appellant Charlesworth, section 1049 of the Code of Civil Procedure cannot be invoked to impair or destroy his right of appeal. *Hartke v. Abbott*, *supra*, 106 Cal. App. at page 391, 289 P. 206.

In the case before us the superior court judgment was not final when it was satisfied, because an appeal was pending. Were we to dismiss this appeal and such dismissal become final, it would amount to an affirmance of the judgment. By such affirmance, appellant Charlesworth would be forever precluded from having an appellate court determine whether the evidence supports the findings adjudging him

guilty of fraud and whether claimed errors of law occurring at the trial were prejudicial to him in his defense to the charges lodged against him in plaintiff's complaint. Furthermore, under the peculiar circumstances surrounding the acquisition of the judgment by Piller, the substituted respondent, and its satisfaction by him, we are constrained to hold that appellant Charlesworth's right to an appeal cannot thereby be abridged. To hold otherwise would be manifestly unjust to such appellant, for it would foreclose him from in any way defending against the accusation made against him before the real estate commissioner in the proceeding to revoke his real estate broker's license on the ground that "a fraud judgment" was obtained against him in the instant case—the validity of which judgment he challenges upon this appeal. Courts should never lend their aid to the possible achievement of injustice. Law and good morals should be one and inseparable. Both law and good morals dictate that satisfaction of a judgment under the conditions here present—unusual to say the least—should not preclude appellant Charlesworth from prosecuting an appeal taken by him in good faith to vindicate rights vital to him. Notwithstanding the satisfaction of the judgment by the substituted respondent, whether he be the nominal or real holder thereof, we hold that the questions raised on this appeal cannot be considered as entirely moot, because satisfaction of the judgment was not occasioned by any payment thereof by appellant Charlesworth or any conduct upon his part acquiescing therein, but on the contrary, such satisfaction was caused to be entered without his consent and against his will. The appeal should be determined upon its merits.

The motion of E. A. Piller, judgment creditor and substituted respondent, to dismiss the appeal, and the motion of appellant J. A. Charlesworth to dismiss the appeal with directions to the superior court to dismiss the action therein, are, and each is, denied.

YORK, P. J., and DORAN, J., concur.

BEBBINGTON v. CALIFORNIA WESTERN STATES LIFE INS. CO.

Civ. 13046.

District Court of Appeal, First District,
Division 2, California.

July 18, 1946.

Hearing Granted Sept. 12, 1946.

1. Insurance ⇨150

Where insured and beneficiary signed life policy with rider excluding liability for death while flying in a noncommercial passenger air craft as part of the contract of insurance, the rider was a part of the contract of insurance and together they constituted only one contract, so that suit was required to be brought on the contract as a whole and not on a part exclusive of the rider.

2. Insurance ⇨144(2), 376(1)

Under express terms of life policy, an agent was without authority to alter terms of policy or waive its express conditions.

3. Insurance ⇨129

Where life policy rider plainly denied all liability if injuries occurred while insured was riding in a noncommercial passenger air craft, alleged representation by agent, at time policy was signed by insured and beneficiary, that rider referred only to double indemnity, although possibly a fraud on the insured, did not make the contract one of insurance covering accident in non-commercial air craft.

4. Insurance ⇨130(2, 3)

An application for insurance is a proposal to which a meeting of the mind is essential and which is not a completed contract until accepted by insurer in the same terms in which the offer was made, and, if the acceptance modifies or alters any of the terms of the proposal, it must then be in turn accepted by the applicant to be effective as a contract.

5. Insurance ⇨668(3)

In action on life policy, whether plaintiff held a contract of insurance exclusive of an aviation rider so that action had to be brought on contract as a whole, or whether rider was not a part of a policy so

that action could be brought on the policy alone, was for jury.

6. Evidence ⇨333(7), 341

In action on a life policy with defense of nonliability because insured met his death in a flying accident which was excluded by a rider to the policy, a telegram, letter of condolence, and a certificate from the Secretary of War indicating that insured met his death in a flying accident while engaged in the Army Air Forces were improperly excluded as hearsay, under the Uniform Business Records as Evidence Act, where the records of War Department were all made in performance of an official duty. Code Civ.Proc. §§ 1953e-1953g.

7. Evidence ⇨341

A certificate of the Secretary of War that documents sought to be introduced were copies of official records of his department was all that was necessary to prove their authenticity so as to be admissible in evidence. Code Civ.Proc. §§ 1953e-1953g.

8. Appeal and error ⇨1056(1)

In action on a life policy with the defense of nonliability on ground that insured met his death in a flying accident which was excluded by rider attached to the policy, excluding documents indicating that insured met his death in a flying accident was reversible error, where exclusion completely foreclosed the insurer from making its defense of nonliability.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Edith R. Bebbington against California Western States Life Insurance Company, a corporation, to recover on a policy of life insurance. From adverse judgment, defendant appeals.

Judgment reversed.

Campbell, Hayes & Custer, of San Jose (Edwin J. Owens, of San Jose, of counsel), for appellant.

Boccardo & Williams, of San Jose, for respondent.

NOURSE, Presiding Justice.

In a trial to a jury on a policy of life insurance plaintiff, as beneficiary, had a verdict for the full amount of the policy. The facts relating to the issuance of the policy are not in material dispute. The plaintiff and her minor son talked to the resident agent of the insurer on January 10, 1941, explaining that the son intended to make aviation his career. At the agent's suggestion the son filled out an aviation questionnaire which was filed with his application for insurance. At the same time the agent submitted to the insurer a question as to which of four specified types of such coverage the insurer would be willing to make. On January 13th the insurer rejected all types except "standard policy with aviation waiver."

On January 14th the insurer, at its home office in Sacramento, signed a policy of life insurance to which was attached a rider reading: "Notwithstanding anything to the contrary in this policy or the riders attached hereto, it is agreed, that in the event of the death, dismemberment, blinding, or total disabling of the insured resulting directly or indirectly from service or travel, or while in, on, or near, as a passenger or otherwise, any vehicle or mechanical device for aerial flight or ascension, except as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed passenger pilot on a regular scheduled passenger flight over a regularly established air route between definitely established air-ports, the liability of the Company shall be limited to the reserve of this policy as of the then current policy year, less any indebtedness thereon."

This "Supplemental Agreement" was signed by the insured and his mother, plaintiff herein, on February 7, 1941, at the time the policy was delivered to them by the agent of the insurer.

The plaintiff testified that she paid to the agent the full year's premium at the time the application was made and took a receipt from the agent. She was unable to produce the receipt. The agent testified that she paid for only one quarter. The

application contained a form of receipt on the bottom which was to be filled in if the full premium was prepaid. This form was blank. The policy contained a provision reading in part: "Provided, however, that if the applicant, at the time of making this application, pays the agent in actual cash the full amount of the first premium * * * and so declares in this application and receives from the agent a receipt therefor *on the receipt form* which is attached hereto * * * then said insurance shall take effect * * * from and after the date * * * of the non-medical examination * * * whether the policies be delivered to and received by the applicant or not." (Emphasis ours.) Though there is a contradiction in the evidence as to whether the full premium was paid with the application, there is full agreement that the insured did not so declare in his application and that the attached receipt form was blank.

The plaintiff testified that a short time after the application was signed her son received a letter from the company stating that they "were glad to welcome him as a policy holder." She also testified that she and her son did not understand the terms of the exclusion rider which they signed upon delivery of the policy, and that the agent informed them it meant that the double indemnity clause would not apply in case of death while riding in other than a commercial plane as a fare-paying passenger.

The son was later inducted into the air service of the United States and while stationed at the government bombing range at Avon Park, Florida, was killed in a collision of aircraft on August 31, 1943. In due time the plaintiff made proof of death to the insurer, submitting a newspaper clipping, a telegram and letter from the commanding officer of the Avon Park field. When these documents were offered in evidence by defendant they were excluded on the objection of plaintiff.

From the foregoing these facts stand out as indisputable: The policy of insurance was signed on January 14, 1941, but was not delivered until February 7th, at which time the insured and his mother signed the

waiver as a part of the contract of insurance; the insured did not declare on the face of the application that he had paid in cash the full year's premium, and hence did not avail himself of the opportunity to make the policy date from the time of the application.

[1,2] For these reasons we must hold that there was but one contract and that was the policy delivered on February 7th with the exclusion rider made an integral part of it. To recover on such policy it was necessary to prove that the beneficiary came within the express terms of the policy. She sued to recover on the policy—including the rider—and cannot recover if the rider excludes the liability. Thus when suing upon the policy she must take the contract as a whole. Viewing the case in this light we find that the contract of insurance became effective on its delivery February 7th; that the insurer's agreement to make it effective as of the date of the application provided the full year's premium was paid in advance and provided the insured "so declares in this application" and provided receipt thereof was entered on the face of the application was not accepted by the insured; and that no agreement or representation by the agent could vary these conditions, or result in a waiver by the insured—at least without proof of knowledge on the insurer's part. No such proof was made. Evidence of a different kind of receipt from a "little book" furnished the agent by the insurer was beside the issues. That the agent was without authority to alter the terms of the policy, or to waive its express conditions, is settled in *Linnastruth v. Mut. Benefit, etc. Ass'n*, 22 Cal.2d 216, 218, 137 P.2d 833.

[3,4] If the respondent designed to attack the policy on the ground that the execution of the rider was procured through the fraud or misrepresentation of the agent, it would seem that a plea to reform the contract on that ground would have been the appropriate procedure. Here she sued on the contract of insurance excluding the rider which was an integral part of the contract. When the rider was pleaded in the answer respondent filed an affidavit charging that its terms had been misrepre-

sented by the agent. Assuming that the question was properly at issue the evidence offered by respondent tended to show no more than that the agent represented that the rider did not mean what it said in plain language, but that it referred only to "double indemnity." The policy stipulated in plain language that the double indemnity benefits should not be payable if death resulted from accident while the insured was riding "as a fare-paying passenger" on a licensed passenger aircraft operated between established commercial airports. The rider went further and denied *all* liability if the injuries incurred while the insured was riding in an aircraft which was not of the commercial passenger type. If the agent represented that the rider did not mean what appeared there in plain language it may have been a fraud upon the insured, but it was not a contract of insurance covering accidents in non-commercial aircraft. The applicable rule is stated in the Linnas-truth case (22 Cal.2d at page 219, 137 P.2d at page 834) where the court said: "An application for insurance is a proposal. A meeting of the minds is essential. And the proposal is not a completed contract until it is accepted by the insurer in the same terms in which the offer was made. If the acceptance modifies or alters any of the terms of the proposal, it must then in turn be accepted by the applicant to be effective as a contract. *Burch v. Hartford Fire Ins. Co.*, 85 Cal.App. 542, 552, 259 P. 1108, and cases cited; *Beswick v. National Casualty Co.*, 206 Mo.App. 67, 226 S.W. 1031."

[5] Though we are satisfied from our review of the evidence that it does not fairly support respondent's theory that she held a contract of insurance exclusive of the aviation rider, nevertheless that was an issue of fact tendered to the jury and the jury might have found in her favor. On the other hand the jury might have found that the rider was fairly executed and became a part of the policy and then found that appellant had failed to prove that death occurred under the circumstances included in the rider. This possibility emphasizes the error to be hereafter discussed.

The picture of the trial of the case as we view it is this: Plaintiff sued on a portion

of the contract only; defendant tendered the entire contract as a defense and pleaded that death occurred within the terms of the aviation rider; plaintiff countered with a charge that the rider was procured by fraud. Plaintiff went to the jury on these two issues—that the rider was inoperative, and that death under its terms was not proved. The jury might have held against the plaintiff on the first issue and with her on the second. The relevancy of defendant's proof of the circumstances of the death thus became the core of the defense to the action, and if that evidence was admissible its rejection was error of a type so prejudicial as to deny defendant a fair trial of the issues.

As we have concluded that the judgment must be reversed on this ground we will confine the discussion to that issue. The appellant has raised twenty grounds, or points, for a reversal of the judgment some of which are more or less academic and technical. It should not be implied from the fact that we do not discuss those grounds that we either approve or reject the arguments made for or against them. We merely hold that since the judgment must be reversed upon the grounds stated in the opinion we find it unnecessary to pass on others.

[6] On the issue of the exclusion of appellant's evidence of proof of the circumstances of the insured's death: A short time after the policy was issued the insured was inducted into the aircraft service and at the time of his death was a first lieutenant stationed at the A. A. F., Avon Park Bombing range, Avon Park, Florida. On August 31, 1943, respondent received a telegram from an officer of the squadron informing her of the death of her son "as a result of an aircraft accident." On September 2d she received a letter of condolence from the captain commanding the aircorps stating that her son was "engaged in training pilots and their crews for combat duty at the time of his death." At the request of the court preceding the trial of the case the Secretary of War issued his certificate on April 27, 1945, certifying these facts: That on August 31, 1943, orders were issued by assistant operations offi-

cer commanding the 480 Bombing squadron to depart on "a bombing mission with fighter interception." The insured and six others were named in the order. On the same day the authorities reported that the plane was struck by a fighter ship and that the injuries to the entire personnel (listing by name the insured and six others) were fatal. On September 4, 1943, service headquarters at Atlanta, Georgia, reported to the war department that the insured met death on August 31st as a result of an "aircraft accident," that he "was on a duty status at time of death," and that "death was incurred in line of duty." The appellant also tendered the certificate of the City Clerk of Orlando, Florida, showing that the insured met his death "on a wooded area" as a result of a "plane crash."

All this evidence was rejected on the ground it was hearsay. The error of the ruling is apparent and its prejudicial effect cannot be questioned. Section 1953f of the Code of Civil Procedure provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Section 1953e defines "business" as including "* * * every kind of * * * operation of institutions, whether carried on for profit or not." Section 1953g provides that the article shall be so construed as to effectuate "its general purpose to make uniform the law of those States which enact it."

In *Loper v. Morrison*, 23 Cal.2d 600, 608, 145 P.2d 155, the Supreme Court, in reviewing this legislation, said: "The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. The common law exception is based on the assumption that records kept in the general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded. *Hale, Hospital Records as*

Evidence, 14 So. Cal. L. Rev. 99, 100. But the exception has been hedged about with so many burdensome restrictions that legislation has been necessary to secure widespread use of such records. Speaking of the desirability of similar legislation, the United States Supreme Court, in the recent case of *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719, stated: 'The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed.'

In a similar case the District Court of Appeal held that such evidence was admissible under these code sections and that the objection that it was hearsay was unsound. We quote from *Gunter v. Claggett*, 65 Cal. App.2d 636, 643, 644, 151 P.2d 271, 274: "So far as the contention that the certificate was inadmissible because of the hearsay rule is concerned, it is also without merit. No objection was made to the certificate on the ground that it was not properly authenticated. Aside from materiality, the sole objection was that the certificate was hearsay. Under the Uniform Business Records as Evidence Act passed in 1941 and incorporated in §§ 1953e to 1953h of the Code of Civil Procedure, the document was admissible. *Loper v. Morrison*, 23 Cal.2d 600, 145 P.2d 1."

[7, 8] The records of the war department were all made in the performance of official duty. The certificate of the Secretary of War that they were copies of official records of his department was all that was necessary to prove their authenticity. See *Wigmore on Evidence*, 3d Ed., sec. 1675a. How far these documents went to prove the defense is not the question before us. The error of the trial judge in excluding all these documents completely foreclosed the appellant from making its defense.

Judgment reversed.

GOODALL and DOOLING, JJ., concur.

75 CalApp.2d 450

CONROY v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

No. 13029.

District Court of Appeal, First District,
Division 2, California.

July 22, 1946.

Rehearing Denied Aug. 21, 1946.

Hearing Denied Sept. 16, 1946.

1. Action ⇨6

An action for declaratory judgment must exhibit all usual conditions of an ordinary action, except that accomplished physical injury need not necessarily be alleged, it being sufficient if a dispute or controversy as to legal rights is shown which, in court's opinion, requires judicial determination.

2. Action ⇨6

In order to entitle one to a declaratory judgment, not only must the controversy be a "justiciable controversy" as distinguished from difference or dispute of a hypothetical or abstract character, but it must be definite and concrete, touching the legal relations of parties having adverse legal interests.

See Words and Phrases, Permanent Edition, for all other definitions of "Justiciable Controversy".

3. Action ⇨6

In order to entitle one to declaratory judgment, the controversy must be of a character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts, and a judgment must decree, and not suggest, what parties may or may not do.

4. Action ⇨6

Although ordinances and statutes are inherently proper subjects of declaratory relief, the declaratory judgment may not be rendered in respect to them in regard of the customary limitations on the granting of such relief.

5. Action ⇨6

The purpose of a declaratory judgment is to serve some practical end in quiet-

ing or stabilizing an uncertain or disputed jurial relation.

6. Action ⇨6

Judgment ⇨563(1)

A complaint by Secretary of San Francisco Police Officers' Association, on behalf of himself and other members, against Civil Service Commission to determine whether under 1941 Amendment to San Francisco Charter the commission was required to hold that an offense which marred a "clear record" deprived candidates seeking promotion from next lower civil service rank of 60 per cent. of 10 per cent. to be allowed for a clean record in the department did not present a "justiciable controversy", and hence purported declaratory judgment entered therein was not binding in subsequent mandamus proceeding by police officer. St.1931, pp. 2973, 3064, § 146; St.1941, pp. 3269, 3270, § 146; Code Civ. Proc. § 1060.

7. Mandamus ⇨72

Though courts may compel a public administrative agency vested with discretionary power to act, ordinarily mandamus will not lie to compel such agency to act in any particular manner so as to substitute court's discretion for discretion invested in administrative agency.

8. Mandamus ⇨72

If facts as admitted or proved are susceptible of but one construction or conclusion, the right to the writ of mandamus becomes a matter of law and the officer may be compelled to act in accordance with the facts as admitted or established as an exception to general rule that writ may not be employed to compel public officers having discretionary power to act in a particular way.

9. Mandamus ⇨176

Limit of powers of trial court in a mandamus proceeding is to direct respondent to exercise its discretion.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Proceeding by John H. Conroy against the Civil Service Commission of the City

and County of San Francisco, Harry K. Wolff and others, members of and constituting said Civil Service Commission, and the City and County of San Francisco, for a writ of mandamus directing respondent commission to place the petitioner upon the eligible list for promotion from the rank of Sergeant to that of Lieutenant in the San Francisco Police Department. From a judgment in favor of petitioner, respondents appeal.

Reversed and remanded.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for appellants.

Melvin M. Belli and Van H. Pinney, both of San Francisco, for respondent.

GOODELL, Justice.

This appeal was taken by the Civil Service Commission of the City and County of San Francisco and the City and County itself, from a judgment in a mandate proceeding directing the commission to place the petitioner upon the eligible list for promotion from the rank of sergeant to that of lieutenant in the San Francisco Police Department, in the position on the list designated by the court, and to correct its records to conform to the court's direction.

When the present San Francisco charter was adopted (Stats.1931, pp. 2973, 3064), section 146 (found under "Civil Service"—"Promotions") read as follows: "Whenever it deems it to be practicable, the commission shall provide for promotion in the service on the basis of such examinations and tests as the commission may deem appropriate, and shall, in addition, give consideration to ascertained merit and records of city and county service of applicants. The commission shall announce in the examination scope-circular the next lower rank or ranks from which the promotion may be made. All promotions in the police and fire departments, respectively, shall be made from the next lower rank on the basis of examinations and tests, seniority of service and meritorious public service being considered."

In consonance with the requirement that consideration be given "to ascertained merit and records of city and county service

of applicants," the commission adopted a schedule which prescribed the points or percentages to be deducted from an applicant's score if his departmental record showed that disciplinary action had been taken for certain offenses or derelictions of duty. These deductible points were worked out according to the nature and gravity of the infraction, and the schedules remained in effect and were applied uniformly for a number of years.

In 1941 section 146 was amended (Stats. 1941, pp. 3269-70). The first two sentences quoted above were not substantially altered, but the third sentence was dropped and the following added: "Except as specifically provided in other sections of this Charter, all promotions * * * shall be made from the next lower civil service rank attained by examinations, * * * giving consideration also to meritorious public service and seniority of service. All such promotive examinations * * * shall be entirely of a written character, and all questions asked or problems given in said examinations shall pertain to matters concerning the duties of members of the department for which the examination is held." After prescribing credits for seniority of service the amendment continues:

"(d) In addition to the foregoing credits for seniority, ten per cent of the total credits allowed for said examinations shall be allowed for ascertained merit and meritorious public service; *sixty per cent of said ten per cent to be allowed to each applicant for a clean record in the department*, and forty per cent of said ten per cent shall be the maximum which may be allowed for acts of meritorious public service according to the judgment of the Commission." (Emphasis added.)

The first examination after the amendment, for promotion from sergeant to lieutenant of police, was held on March 6, 1942, and petitioner took it. The scope circular, available to all candidates, stated that 100 points out of the highest possible 1000 would be credited for ascertained merit and meritorious public service—"Credits to be allocated in accordance with provisions of Section 146 of the Charter." It did not contain, as had the scope circu-

lars before the amendment, any schedule showing how many points would be deducted for past infractions, depending on the nature and gravity of the offense.

The commission decided in advance of the examination that the passing score would be determined by the lowest score among the 25 highest candidates, and this passing mark turned out to be 693.04 points. The petitioner's score was 661.64. The record of the petitioner in the department disclosed that in 1938 he had been before the police commission for disobedience of an order, and had been fined \$100 therefor. In computing petitioner's score the civil service commission treated this offense as depriving him of *all* 60 points (see charter, *supra*, "sixty per cent of said ten per cent to be allowed * * * for a clean record * * *"). Under the schedule contained in the pre-amendment rules, petitioner would have been entitled to 40 points (a 20 point deduction from 60, because of the offense), which 40 would have brought him up to 701.64, and with his veteran's preference of 30 points added he would have had a score of 731.64, which would have put him in 14th place in point of relative excellence and safely on the eligible list for promotion.

The petitioner filed a protest based on the fact that for many years prior to this examination the commission had adhered to the schedule above referred to (by which he would have been entitled to 40 points) and should still do so. At the hearing of the protest the president of the commission explained that they had followed an opinion of the city attorney which held that the amendment had effected a change and that if a candidate did not have a "clean record" he was entitled to no fractional part of the 60% of the 10%; that the amendment left no room for discretion, but was mandatory on the commission. The president stated further, in disallowing the protest, that if this opinion were reversed by the city attorney or the courts, the commission would treat petitioner's case the same as cases which had arisen under the pre-amendment rules.

Eleven months after the examination, an action for declaratory relief was com-

menced by Gerald Flynn, as secretary of the San Francisco Police Officers' Association, on behalf of himself and its 1300 members (of whom the petitioner was one) against the Civil Service Commission, its members, and the City and County of San Francisco. The complaint therein alleged that the questions to be determined were of common and general interest to all 1300 members; it alleged the general situation just stated; the holding of the examination (without referring to this petitioner or the score he made or any other scores or percentages); the departure therein from the old, pre-amendment schedules; the commission's threat to no longer apply the old rules to future examinations, but its intention to hold that any offense which marred a "clean record" deprived the candidate of the *whole* 60% of 10%; and it stated that such position would be detrimental to the morale and discipline of the members of the Police Department.

In setting out the "controversy" the opposing contentions of the 1300 officers and of the commission, with respect to the meaning of the amendment, are stated. Nowhere is Sergeant Conroy's name mentioned. Nowhere does it appear that he is the person "who desires a declaration of his rights or duties with respect to another" (sec. 1060, Code Civ.Proc.) or that there exists any controversy between himself and the civil service commission. The prayer asks for "a determination that the said Commission has the right and duty to *exercise its discretion*" in computing deductions.

After making findings, the court entered a judgment declaring that under the amendment the commission "has discretion to determine whether all or only a part of the 'sixty per cent of said ten per cent,' allowed for a clean record, should be deducted from an applicant in an examination who has not a clean record; and should the commission determine to deduct only a part of the 'sixty per cent of said ten per cent' from an applicant in an examination who has not a clean record, then the commission may exercise its discretion in determining how much thereof to deduct, and in the exercise of this discretion may take into consideration the nature and

gravity of the offense with which the applicant has been charged." Further, that the "Commission has the power, authority and discretion to determine what constitutes a clean record and/or an unclean record * * *." Judgment went for the plaintiff "as herein related."

There was no appeal.

The judgment-roll in that case went into evidence in this case by stipulation, and the judgment is strongly relied on by respondent.

The allegations and prayer of the complaint show clearly that what was sought was a declaration whether section 146 as amended vested in the commission the power and discretion to determine that a candidate—*any* candidate—for promotion should be rated with respect to "clean record" according to percentages based on the gravity of his prior infractions or offenses—as had been the case before the amendment—or whether, on the other hand, the amendment rendered the 60% of 10% a fixed and static factor, beyond the reach of rules or ratings by the commission and beyond the scope of its discretion. What was really sought was an advisory opinion applying to all 1300 members, generally, without regard to any acute, specific or pending controversy, so that there would be available and ready for use in any dispute arising in the future a judicial interpretation of the 1941 amendment.

A reading of the declaratory judgment shows that it did not adjudicate an "actual controversy relating to the legal rights and duties of the respective parties." Sec. 1060, Code Civ.Proc. It passed upon the differences of opinion between the 1300 members on the one hand, and the civil service commission on the other as to how the 1941 amendment should be interpreted. Nowhere in the judgment is Sergeant Conroy's name mentioned, nor is his controversy with the Commission stated. The judgment says that the Commission "has discretion to determine whether all or only a part of the 'sixty per cent of said ten per cent'" should be deducted from *an* applicant—*any* applicant—and it makes the hypothetical declaration that "*should the commission determine to deduct,*" then it can

say how much should be deducted. It says that in exercising its discretion the Commission "may take into consideration the nature and gravity of the offense with which the applicant has been charged"—meaning, of course, any hypothetical applicant. It says, also, that the Commission has the discretion to determine what constitutes a clean or an unclean record.

The decree does not adjudicate whether Sergeant Conroy, or the plaintiff Gerald Flynn, or any of the 1300 members has the *right* to be certified to any eligible list or is entitled to so many points, or that it is the *duty* of the Commission to so certify or to award such points. It passes only upon an abstract question of law—to wit, the interpretation of section 146, as amended—without settling or declaring anybody's legal rights, or ordering that anything be done.

The record shows, however, that in the present mandate case it was treated as a final judgment. In a colloquy this appears:

"Mr. Purcell: That has been interpreted by the Flynn case.

"The Court: Yes, that has been interpreted by the Flynn case, and it is final." Moreover, in the instant case the court made a finding that after this petitioner's protest had been overruled the case of Flynn v. Civil Service Commission was tried and findings and judgment therein entered in favor of that plaintiff and that "no further proceedings were taken in said matter and said judgment is a final judgment."

[1] In Borchard on Declaratory Judgments, Second Edition, 1941, the author says:

"It has already been observed that an action for a declaratory judgment must exhibit all the usual conditions of an ordinary action, except that accomplished physical injury need not necessarily be alleged. It is sufficient if a dispute or controversy as to legal rights is shown, which, in the court's opinion, requires judicial determination—that is, in which the court is convinced that by adjudication a useful purpose will be served. The requisites of justiciability must be present.

"Not only must the plaintiff prove his tangible interest in obtaining a judgment, but the action must be adversary in character, that is, there must be a controversy between the plaintiff and a defendant, subject to the court's jurisdiction, having an interest in opposing his claim. Unless the parties have such conflicting interest, the case is likely to be characterized as one for an advisory opinion, and the controversy as academic, a mere difference of opinion or disagreement not involving their legal relations, and hence not justiciable."

[2-5] In *Monahan v. Department of Water and Power of City of Los Angeles*, 48 Cal.App.2d 746, 751, 120 P.2d 730, 732, it is said: "* * * we may well observe that not only must the controversy be a justiciable controversy, as distinguished from 'a difference or dispute of a hypothetical or abstract character; from one that is academic or moot', but it must be 'definite and concrete, touching the legal relations of the parties having adverse legal interests.' *Aetna Life Ins. Co. [of Hartford, Conn.] v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 464, 81 L.Ed. 617, 108 A.L.R. 1000. In short, the controversy must be of a character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, and not suggest, what the parties may or may not do. While ordinances and statutes are inherently proper subjects of declaratory relief, yet a declaratory judgment may not be rendered in respect to them in disregard of the customary limitations upon the granting of such relief." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, therein cited, contains in 300 U.S. at pages 240, 241, 57 S.Ct. at pages 463, 464, and 81 L.Ed. at pages 621, 622, a full statement of the rule. See, also, 5 Cal.Jur. Ten-year Supp. p. 108 et seq.; 16 Am.Jur. pp. 282-284, secs. 9, 10; *Deming v. Communist Party*, 64 Cal.App.2d 35, 38, 148 P.2d 135. In *Frederick v. North Side Water Co.*, 49 Cal.App.2d 489, 491, 122 P.2d 59, 60, it is said: "* * * it is not enough that there be a controversy. It must be justi-

ciable. Moreover, the specific claims made must be set forth together with the ultimate facts to sustain them." "The purpose of the declaratory judgment is to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation' [citations]." *Columbia Pictures Corporation v. DeToth*, 26 Cal.2d 753, 760, 161 P.2d 217, 220.

[6] We are satisfied that the declaratory judgment in the *Flynn* case did not adjudicate any rights or duties and that the finding herein that "there exists a Final Judgment determining said petitioner's right to have said Civil Service Commission exercise said discretion" was erroneous.

Soon after the declaratory judgment (and no doubt because of it) the commission adopted a new schedule of deductions based upon "the severity of the disciplinary penalty levied by the Police Commission." This new schedule prescribed 30 points as deductible in all cases where a \$100 fine had been imposed (the Conroy fine was \$100), and if this new schedule had been applied to the Conroy examination his score would have still been below the passing mark.

The judgment in the instant case orders a peremptory writ directing the commission and the city and county "to place said John H. Conroy upon the list of eligibles for promotion to the rank of lieutenant * * * and requiring said respondents * * * to place the name of said John H. Conroy upon said eligible list as No. 14 in position thereon and to certify said John H. Conroy for appointment to rank of lieutenant following the certificate for appointment of said thirteen persons named upon said eligible list with a higher ranking than said John H. Conroy, and to correct their records accordingly, by allowing to said John H. Conroy, 40% of the 10% * * *, the same being forty (40) points in the marking of said examination, together with a credit of 3%, to which said John H. Conroy is entitled as a veteran of World War No. 1, the same being thirty (30) points in the marking of said examination." That this judgment compels the civil ser-

vice commission to act in a particular manner cannot be gainsaid.

[7] The appellants invoke the settled and familiar rule recently restated in *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 315, 144 P.2d 4, 11, as follows:

"It is the general rule that the writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner. The court in response to appropriate application may compel such agency to act, but it may not substitute its discretion for the discretion properly vested in the administrative agency. 16 Cal.Jur. 809, § 28, and cases there cited; 34 Am.Jur. 856, § 68, with supporting authority. In a proceeding of this character, challenging the propriety of decision of an administrative board, the attitude of the courts is well stated in the following language found in the case of *Maxwell v. Civil Service Commission*, 169 Cal. 336, 339, 146 P. 869, 871: 'Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere.'" See, also, cases there cited.

[8] The respondent frankly admits this rule but claims that this case comes within the exception stated in *Bank of Italy v. Johnson*, 200 Cal. 1, 31, 251 P. 784, 795, as follows:

"An important exception to the foregoing general rule is that if the facts as admitted or proved be susceptible of but one construction or conclusion, the right to the writ becomes a matter of law, and the officer may be compelled to act in accordance with the facts as admitted or established. *Dufton v. Daniels*, 190 Cal. 577, and cases cited on page 581, 213 P. 949. Cases further illustrating the exception to the general rule are *Inglin v. Hoppin*, 156 Cal. 483, 105 P. 582; *Hammel v. Neylan*, 31 Cal.App. 21, 159 P. 618; and *Walker v. Kingsbury*, 36 Cal.App. 617, 173 P.

171 P.2d—32½

95." See, also, *Klevesahl v. Byington*, 1 Cal.App.2d 671, 677, 37 P.2d 179, where it is restated in almost identical language. In both of these cases, cited by respondent, the court held the question discretionary and refused to issue the writ.

Neither of these cases nor the four cases cited in the *Bank of Italy* opinion aids the respondent. The best illustration of the way the exception works is found in *Inglin v. Hoppin*, where the plaintiffs, before the supervisors, made the showing required by the statute for the establishment of a new reclamation district. Despite this the board refused to form the district. The court held that all the petitioners had to do in the mandate case was to prove in court that they had made the requisite statutory proof before the board, and if they did that the court must grant a peremptory writ directing the board to form the district.

Dufton v. Daniels and *Hammel v. Neylan* were cases where the state board of examiners or control had refused to audit valid claims against the state. In each case the court held that the claimant had fully complied with the statutory requirements and that the plain duty rested on the board to audit the claims. *Walker v. Kingsbury* is not at all in point.

[9] None of the authorities cited by respondent touches a situation similar to that presented in the case at bar, and we are satisfied that none can be found. The instant case falls clearly within the rule, and not within the exception.

The limit of the powers of the trial court, if it finds the petitioner is entitled to relief—a question which we do not decide—would be to direct the commission to exercise its discretion in determining whether the petitioner is entitled to any part of the 60 points, and, if so, what part.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with these views.

NOURSE, P. J., and DOOLING, J., concur.

75 Cal.App.2d 418

DOTSCH v. GRIMES.**Civ. 15261.**

District Court of Appeal, Second District,
Division 1, California.

July 18, 1946.

As Modified Aug. 6, 1946.

1. Divorce ☞332

California courts can inquire into and determine in their own behalf what are the best interests and what will best promote welfare of child who is in California and whose custody has been awarded to divorced parents, notwithstanding any judgment or order of the courts of a sister state. Civ.Code, § 199.

2. Divorce ☞332

The rule that award of custody of minor child to either party in a divorce proceeding has no permanent finality, and is later subject to change and modification by the court wherein the award was made, is applicable not only to orders made by California courts but to such former orders of courts in other states.

3. Divorce ☞298(1)

The paramount concern in awarding custody as between divorced parents is the welfare of the child.

4. Divorce ☞332

While a California court may not be held to have abused its discretion in refusing to modify or change an order of a court of a sister state awarding custody of child of divorced parents, unless there is a showing of changed circumstances, such showing is not an essential prerequisite to the making of such modification if, in the exercise of its sound discretion, the California court, under the facts before it, determines that the best interests of the child would be conserved by modifying the previous order.

5. Divorce ☞301

In proceeding involving custody of child of divorced parents, trial court must pass upon intrinsic value of the evidence and determine credibility of witnesses.

6. Divorce ☞332

Evidence was sufficient to warrant modification of order of an Ohio court by providing that divorced father should have custody of minor child for six weeks instead of three months during summer school vacations. Civ.Code, § 199

Appeal from Superior Court, of Los Angeles County; Leslie E. Still, Judge.

Proceeding involving custody of minor child by Mary Elizabeth Dotsch against Ernest A. Grimes. From the judgment, the defendant appeals.

Affirmed.

Henry D. Lawrence, of Long Beach, for appellant.

No appearance for respondent.

WHITE, Justice.

This is an appeal by defendant from a judgment of the Superior Court of Los Angeles County modifying an order in re custody of the minor child of plaintiff and defendant, which custody had formerly been granted by the Court of Common Pleas of the County of Summit, State of Ohio, to plaintiff mother "during the regular public school term in the community in which the child then resides" and to defendant father "during the summer vacation period, which shall begin on the third day after the closing date of the regular public schools in the spring, and shall end on the third day before the commencing of the regular public school term in the fall."

By her complaint the plaintiff mother sought the sole and exclusive custody of said minor, and the litigation was instituted pursuant to the provisions of section 199 of the Civil Code. To plaintiff's complaint defendant father filed his answer, and the cause proceeded to trial, following which the court ordered judgment, adopting as such judgment the aforesaid judgment rendered in the Ohio court relating to the custody of said minor child, except "that the period of time during which Ernest A. Grimes, the father of said child, shall

be entitled to his custody shall be for a period of six weeks, instead of three months, during the summer vacation period of the public schools."

Plaintiff mother remarried and has resided at San Pedro in Los Angeles County since 1940. When in September, 1944, she obtained custody of the child in the Ohio court, she brought him to her California home, and in March, 1945, commenced this action for his exclusive custody. No brief has been filed on behalf of respondent.

[1,2] The child being within this jurisdiction, the courts of this state are empowered, notwithstanding any judgment or order of the courts of a sister state, to inquire into and determine in their own behalf what are the best interests and what will best promote the welfare of the child. This because under long-recognized authority in this State an award of custody of a minor child of divorced parents to either party in a divorce proceeding has no permanent finality, and is later subject to change and modification by the court wherein it was made. This rule is applicable not only to orders made by California courts, but to such former orders of courts in other states. *Foster v. Foster*, 8 Cal.2d 719, 726, 68 P.2d 719.

While contending that the order of the Ohio court was entitled on principles of comity to full faith and credit in the courts of this state, appellant does not seriously insist that the jurisdiction of the Superior Court of Los Angeles County to make an order modifying the Ohio order can be successfully challenged upon the ground that the latter order was res judicata and could not therefore be changed. Appellant, however, does contend that where no evidence was offered or introduced of any change in circumstances arising after the making of the Ohio order, the California court was without authority to modify the same. In support of this claim appellant relies upon *Foster v. Foster*, supra, wherein the court, at page 728 of 8 Cal.2d, at page 723 of 68 P.2d, quotes approvingly from *Titcomb v. Superior Court of Santa Clara County*, 220 Cal. 34, 39, 29 P.2d 206, 209, as follows:

"The paramount concern in awarding custody as between parents is the welfare of the child, who is not the property of his parents. If it appears that the circumstances upon which the prior order of another state is based have not changed, our courts, on principles of comity, may refuse to decree a change of custody, but the decree of the other state is never a bar to inquiry as to the best interests of the child."

It should be noted that the court uses the phrase, "may refuse to decree a change of custody," immediately followed by the significant language that the decree of a sister state "is never a bar to inquiry as to the best interests of the child."

[3,4] We are here confronted with another case wherein the Ohio and California courts found both parents fit to have custody of the child and did award physical custody to both parents during specified periods of each calendar year. In the case of *Kelly v. Kelly*, 171 P.2d 95, we had before us a similar situation so far as the fitness of both parents is concerned. In the case just cited we held that the so-called "changed circumstances" rule was never intended to nor can it impair the inherent statutory power of the court to make such orders relative to the custody of children "as may seem necessary or proper" and to "at any time modify or vacate the same." Civ.Code, sec. 138, subd. 2. If, as it has been repeatedly held, the welfare and best interest of the child are the paramount concern of the court, then what governs is not the rule of "changed circumstances," but what at the time of the hearing is, in the sound discretion of the court, for the child's welfare. While, as stated by this court in *Kelly v. Kelly*, supra, the court may not be held to have abused its discretion in refusing to modify or change the custody unless there is a showing of "changed circumstances," such a showing is not an essential prerequisite to the making of such modification if, in the exercise of its broad and sound discretion, the court, under the facts before it, determines that the best interests of the child would be conserved by modifying the previous order.

Therefore, the question before us for determination is whether, under the evi-

dence adduced, the action of the court in modifying the previous order of custody amounted to a clear abuse of the extensive discretion vested in it.

A perusal of the record before us discloses evidence given by neighbors that plaintiff mother is very much devoted to the child, a boy eight years of age, and has not only provided him a suitable home, but proper care as well. The mother testified that when she returned the boy from his father's home in Ohio to San Pedro, California, in September, 1944, the child was "hysterical and the teacher at school requested me to keep him home until he was better"; that at nights he could not sleep; that "he cried out in his sleep, 'Mother, I don't want to go back to Ohio,' and we have to stand with him for a while to reassure him that everything will be all right and not to worry." When asked by the court why she wanted exclusive custody of the child, the mother testified, "Because he (the father) has abused the child from when he was small, he threatened to kill me and the child is so nervous and upset and the child doesn't want to go. He has deprived us of a good home, a happy home. He gambles and he borrowed money from anybody he could get money from. He never supplied the child with the proper food or proper clothes."

[5] True, much of the foregoing testimony given by the mother was contradicted by defendant father, but it was the province of the trial court to pass upon the intrinsic value of the evidence and determine the credibility of witnesses.

When asked, "What do you do yourself, to foster love and respect of the child toward his own father?" Fred C. Dotsch, present husband of plaintiff, testified, "I have always talked to him and Mrs. Dotsch and I have told the whole family the boy must be taught nothing but love for his father. I believe in that. He should never be taught hate or dislike for anybody, especially his own father, and especially around the house. I want him to love his father all his life, and I hope he does. I would not tolerate anything else." This witness also corroborated the testimony of his wife, mother of the child, that the lat-

ter upon his return from his father's home was "very high-strung, extremely nervous."

Another witness corroborated the testimony of the plaintiff mother that the child upon his return to San Pedro was "very high-strung and very nervous and a very sad look in his face, in fact, there was never a smile in his face; * * *"; that the child lost weight. This witness further testified as follows:

"Q. What has his physical condition been though generally, if you know, since September and his return from Ohio and up to the present time? A. You mean the condition he is in now?

"Q. His physical condition? A. His physical condition is much improved now since that time.

"Q. Do you know whether or not he has regained weight? A. Yes, I do.

"Q. Does he appear to be happy and contented in his present surroundings and environment? A. He certainly does."

A brother of plaintiff mother testified that the minor had complained to him innumerable times "about returning to Ohio."

There was also testimony as to the financial condition of defendant father, wherein it appears that he is a discharged veteran of World War II, by reason of which fact his tuition and books are paid for by governmental allotment to the University of Akron, Ohio, where the father is taking a course in electrical engineering. He too has remarried and resides with his wife in a house owned by him in the Ohio city. Defendant father testified that at the time of the trial his total income consisted of a government pension award of \$109.25 per month, out of which he has allotted for the support of the minor child herein \$21.85, leaving his net income \$87.40 per month. In that regard, the record reveals the following:

"Q. Well, do you and your wife live on \$87.00 a month? A. That is right, sir.

"Q. And there is no other pension or no other income coming into your home other than the \$87.00 a month? A. None whatsoever."

[6] From the foregoing testimony we are persuaded that it cannot reasonably be

held that in modifying the order of the Ohio court to provide that defendant father should have the custody of the minor child for six weeks instead of three months during the summer school vacations, the trial judge abused the sound discretion vested in him. It therefore follows that the evidence supports the findings and the findings support the judgment.

For the reasons herein stated, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



WOLFE v. WOLFE.

Civ. 3616.

District Court of Appeal, Fourth District,
California.

July 19, 1946.

Rehearing Denied Aug. 1, 1946.

Hearing Granted Sept. 16, 1946.

1. Divorce ⇨312

On appeal from order of trial court on a motion to vacate order fixing amount of support money to plaintiff for minor children of parties under a prior final divorce judgment, trial court's finding of fact on conflicting evidence was conclusive. Civ.Code, § 139.

2. Divorce ⇨311

Evidence supported finding that plaintiff wife, who had received no support money under divorce decree for support of parties' children from defendant for all but the last three months of a five-year period, was not guilty of laches in filing affidavit for a determination of the amount due. Civ. Code, § 139.

3. Divorce ⇨310

Earnings of a minor son of divorced parents are relevant only as a guide in making or modifying orders for support, and do not relieve the father from contributing to the child's support. Civ.Code, § 139.

4. Divorce ⇨310

Remarriage of mother of infant children after divorce does not relieve the father from duty to support the children. Civ.Code, § 139.

5. Divorce ⇨311

Defendant, who had never appeared in divorce action and who had no attorney upon whom service could be made, could not complain that an ex parte order, fixing amount of support money for minor children which was delinquent and due divorced wife, had not been served upon his attorney as required by court rule. Rules for Superior Court of San Diego County, rule 14; Code Civ.Proc. § 1014; Civ. Code, § 139.

6. Divorce ⇨311

The superior court has power to determine the amount unpaid on a judgment or order which requires a father to support his minor children. Civ.Code, § 139.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Affidavit by Ann L. Wolfe against Martin C. Wolfe for an order fixing the amount of unpaid support due under a prior final judgment for divorce. From denial of defendant's motion to vacate the order, defendant appeals.

Affirmed.

John B. Molenaar, of Chula Vista, for appellant.

Harry C. Clark, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from an order which fixed the amount of money unpaid by defendant under the terms of a final decree of divorce which required him to pay to plaintiff \$50 a month towards the support of their two minor children. The order is denominated a judgment and counsel for defendant makes much of this. However, it is clear that it is nothing more than an order fixing the amount in which defendant is in default under the terms of a prior final judgment. The misnomer of the instrument cannot change its character.

The parties were married in 1925. There were two children the issue of the marriage who were both minors at the time of the orders here in question. On November 6, 1931, plaintiff obtained an interlocutory decree of divorce which awarded her custody of the children and required defendant to contribute to their support. These provisions were continued in effect in the final decree of divorce which was rendered October 18, 1933. There has been no modification of either of these decrees and as far as we are advised the provision for the payment for the support of the minors is in full force and effect.

On September 8, 1945, plaintiff filed her affidavit which in substance stated that during the five years preceding that date, there was unpaid, under the decree, the sum of \$2925, which was \$50 per month for the entire period of five years excepting the last three months when \$25 a month was not included as the minor son had been drafted into the Army. He was discharged for physical disability the following November. On September 8, 1945, the trial court made an ex parte order fixing the amount of the unpaid support money at \$2925. There was no order directing execution to issue.

There is no showing that defendant had notice of these proceedings and his counsel states he was in ignorance of them until about November 29, 1945, which we will assume to be true.

On December 7, 1945, defendant filed his notice of motion to vacate the order of September 8, 1945. This was his first appearance in the action, he having made default in the action for divorce.

The motion was heard on January 22, 1946, on affidavits and on the oral evidence of the parties. The motion was denied and this appeal followed.

Defendant argues many questions which can have no possible bearing on the issues before us here so we will not burden this opinion with mention of them further than to say we have considered them and find no merit in them.

[1] Defendant maintains there was an agreement between the parties that he

would pay \$24 per month towards the support of the children and no more; that he paid this sum which was accepted by plaintiff in full satisfaction of his obligation; that this amounted to an accord and satisfaction. This argument is based on the testimony of defendant which was contradicted by plaintiff. This presents the familiar picture of a conflict in the evidence which was resolved in favor of plaintiff in the trial court. This is conclusive of the matter here, as conflicts in the evidence are questions for decision of the trial judge.

[2] Defendant argues laches of plaintiff as a bar to her collection of the unpaid support money. Plaintiff testified to many demands on defendant both in person and by letters for payments of the amounts due under the decree. She also consulted two district attorneys in an effort to force defendant to make up the delinquencies. Defendant admitted being interviewed by an investigator from a district attorney's office. This is sufficient to support the conclusion of the trial judge that plaintiff had not been guilty of laches.

Defendant argues that the son had been supported by others than plaintiff until about 1939; that he had been given property which had been sold for \$1600; that a guardian had been appointed for him; that the son had worked and supported himself; that plaintiff had remarried and that her second husband had provided the support for the two children in amounts not covered by the \$24 per month and the earnings of the boy.

Plaintiff testified that when her son was born he was taken directly from the hospital to the home of her grandparents where he lived until their death; that this was with defendant's knowledge and consent; that after the separation she contributed what she could to his support though these contributions were small; that after the death of her grandparents the boy came to live with her and her husband where he lived for almost six years prior to the hearing of the motion. He worked for plaintiff's husband, part time.

Plaintiff's grandparents deeded the boy their home in Palm City in San Diego

County. After their death a guardian was appointed who took charge of the property and sold it for \$1600 upon terms of nothing down and instalments of \$25 per month which had accumulated to a sum less than \$400 in a bank account. The letters of guardianship are not in the record but from plaintiff's testimony it would seem reasonably clear that the guardianship was of the minor's estate and not of his person.

[3, 4] The fact that the boy was in part self-supporting and had a small amount of property would not relieve the father from contributing to his support. *Howe v. Howe*, 206 Cal. 1, 272 P. 751. Such earnings are relevant only as a guide in making or modifying orders for support. *Rosher v. Superior Court*, 9 Cal.2d 556, 71 P.2d 918. The remarriage of the mother does not relieve the father from his duty to support his children. Sec. 139, Civil Code; *Avila v. Leonardo*, 53 Cal.App.2d 602, 128 P.2d 43.

[5] Defendant argues that the order in question here is void as it was made ex parte and he had no notice of the hearing and no knowledge of the order for more than two months after it was made. He points to Rule XIV of the Superior Court of San Diego County which provides in part as follows: "Every order obtained ex parte from a Judge of the Court must be served upon the attorney of the adverse party and filed with the Clerk within two days after it has been obtained or it shall be void."

A court cannot require the impossible. As defendant had not appeared in the action, he had no attorney upon whom service could be made. Under these circumstances the following provision of Section 1014 of the Code of Civil Procedure should control: "But where a defendant has not appeared, service of notice of papers need not be made upon him unless he is imprisoned for want of bail."

[6] The power of the Superior Court to determine the amount unpaid on a judgment or order which requires a father to support his minor children, cannot now be

questioned. *Shields v. Shields*, 55 Cal.App. 2d 579, 130 P.2d 982; *Cochrane v. Cochrane*, 57 Cal.App.2d 937, 135 P.2d 714.

The order is affirmed.

BARNARD, P. J., concurs.



75 Cal.App.2d 741

MARTIN v. LOS ANGELES RY. CORPORATION et al.

Civ. 15176.

District Court of Appeal, Second District,
Division 1, California.

Aug. 12, 1946.

Hearing Denied Oct. 10, 1946.

1. Appeal and error ⇨1043(1)

That plaintiff moved in presence of jury to dismiss as to one defendant, and that the motion was granted, was not prejudicial to other defendants, particularly where court instructed jury that by granting the motion the court did not pass upon whether the defendant dismissed was guilty of negligence or whether, if negligent, such negligence was the proximate cause of the accident, and did not intend to intimate any opinion on such matters. Code Civ.Proc. § 581, subd. 4.

2. Witnesses ⇨380(5)

The impeachment of one's own witness by showing statements inconsistent with witness' testimony is limited to cases where the witness gives adverse testimony and where counsel is taken by surprise and does not include cases where the witness merely fails to testify as expected. Code Civ.Proc. § 2049.

3. Witnesses ⇨380(5)

The mere assertion by counsel that he has been surprised by testimony given by one of his witnesses is not conclusive of the matter as respects right to impeach such witness by proof of statements inconsistent with testimony. Code Civ.Proc. § 2049.

4. Witnesses ⇨386

Where defendant's witness denied that person involved in collision said that he speeded up his vehicle until rear wheels were barely inches ahead of the motor coach and then executed a right turn, and report made by witness merely purported to be a composite version according to both drivers involved and disinterested witnesses that person so involved did so operate his vehicle, there was no direct contradiction or inconsistency between the testimony and the report that would justify impeachment of such witness by defendant. Code Civ.Proc. § 2049.

5. Witnesses ⇨380(5)

Refusal to permit party to impeach own witness by proof of allegedly inconsistent statements was not an abuse of discretion where witness merely failed to testify as party had expected. Code Civ.Proc. § 2049.

6. Witnesses ⇨267

The length of cross-examination in pages or otherwise is not decisive of whether cross-examination was unduly curtailed.

7. Appeal and error ⇨206(2)

A contention that cross-examination of a witness was unduly curtailed could not be sustained on appeal, where record disclosed that at the end of the cross-examination appellants' attorney stated "that is all" without in any manner indicating a belief that cross-examination had been unduly curtailed.

8. Witnesses ⇨266, 267

The right of cross-examination is a most valuable one, but is not unlimited, and like other details of a trial is subject to proper and reasonable control by trial court.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action for personal injuries by Philaletha Martin against Los Angeles Railway Corporation and others for personal injuries sustained by plaintiff while a passenger for hire in the named defendant's motor coach as the result of a collision with automobile driven by another defend-

ant. From a judgment for plaintiff for \$10,000 against the named defendant and its driver, such defendants appeal.

Judgment affirmed.

Frank Karr, C. W. Cornell, O. O. Collins, and Malcolm Archbald, all of Los Angeles, for appellants.

Marion P. Betty, of Los Angeles, for respondent.

DORAN, Justice.

The plaintiff and respondent brought this action to recover damages for personal injuries sustained while riding as a passenger for hire in defendants' motor coach. The accident and resulting injuries were caused by a collision between the motor coach and a private automobile operated by the defendant Bernard Unrath. The collision occurred about 7:15 p. m., February 13, 1943, on Wilshire Boulevard between Almont Drive and La Peer Drive in Beverly Hills. The complaint charged negligence in general terms as to all defendants; the answers of the L. A. Railway Corporation and its driver, H. R. Harrington, denied negligence and as an affirmative defense charged that the accident was caused solely by the negligence of the defendant Unrath. At the trial, held before a jury, plaintiff dismissed as to the defendant Unrath, and a verdict for \$10,000 was returned against the railway company and its driver.

The accounts of how the collision happened, as given by the defendant Unrath who was driving a Chevrolet coupe, and the defendant Harrington, the driver of the motor coach or bus, were at material variance. Both vehicles were being driven easterly on Wilshire Boulevard near the south curb, at a speed of about 25 miles per hour. Unrath's testimony indicated that the Chevrolet was "sideswiped" by the bus as Unrath attempted to pull in to the curb for the purpose of picking up a sailor. At the impact of the two vehicles, the bus went over the curb and into a lamp post, plaintiff being "catapulted through the air and struck the rear of the (bus) seat in front of me with my head," resulting in injuries to plaintiff's face, neck, shoulders, legs and body. Unrath testified to

first seeing the bus through the rear-view mirror, about 200 feet behind; that "We traveled right on down there together, so to speak. * * * He (the bus driver) was to my right hand and rear." Unrath's further testimony was to the effect that the bus driver did not sound a warning, and that the bus struck Unrath's car on the right rear fender and running board. On the other hand, Howard Harrington, the bus driver, testified that Unrath's automobile, when first seen, was behind the bus, "about 5 feet to the left of the motor coach (bus). As I was driving along, the car pulled up, and as he gained his front wheels got alongside of the coach, and we drove that way for 25, 30 or maybe 40 feet. He suddenly pulled ahead at least seven to ten feet on the left side of my coach. * * * He made a sudden swerve to the right, applied his brakes, I sounded my horn, applied my brakes; I pulled over a little to keep from hitting him. The bus, left front of the bus, came in contact with his right rear fender, pushed the bus up against the curb." At the time of the collision the bus was loaded with about 60 passengers including the plaintiff.

On October 19, 1944, at 2:00 p. m. after all of the evidence on the question of liability and practically all of the medical testimony had been received, plaintiff's attorney, in the presence of the jury, made the following motion for dismissal as to the defendant Unrath, which motion and the court's ruling thereon, is assigned as prejudicial error:

"Mr. Betty: At this time, Your Honor, I would like to move for a dismissal of the plaintiff's cause of action against the defendant, Unrath, upon the ground that the evidence does not show any liability.

"The Court: Any objection on the part of the defendant, Unrath?

"Mr. Ryan: No, Your Honor.

"The Court: Well, the case is dismissed as to the defendant, Unrath, only."

On the morning of October 20, 1944, Mr. Collins, attorney for the Los Angeles Railway Corporation, in chambers, moved for a mistrial "upon the ground of misconduct on the part of the plaintiff and upon the further ground that the granting of the

motion and the motion itself prejudiced the jury—or at least took away from the jury a defense which was properly plead, which was an issue in the case; and that the evidence is such that the court could not say, as a matter of law, Mr. Unrath was not guilty of negligence and the sole negligence which caused the accident." Mr. Collins further stated that: "Your Honor knows I have been somewhat hard of hearing during this week and I didn't hear the entire motion yesterday. * * * I was sorry I did not hear it or I would have protested at that time." After denial of this motion for a mistrial, Mr. Collins then moved the court "to instruct the jury they should disregard that portion of the motion, that there is no liability on the part of the defendant Unrath; further that the court instruct the jury that the court did not pass upon that question, whether or not the defendant, Unrath, was guilty of negligence, jointly or severally, or whether the negligence on the part of Unrath was the sole cause of the accident." Plaintiff's counsel then stated: "I have no objection to Your Honor making an instruction to the effect that the motion was granted, because the plaintiff has a right to dismiss as to any codefendant, and that the court did not pass upon any question of negligence of the defendant, Unrath, and that they are not to place any reliance upon granting the motion". Thereafter the trial court instructed the jury on this subject as follows: "You are instructed that the court in granting plaintiff's motion for a dismissal as to the defendant Unrath, did not pass upon or intend to infer that the defendant Unrath was not guilty of negligence at the time of the accident, or that if he was guilty of negligence, that his negligence was not the sole proximate cause of the accident."

[1] The contention that "The manner in which the case was dismissed as to the defendant Unrath resulted in prejudicial error as to appellants" cannot be sustained. Under the provisions of Section 581 of the Code of Civil Procedure the plaintiff had a right to dismiss the action against one or more defendants, and an action may likewise be dismissed "4. By the court, when upon the trial and before the final submission of the case, the plaintiff abandons it."

Perhaps nothing is more common than for a plaintiff to join various defendants in a complaint, and later, at the trial, to dismiss as to one or more defendants depending upon the state of the evidence. In the present case the record discloses nothing more than this. While it is quite true, as commented upon in appellant's brief, that the plaintiff could have dismissed the action as to Unrath in other ways than by making such motion in open court before the jury, there is nothing, other than appellants' unsupported statement, to show bad faith on the part of plaintiff's counsel, or that the procedure adopted actually resulted in any prejudice to appellants. At the time the motion was made, practically all of the evidence in the case had been presented. Thereafter only a few questions were propounded to a medical witness before the evidence was closed. Certainly the plaintiff's attorney would have been entitled to argue to the jury that the evidence indicated that the bus driver's negligence was the sole proximate cause of the accident. The appellants were in no manner prevented from presenting any defense within the issues. Neither the attorney's motion for dismissal against the defendant Unrath "upon the ground that the evidence does not show any liability," nor the trial court's order, "Well, the case is dismissed as to the defendant, Unrath, only," were calculated to prejudice the jury. Moreover a proper instruction on the subject was given by the trial court.

No case has been cited by appellants holding that the procedure adopted in the instant case was either improper or prejudicial. The case of *Nicholas v. Crossetti*, 16 Cal.App.2d 376, 60 P.2d 335, was an action for assault in which the trial court advised the jury that it had granted a nonsuit in favor of defendant's father on the ground that there was no evidence that the father had participated in or authorized the son's action. In overruling another objection the court said: "There won't be anything to it after it is submitted to the jury." Finally in overruling an objection to hearsay evidence the court stated: "Overruled. There is testimony before the jury here that this defendant was leading the mob." In this state of the record the judgment was

reversed on the ground that the defendant had not been accorded a fair trial. The *Nicholas* case bears no resemblance to the present situation and is not authority for appellants' contention. Appellants also rely on *Abbott v. Limited Mutual Compensation Ins. Co.*, 30 Cal.App.2d 157, 161, 85 P.2d 961, 963, where the court said: "In an action on a contract, when it appears from the pleadings or the evidence that any defendant is not liable or necessary to a determination of the controversy, he may be dismissed from the action, provided a remaining defendant is not thereby prejudiced." As hereinbefore indicated, in the instant case there is no reason to believe that the remaining defendants were or could have been prejudiced by the dismissal in question. In *Steele v. Wardwell*, 57 Cal.App.2d 642, 135 P.2d 628, a reversal was ordered because of certain remarks of the trial court by way of implied criticism of expert witnesses, where the case was close "and the statements made by the court may well have been the determining factor." Again, the situation in the *Steele* case was in no wise comparable to that now under consideration.

Appellants' second contention is that "The court committed prejudicial error in refusing to permit the defendant railways to impeach and cross-examine the witness W. L. Ritchey." This witness, a police officer, had first been called by the plaintiff, and as stated in appellant's brief, "Thereafter, the witness Ritchey was recalled to the stand by the defendant railways." The officer testified that both the bus driver and Unrath, the automobile driver, had stated how the accident happened, and that the witness thereafter made a police report detailing the facts "according to both drivers involved, and disinterested witnesses present at the scene of the accident." After the witness had been recalled by appellants the question was asked, "At that time did Mr. Harrington, in substance, Mr. Unrath, in substance, say to you that he was driving east * * *, that he speeded up his vehicle until the rear wheels were barely inches ahead of the motor coach and then executed a right turn?" Although this question, as commented upon by the witness, "was rather composite like," and in-

deed, confusing, it was finally answered in the negative. The appellants' attorney then sought "to use the paper (police report) for the purpose of impeaching the officer. I have been taken by surprise, after reading the document which was given me, that his answer was no, in view of the signed written statement of the officer to the contrary." The trial court refused to permit the use of the police report other than for the purpose of refreshing recollection, of which action the appellants complain. Appellants' brief concedes that permission to impeach or cross-examine one's own witness is a matter largely within the sound discretion of the trial court but argues that there has been an abuse of such discretion.

[2-4] Section 2049 of the Code of Civil Procedure provides that a party's own witness may be impeached by a showing "that he has made at other times statements inconsistent with his present testimony." Such impeachment, however, is limited to those cases where the witness gives adverse testimony and where counsel is taken by surprise, and not in cases where the witness merely fails to testify as expected. *People v. Creeks*, 141 Cal. 529, 75 P. 101; *People v. Flores*, 37 Cal.App.2d 282, 99 P. 2d 326. Obviously, appellants' assertion that the witness's statement constituted "surprise" does not make it so, and at most, the case seems to be merely one of those in which the witness failed to testify as favorably as counsel expected or hoped would be the case. Moreover, there is no direct contradiction or inconsistency in the officer's testimony that Unrath did not say "that he speeded up his vehicle until the rear wheels were barely inches ahead of the motor coach and then executed a right turn," and the police report which did not contain such a statement by the officer but merely purported to be a composite version "according to both drivers involved and disinterested witnesses," etc. In the court's

ruling prohibiting the use of the police report for impeachment purposes, there appears to have been no abuse of discretion of which appellants can complain.

[5-8] Lastly, appellants complain that "The court erred as a matter of law in limiting defendants' cross-examination of plaintiff's witness, Ruth Mullen." This witness was a passenger on the defendants' bus and had testified both as to the facts of the accident and also as to a written statement made at defendants' request. Respondent's brief calls attention to the fact that the appellants' so-called "curtailed cross-examination" and recross-examination occupied some twelve pages of the Settled Statement on Appeal, and that during the course of cross-examination only four objections thereto were sustained by the trial court. While the length of cross-examination in pages or otherwise is obviously not decisive, an examination of the record in this case fails to disclose any undue limitation of defendants' cross-examination. The record further reveals that at the end of the cross-examination, Mr. Collins, appellants' attorney, stated, "That is all," without in any manner indicating a belief that the right of cross-examination had been unduly curtailed or interfered with. It is true that the right of cross-examination is a most valuable one and, as appellant says, one of the "virtues of our system of legal justice that have grown up through the years." The right, however, is not unlimited, and like other details of a trial is subject to proper and reasonable control at the hands of the trial court.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

75 Cal.App.2d 472

LUMINOSO v. LUMINOSO.

Civ. 13053.

District Court of Appeal, First District,
Division 1, California.

July 23, 1946.

1. Husband and wife ⇨249

Property deeded to husband and wife as joint tenants under certain circumstances, upon the introduction of extrinsic evidence of an intent to the contrary, may be declared to be the separate property of one, or community property.

2. Divorce ⇨253

In divorce action, evidence warranted division, as community property, of realty deeded to husband and wife as joint tenants.

3. Divorce ⇨252

In divorce action, promissory note running to husband and wife as joint tenants was divided as community property, where the land for which the note was given as part of the purchase price was community property.

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Divorce action by Millie Luminoso against Angelo Luminoso, who filed a cross-complaint. From the interlocutory judgment dividing the property, the defendant appeals.

Affirmed.

Mark M. Coleman, of San Francisco, for appellant.

Young, Hudson & Rabinowitz, of San Francisco, for respondent.

WARD, Justice.

Plaintiff wife brought this action for divorce on the ground of extreme cruelty and prayed for an award of the community property. Defendant answered and filed a cross-complaint in which it is admitted that certain property is community property, but it is alleged that other property is held in joint tenancy. In an answer to the cross-complaint the standing of the title to

the property in joint tenancy, in form, is admitted, but it is alleged that the property was in fact community property irrespective of the vesting of title thereto.

The trial court granted the suit of plaintiff for a divorce and made a division of all the property, which it found to be community property no matter how held. The defendant appeals from this division of the property urging error with respect to three pieces—one parcel of real estate located in Barstow and one in San Francisco, each income property, awarded to plaintiff, and a certain promissory note secured by a deed of trust, awarded to defendant.

[1] It is true that the promissory note, etc., and the grant deeds, run to the parties as joint tenants. However, property deeded to husband and wife as joint tenants under certain circumstances, upon the introduction of extrinsic evidence of an intent to the contrary, may be declared to be the separate property of one, *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708, or community property, *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905. Defendant contends, however, that there is no evidence in the record of an intent to hold the property in fact as community property although in form joint tenancy.

As to the realty parcels, the evidence shows: "[Attorney for plaintiff]: Q. Did he discuss with you at that time anything about this property being held in joint tenancy? A. No, he did not say anything.

"Q. It was never mentioned? A. He did not say anything.

"Q. In connection with the reason, I mean buying—in connection with the buying of the Barstow garage property? A. No.

"Q. It was never discussed it was to be held in joint tenancy between you and your husband? A. He said—between him and I, he never said 'joint tenancy.' I never remember it. * * *

"Q. Do you know how the deed was made out, as far as the original document was concerned? A. No, I do not know.

"Q. At the conversation we are talking about now, between you and your husband,

in relation to the buying of the Barstow garage property, did you and your husband, or did your husband discuss with you any change in the manner of holding that property or owning that property?

"[Attorney for Defendant]: Your Honor please, I object to the question as already being answered, and also leading and suggestive.

"The Court: I will overrule the objection. I must take judicial cognizance of the intelligence, knowledge and experience of this particular lady, who previously stated all her schooling consisted of to and including the second grade. I have to allow more leeway and latitude than normally. It is a prerogative of the judge in a case.

"[Attorney for Plaintiff]: Will you read the question? (Question read by the reporter.) A. What was that?

"The Court: If you do not understand it, say you do not know, madam. A. Well, I—we always talked of it as community property, your Honor."

The evidence also shows: "[Attorney for Plaintiff]:

"Q. In October, 1943, or thereabouts, Mrs. Luminoso, and coming down now, so you will be clear on this, to the Frederick Street property in San Francisco, did your husband come to San Francisco to inspect that property before it was bought? A. Yes, he did.

"Q. Did he want the property because it was here in San Francisco? A. Yes.

"Q. He approved of the buying of it? Did he give any instruction, if you know, with reference to the issuance of the deed concerning that property? A. He said to me—

"Q. Did he, if you know? A.—to make it something like the other.

"Q. You and your husband were buying this property with the community funds you had and he had saved and collected? A. That is right."

In *Buehler v. Buehler*, 73 Cal.App.2d —, 166 P.2d 608, on page 610, the following appears: "In the present case plaintiff

testified that defendant had referred to the property in question as 'community property' or 'our property' and that on one occasion defendant had asked plaintiff to sign a deed changing the property from a community interest between them to an interest whereby plaintiff, defendant and their son would each have a one-third interest in the property. From this evidence the trial court was justified in inferring that the property was community property even though they had taken the title in joint tenancy."

[2] If the trial court upon the foregoing evidence determined that the Barstow and the San Francisco parcels constituted community interest, this court is not in a position to interfere. There is some evidence upholding the finding relative to the realty, which this court cannot declare to be unsubstantial.

[3] In view of the conclusion relative to the realty, appellant would not be assisted by a reversal of the finding on the promissory note. There is no direct testimony as to how the promissory note was intended to be held. It does appear that the land, for which the promissory note was given as part of the purchase price, was community property. An order declaring the property to be in joint tenancy would result in plaintiff obtaining half of that property which was awarded to defendant by the decree. The trial court seems to have equitably measured and distributed the interest that should go to each party. In *Huber v. Huber*, supra, 27 Cal. 2d at page 789, 167 P.2d at page 711, the court said "defendant advised plaintiff of his intention as to the first parcel of real property and it may be inferred that the placing of the other parcels in joint tenancy was done under like circumstances."

Consequently, on the authority of the *Huber* and the *Tomaier* cases the disposition of the three items in dispute should be approved. The interlocutory judgment in so far as the property rights are concerned is affirmed.

PETERS, P. J., and SCHOTTKY, J.
pro tem., concur.

**BRIGNOLI et al. v. SEABOARD TRANSP.
CO. et al.**
Civ. 7187.

District Court of Appeal, Third District,
California.

July 31, 1946.

Hearing Granted Sept. 19, 1946.

1. New trial ⇨41(3)

In action involving liability of a motor carrier, failure to give requested instruction defining a contract or private carrier, which definition was incomplete and served merely to emphasize a particular portion of the evidence and was in part erroneous, did not require a new trial. Gen.Laws, Act 5129a, § 1(h, i); Act 6386, § 50¾; Code Civ.Proc. § 657.

2. New trial ⇨41(3)

In action involving the liability of a motor carrier, where court gave a number of instructions defining highway contract carriers, highway common carriers, and radial highway common carriers, and jury was fully and fairly advised as to various legal principles applicable, failure of court to give a more detailed or elaborate definition of a particular type of carrier did not require a new trial. Gen.Laws, Act 5129a, § 1(h, i); Act 6386, § 50¾; Code Civ. Proc. § 657.

3. Appeal and error ⇨1008(1)

As respects liability of a motor carrier, carrier's status as common or private in particular operation is primarily for trier of fact.

4. Appeal and error ⇨854(6)

Where trial court did not specify insufficiency of evidence as a ground for its order granting a new trial, appellate court was precluded from considering sufficiency of evidence to support a particular fact finding by jury. Code Civ.Proc. § 657.

5. Trial ⇨330(5)

Where cross-complaint was in two counts and cause was submitted to jury with sufficient instructions covering both counts and jury returned a general verdict for cross-defendants, reviewing court could neither disturb verdict nor reverse judg-

ment if either count was free from prejudicial error and sufficient to sustain the verdict.

6. Evidence ⇨271(2), 318(3), 417(3)

Where it was conceded that motor carrier's permit to operate as a radial highway common carrier was properly admitted and such permit was obviously issued pursuant to an application, and application necessarily limited scope of permit, application was admissible over objection that it constituted a violation of parol evidence rule, a self-serving declaration, and hearsay. Gen. Laws, Act 5129a, § 1(h, i); Act 6386, § 50¾.

7. Automobiles ⇨104

Permit to operate as a radial highway common carrier must be read together with application for permit in order to determine scope of permit. Gen.Laws, Act 5129a, § 1(h, i); Act 6386, § 50¾.

8. Evidence ⇨450(1)

Where a writing itself contains a reference to extrinsic matters, such matters may be shown for purpose of explaining the writing without violating parol evidence rule.

9. Evidence ⇨269(1)

Declaration of radial highway common carrier in application for permit as to area over which dedication of services would extend, even if considered self-serving, comes within rule that, when intent is a material element of disputed fact, declarations that indicate intent are admissible. Gen.Laws, Act 5129a; Act 6386, § 50¾.

10. Trial ⇨252(2)

Testimony consisting of a mere surmise hazarded by one of the witnesses was not sufficient to authorize submission of a question of fact to jury concerning such surmise, and hence, refusal of trial court to give instruction based thereon was justified.

11. Trial ⇨139(1)

To justify submission of any question of fact to a jury, proof must be sufficient to raise more than a mere conjecture or surmise that fact is as alleged and it must be such that a rational well-constructed

mind can reasonably draw from it conclusion that fact exists.

12. Trial ⇨251(1)

Where hypothesis upon which particular instruction was requested was immaterial refusal to give instruction submitting such issue was not error.

13. Carriers ⇨136

In cross-action against motor carrier for loss of freight when semi-trailer was destroyed by fire while driver was summoning assistance after a blowout, whether motor carrier was negligent in sending out equipment without spare tires, in taking out equipment knowing that a trailer was overloaded, or in act of driver in leaving truck unguarded while summoning assistance was for jury. Gen.Laws, Act 5129a; Act 6386, § 50¾; Code Civ.Proc. § 657.

14. Carriers ⇨136

In cross-action against motor carrier for loss of freight when semi-trailer was destroyed by fire while driver was summoning assistance after a blowout, whether carrier's alleged lack of due care in sending out equipment without spare tires, in overloading equipment, or in act of driver in leaving truck unguarded while summoning assistance, was proximate cause of loss was for jury. Civil Code, §§ 2114, 2194, 2195.

15. Negligence ⇨136(25)

As respects question of proximate cause it is where reasonable minds cannot differ on the question that a court is justified in taking that question from trier of fact.

16. Appeal and error ⇨978(1)
New trial ⇨39

In granting a new trial on ground of error in giving or refusing to give an instruction or for any other error of law, much is committed to discretion of trial court, and an abuse of such discretion must appear before order will be set aside.

17. New trial ⇨27

Court should deny a new trial for error of law unless such error is prejudicial. Const. art. 6, § 4½.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Charles Brignoli and Charles Trombetta, executors of the estate of Pete Rampone, deceased, doing business as Rampone Brothers, and another, against Seaboard Transportation Co. on a common count for services rendered. After the dissolution of corporate defendant, Walter A. Junge, doing business as Seaboard Transportation Co., was joined as a defendant and defendants counterclaimed in the nature of a cross-complaint. From an order setting aside a judgment for plaintiffs and granting the motion of defendants for a new trial, plaintiffs Charles Brignoli and Charles Trombetta, doing business as Rampone Brothers, appeal and defendants cross-appeal.

Order reversed and judgment affirmed.

Gumpert & Mazzeria and J. Calvert Snyder, all of Stockton, and George H. Hauerken, of San Francisco, for appellants.

Neumiller & Ditz and Irving L. Neumiller, all of Stockton, for respondents.

PEEK, Justice.

This case combines the appeal of plaintiffs Brignoli and Trombetta from an order setting aside a judgment in their favor and granting the motion of defendants Seaboard Transportation Company and A. Junge for a new trial, and the cross-appeal (taken pursuant to rule 3(a) of the Rules on Appeal) of said defendants from the judgment thus set aside. Said plaintiffs are the executors of the will of Pete Rampone, whose motor transportation business they have been operating under the name of Rampone Brothers, pursuant to authority granted by the probate court. The remaining plaintiff, Nancy Sarmento, widow of said decedent, is not a party hereto. Prior to the entry of judgment the defendant corporation was dissolved, and A. Junge, who had managed its business for many years, entered the proceedings as a party defendant, upon the stipulation that any judgment against the corporation would be binding on him and any judgment in favor of the corporation would inure to his benefit.

In March 1944, plaintiffs filed this action against the defendant company by a complaint in the form of a common count for services rendered by their firm to defendant during the preceding two years at the latter's special instance and request. To said complaint defendant company filed an answer admitting liability on the indebtedness sued upon to the amount of \$7,166.48, but counterclaiming for the sum of \$14,780.93 on account of prior transactions by reason of which it was claimed plaintiffs had become indebted to defendant, which debt they had failed to pay. Originally, the counterclaims, which were treated by the parties and the court as a cross-complaint contained four counts. However, counts three and four were dismissed. Each of the remaining counts (one and two) charged that on the 26th and 27th day of February, 1943, plaintiffs received from defendant company certain goods belonging to the United States of America, to be safely carried from the Stockton Ordnance Depot, Stockton, California, and delivered to the Desert Training Center, Hobbs, California; that plaintiffs did not safely carry and deliver said goods, but on the contrary, while in the course of transit and the exclusive possession and control of plaintiffs, said goods were damaged or destroyed in the amount above named. In addition the first count alleged that plaintiffs received the goods in the capacity of a radial highway common carrier of goods for hire between various places within the state, and particularly the places named, while the second account alleged that plaintiffs received the goods in the capacity of a contract carrier of goods between the named places, and that the destruction of or damage to said goods was proximately caused by the negligence of plaintiffs in the transportation thereof.

Plaintiffs by an amended answer admitted receiving the goods for carriage and the destruction or damage thereof in the amount charged, but denied that they were acting as a common carrier and alleged that they received said goods in the capacity of a private or contract carrier and that the goods were destroyed or damaged by fire without fault on the part of plaintiffs or their employees or servants.

On the issues thus joined the cause proceeded to trial before a jury, and the following facts, which are for the most part undisputed, were adduced in evidence: The principal business of plaintiffs and their predecessor was transporting by motor trucks fresh fruits, fresh vegetables, and canned goods from the delta region of the San Joaquin and Sacramento rivers to Oakland or San Francisco. In addition, they hauled other commodities for various concerns, and, commencing sometime in 1941, they also occasionally carried freight as subcontractors for defendant. Plaintiffs' predecessor held a certificate of public convenience and necessity under the provisions of the Public Utilities Act, Deering's General Laws, Act 6386, sec. 50¾. Plaintiffs themselves made application to and received from the railroad commission, under the provisions of the Highway Carriers' Act, Deering's General Laws, Act 5129a, a radial highway common carrier permit and a highway contract carrier permit, as those terms are defined in section 1, subdivisions (h) and (i), of said Act. Plaintiffs reserved the right to, and did, on occasion, refuse to carry freight for anyone who might solicit their business, except during the fruit season, and then they carried only fresh fruits, vegetables and canned goods between the termini above indicated.

On February 26, 1943, plaintiffs received from defendant a shipment of army goods to be carried from the ordnance depot at Stockton to a training center at Hobbs, a distance of several hundred miles. This was done at the request of defendant, which, according to its usual custom, sublet portions of this kind of business when it did not have sufficient equipment to handle it. The bill of lading covering the goods in question had been issued by the defendant company to army authorities. There was no written contract between defendant and plaintiffs, nor did the latter issue any bill of lading. The goods were loaded by army men, and plaintiffs' driver signed defendant's "dray tag", showing the kind and amount of freight to be delivered, and signed a talley-sheet of the ordnance depot which showed the general nature of the load and its destination. The rate of

carriage which was agreed upon between plaintiffs and defendant's agents was somewhat less than the rate paid to defendant by the army.

Plaintiffs' equipment consisted of a diesel tractor with a semi-trailer and trailer. The load comprised automobile and truck parts, materials, tools and repair equipment, which were contained or packed in crates, boxes, cans and bundles. After tarpaulins had been tied over the loads by the driver, he proceeded south on U.S. Highway 99 toward his destination. A short distance from the town of Pixley and approximately 270 miles from Stockton, the front tires of the trailer blew out, whereupon the driver pulled off to the side of the highway, stopped, set out flares, and checked the tires, which he found to be warm but not dangerously hot. Not having spare tires for both wheels, he flagged a motorist and was taken to Pixley, where he telephoned plaintiffs' manager for additional tires. Within an hour he was driven back to his truck by another truckdriver. Upon his return he found the semi-trailer in flames and the trailer partly burned. The trailer and much of its load were saved, but the semi-trailer and its load were a complete loss. The cause of the fire was never explained. The salvaged merchandise to the value of approximately \$30,000 was returned to the army depot, and the army authorities made a claim against defendant company of \$14,486.98, which the latter paid.

The court in its instructions to the jury stated the essential differences between a common carrier and a highway contract carrier or private carrier and between a highway common carrier and a radial highway common carrier, for the most part in the language of the applicable code and statutory provisions. Likewise the nature of the liability of each was explained. According to a further stipulation, a verdict was directed and returned in favor of plaintiffs on their original cause of action for a recovery in the amount of \$8197.02. On the defendant's counterclaim or cross-complaint the verdict was likewise in favor of plaintiffs and against defendant. Judgment was entered accordingly. Thereupon,

defendants moved that the judgment be set aside and a new trial granted, assigning as grounds therefor all of the causes provided by Section 657 of the Code of Civil Procedure. The trial court at the time of granting said motion filed a memorandum opinion wherein the court stated that it had reluctantly reached the conclusion that the motion should be granted because the "Failure of the Court, through inadvertence, to give the defendant's instruction defining a private carrier constituted the error of law which I believe, under the peculiar circumstances of this case, confused the jury and seriously affected the outcome of the trial." In further explanation thereof, the court said: "I consider it quite significant that the jury, after retiring, returned to the courtroom and requested that the court point out 'the distinction between a common carrier, a contract carrier and a radial carrier.' This indicates that the jurors were confused; and I am convinced now that the Court did not clarify the matter by giving them the definitions requested."

Plaintiffs' first contention is directed to the question raised by the trial court in its memorandum opinion: Whether the failure to give the particular instruction requested by defendant constituted such error as would warrant the granting of defendants' motion for a new trial.

The instruction which the court refused, but which it is contended should have been given, reads as follows:

"A contract or private carrier is distinguished as one who does not dedicate and hold out his transportation service generally to the public or a substantial portion thereof, but who is employed by a select and limited group of shippers as a private carrier for an agreed compensation to the exclusion of all others by a mutually binding contract entered into and performed in good faith for an agreed term, and which contract mutually binds the carrier to transport and the shipper to supply a specific category of freight and which contract is definite as to the following:

"1. The time involved in the performance of the contract;

"2. The route and/or termini and/or area involved in the performance of the contract;

"3. The kind of commodity or commodities involved in the contract;

"4. The tonnage to be hauled;

"5. The compensation to be paid and received."

[1] At the outset, it is to be noted that said proposed instruction, removed from its context in the opinion from which it was taken (*Rampone v. Leonardini*, Dec. No. 28526, 39 C.R.C. 562, 567, 568) and left unexplained, is only partially a correct exposition of the law applicable to the present case. First, it constitutes only a part of the commission's statement in that case. Secondly, it fails to include the remaining portion of the context dealing with a carrier's conduct in soliciting and procuring a contract, which the commission declares to be of controlling importance in determining whether or not the carrier is a highway contract carrier. Lastly, it fails to include the substance of a succeeding paragraph in said opinion dealing with a shipper's conduct in relation to the carrier's activities, which the commission states "is also important, in determining whether such a carrier is in fact a 'highway contract carrier.'" Our conclusion in this regard is supported by the opinion of the commission in *Matter of Fred Belli*, Dec.No. 30382, 41 C.R.C. 1, 3, 4, wherein all three of these paragraphs are embodied, and not merely the first one, as in the case of the instruction proposed by defendant herein. By singling out one portion of the statement and omitting others, the proposed instruction places undue emphasis on a feature which does not appear to have entered into the theory of either of the parties, namely, the definiteness of the contract of hire. As the court stated in *Still v. San Francisco, etc., R. Co.*, 154 Cal. 559, 572, 98 P. 672, 678, 20 L.R.A., N.S., 322, 129 Am.St.Rep. 177: "Instructions which are drawn solely for the purpose of, and which simply have the effect of, emphasizing some particular portion of the evidence, are not to be commended."

Furthermore, insofar as said instruction may be said to carry the implication that a

highway contract carrier must operate ordinarily between fixed termini or over a regular route, it is incorrect. In the very opinion of the railroad commission from which the language of the questioned instruction was taken and on the same page of the report of said opinion (39 C.R.C. at page 568), the following statement appears:

"The services of the 'highway contract carrier' may or may not be conducted, usually or ordinarily, between fixed termini or over a regular route, and may or may not be on a regular schedule."

It is this latter statement which the cases of *People v. Lang Transportation Co.*, 217 Cal. 166, 170, 171, 17 P.2d 721, and *People v. Duntley*, 217 Cal. 150, 166, 17 P.2d 715, support as reflecting the true rule. In the former case the court stated [217 Cal. 166, 17 P.2d 723]:

"The finding of the court of the common carrier status of the defendants is therefore not supported by the record. The question whether they were operating between fixed termini or over a regular route becomes immaterial."

The *Duntley* case is to the same effect, that [217 Cal. 150, 17 P.2d 721]:

"The determination that the record supports the findings and conclusions of the trial court that the defendant is not a common carrier renders it unnecessary to decide whether he conducted his operations between fixed termini or over a regular route."

Additionally, it must be borne in mind that by other instructions the jury was told: "A private or contract carrier, on the other hand, is not bound to carry for every person and can refuse to do so without incurring any liability"; and that "A carrier may be a common carrier as to certain types of merchandise, and be a contract carrier as to other types of merchandise, and this will depend upon the conduct of the carrier or the agreement of the carrier with the shipper, or both. The true test as to whether or not a carrier is a common carrier or a private carrier is not what the company is empowered to do, but what it is actually engaged in doing." Also it is to be noted that the Highway Car-

riers' Act goes no further in defining a highway contract carrier than to say: "The term 'highway contract carrier' when used in this act means every highway carrier other than a highway common carrier as defined in subsection (g) and every radial highway common carrier as defined in subsection (h)."

By still other instructions, the jury was advised that if they found the plaintiffs were operating as a common carrier on the occasion in question, and in the absence of certain exceptional circumstances, none of which was in issue or proof, they must find for the defendant; but if they found that plaintiffs were operating as a highway contract carrier, or a private carrier, they must find for plaintiffs, unless they were satisfied from the evidence that the plaintiffs were guilty of negligence. Therefore, in bringing in the verdict it did, the jury must have determined that the plaintiffs were operating as a highway contract carrier or private carrier and not as a common carrier, whether radial or otherwise, and that the loss of the property in question was not due to negligence on their part.

[2] Our examination of all of the instructions leads to the conclusion that the jury was fully and fairly advised as to the various legal principles applicable to the case. This being so, the defendant could not have been injured by the refusal of the court to give a more detailed or elaborate definition of a highway contract carrier than the one given.

While we are entirely in accord with the general rule stated in *American Marine Paint Co. v. Nynco Line, Inc.*, 45 Cal.App. 1, 3, 187 P. 71, and relied upon by the trial court in granting a new trial on the sole ground of what the trial court construed to be confusion in the minds of the jury relative to the various types of carriers, nevertheless our examination of the record leads to the conclusion that no such confusion existed in the present case.

Because of the manner in which the question has arisen, we quote at length from the transcript wherein the colloquy between the court and the jury appears.

CAL.REP.171-172 P.2d-17

"The Court: The Bailiff has just advised me that would like some instructions read to you, is that true?"

"Foreman Larimer: Your Honor, the Jury would like to know what is the distinction between a common carrier, a contract carrier and a radial carrier.

"The Court: The instructions are quite lengthy; It might take me a few moments to find what you want. Here is one instruction (reading from Instructions Given): 'There are two classes of common carriers operating upon the highways of this state in intrastate commerce. The first class is called "highway common carrier" and the second class is called a "radial highway common carrier." A "highway common carrier" is one who dedicates and holds out his transportation services generally to the public, or a substantial portion thereof, for compensation, for the transportation of some certain variety or varieties of freight, at rates filed with the Railroad Commission of the State of California and who usually or ordinarily operates between fixed termini or over a regular route. Before commencing his operations as such, a "highway common carrier" is required to make a showing before the Railroad Commission sufficient to justify and culminating in the issuance by the Commission of a certificate that declares that public convenience and necessity requires such operation. A "radial highway common carrier" is one who dedicates and holds out his transportation services generally to the public, or a substantial portion thereof, for compensation, for the transportation of some certain variety or varieties of freight, and who does not usually or ordinarily operate between fixed termini or over a regular route, and who offers to serve anyone within the scope of his dedication, which scope must be a clearly defined area.' Does that answer your question in reference to that point?"

"Foreman Latimer: Yes, sir.

"A Juror: One thing we want to know, the discussion now being about the radial area, what area was meant there?"

"The Court: You will have to remember that from the evidence. The instructions

would not comment on the evidence in respect to the question you just asked.

"(Addressing the Jury) Now, do you understand what is meant by private carrier? It is another branch of the case. Have you that instruction clearly in your minds as to what a private carrier is, as distinguished from a common carrier, in relation to the law?

"Jurors: (Collectively) Yes.

"The Court: Are there any other Instructions you would like the Court to read; if so, I would like to read them to you.

"A Juror: The contract carrier now.

"The Court: Now I will read you an instruction which will go back of that somewhat (Reading):

"A carrier may be a common carrier as to certain types of merchandise, and be a contract carrier as to other types of merchandise, and this will depend upon the conduct of the carrier or the agreement of the carrier with the shipper, or both.

"The true test as to whether or not a carrier is a common carrier or a private carrier is not what the company is empowered to do, but what it is actually engaged in doing.

"This is important from a standpoint as to liability because if you find that the cross-defendant, Rampone Brothers was a common carrier, then one rule of law would apply, but on the other hand, if you find that the cross-defendant, Rampone Brothers, was a contract carrier, then another rule of law would apply.

"In this connection, you are instructed that if you decide that the cross-defendant—

"(Addressing the Juror) You are not confused in reference to plaintiffs and defendants and cross-complainants, are you, you have the parties in mind?

"The Juror: Yes.

"The Court: I will read that again (Reading): 'In this connection, you are instructed that if you decide that the cross-defendant, Rampone Brothers, was a common carrier, that Section 2194 of the Civil Code of California, reads as follows: "Liability of inland carriers for loss. Unless the consignor accompanies the freight and

retains exclusive control thereof, an inland common carrier of property is liable, from the time that he accepts until he relieves himself [of] liability * * * for the loss or injury thereof from any cause whatever.'" Now, that is the general statement. Here are some exceptions (Reading):

"1. An inherent defect, vice or weakness, or a spontaneous action, of the property itself;

"2. The act of a public enemy of the United States or of this State;

"3. The act of the law; or

"4. Any irresistible human cause.'

"If any of these things occurred, then there would be no liability, and in the absence of the occurrence of any of these things that I have just read, there would be a liability from the fact you found them to be a common carrier (Reading): 'In the event that you decide that the cross-defendant, Rampone Brothers, was a contract carrier, you are advised that Section 2114 of the Civil Code of California provides that a contract carrier or a private carrier is as follows: "A carrier of property for reward must use at least ordinary care and diligence in the performance of all his duties.'" Is that plain?

"The Foreman: Yes, sir.

"The Court (Reading): 'Therefore, if you decide that the cross-defendant, Rampone Brothers, was a contract carrier as to the Seaboard Transportation Company and the particular load of merchandise, then, before you can return a verdict against the cross-defendant, Rampone Brothers, you must find from a preponderance of the evidence that the cross-defendant, Rampone Brothers, was guilty of some negligence which proximately caused the loss and/or damage to the merchandise.' Now, is that clear?

"The Foreman: Yes.

"The Court: Is there anything else you would like me to read in connection with these instructions?

"Mr. Neumiller: If Your Honor please, if I might make one suggestion. One of the jurors said there was some discussion about the area that might be embraced in

the activities of a common carrier as compared to a radial common carrier. I assume we could stipulate that the permit issued by the State of California covers all the highways in the State of California.

"Mr. Snyder: I don't think that is important. It is what the law authorized them to do; it is what they held out to the public, and that is a statement of facts.

"The Court: If the Jury wish the evidence read, it will be read to them. Is there anything else?

"A Juror: The question came up in the jury room as to what the radius was under the radial law.

"The Court: You will have to rely on your memories of the evidence, and if your memories are not good as to the evidence, you will call upon the Reporter to read it to you. The Court does not cover that; that is a question of fact, not of law. I would not cover that. Anything else? Do you wish the Reporter to look that up for you?

"A Juror: Well, I don't think it makes a difference, although some of us members, where the evidence showed they had a radius of 150 miles, and this load got further, about 260 miles away, and there was a discussion over that, and some said that the radial contract called for the full state and some said it was only for a 150 mile radius.

"The Court: You will have to call upon your memories of the evidence. Members of the Jury, you may retire, and if you cannot remember it, you can come back into Court and take all the time necessary to look that testimony up and have the Reporter read it to you.

"Juror Mrs. Bacon: It seems to me your instruction gave the liability of a common carrier and of a contract carrier, but you did not also just now read as to a radial common carrier. Is the liability just the same for a radial common carrier as it is for a common carrier?

"Mr. Neumiller: I think we could stipulate on that, Your Honor.

"The Court: Yes. It is a different name.

"Mr. Snyder: If it is a common carrier, whether it is a radial common carrier or

a common carrier between fixed points, the liability is exactly the same.

"Mr. Neumiller: Yes, sir; we so stipulate."

It appears therefrom that while initially the jurors were not clear on this question, upon a reading of the instructions their uncertainty disappeared and they were satisfied they understood the distinctions between highway contract or private carriers and common carriers. And although there remained apparent confusion concerning the extent of a radial carrier's scope of activity, this appears to have been due principally to the insistence of defendant on the contention that said fact was not material to the inquiry and that the evidence which alone could determine that scope was incompetent; and in any event it would seem that this question was also set at rest when counsel stipulated that the liability of a radial common carrier was the same as that of an ordinary common carrier.

[3.4] With the asserted object of showing that the alleged error in refusing to give the questioned instruction could have been prejudicial, defendants have discussed at length the evidence on the issue of plaintiffs' status as a common or private carrier in order to demonstrate that the evidence would support a finding that plaintiffs were operating as a common carrier on the occasion in question. We find no merit in this contention. The capacity in which plaintiffs were acting was a question of fact primarily for the jury (*George v. Railroad Commission*, 219 Cal. 451, 456, 27 P.2d 375; *People v. Duntley*, supra, 217 Cal. at page 165, 17 P.2d 715; *Haynes v. MacFarlane*, 207 Cal. 529, 532, 279 P. 436), and, since the trial court did not specify the insufficiency of the evidence as a ground for its order, this court is precluded from considering that feature of the record (*Ellis v. Jewett*, 18 Cal.App.2d 629, 631, 64 P.2d 432), either directly or indirectly. Moreover, even if defendants succeeded in making such a showing, this would not render applicable the decisions they cite, viz., *Tower v. Humboldt Transit Co.*, 176 Cal. 602, 606, 169 P. 227, and *Langford v. San Diego Electric R. Co.*, 174 Cal. 729,

734, 164 P. 398. Both cases were decided prior to the amendment of section 657 of the Code of Civil Procedure limiting our duties in reviewing the evidence.

[5] In any event, it is to be borne in mind that defendant's claim was advanced in two different counts each preserving a separate issue, (1) that plaintiffs were a radial common carrier, and (2) that plaintiffs were a contract carrier. In addition, instructions were given and refused with respect to the law and evidence applicable to each issue. When, therefore, the jury gave its verdict to plaintiffs and there was substantial evidence to support such verdict on either count, as the trial court found, and as we are required to presume, then, and in the absence of a showing of prejudicial error directly referable to both counts, the general verdict must be allowed to stand. *Shields v. Oxnard Harbor Dist.*, 46 Cal.App.2d 477, 491, 116 P.2d 121; *Martin v. Vierra*, 34 Cal.App.2d 86, 94, 95, 93 P.2d 261, 94 P.2d 567; *King v. Schumacher*, 32 Cal.App.2d 172, 179, 89 P.2d 466; *Hume v. Fresno Irr. Dist.*, 21 Cal.App. 2d 348, 356, 357, 69 P.2d 483; *Walton v. Southern Pacific Co.*, 8 Cal.App.2d 290, 305, 48 P.2d 108, certiorari denied 296 U.S. 647, 56 S.Ct. 308, 80 L.Ed. 461. In other words, the cause herein having been submitted to the jury with sufficient instructions covering both of the counts of the cross-complaint, and the jury having returned a general verdict for plaintiffs, this court may neither disturb that verdict nor reverse the judgment if either count is free from prejudicial error and sufficient to sustain the verdict. *Mitchell v. Towne*, 31 Cal.App.2d 259, 261, 87 P.2d 908; 24 Cal. Jur. sec. 134, p. 885.

It is our conclusion, therefore, that the particular asserted error of law upon which the motion for a new trial was granted did not warrant the order herein made granting said motion. It remains to be seen whether any other error was committed which would warrant such an order or which constitutes reversible error under defendants' cross-appeal.

[6] The first ground of defendants' attack on the judgment and the proceedings leading thereto is the action of the trial

court in admitting in evidence plaintiffs' application for a permit to operate as a radial highway common carrier, although it is conceded that the permit (which obviously was issued pursuant to the application) was properly received in evidence. This objection is based on two contentions: (1) That the admission of the application constituted a violation of the parol evidence rule; and (2) that said writing was nothing more than a self-serving declaration and therefore was inadmissible as pure hearsay. We find no merit in either of these contentions.

Said permit in part reads:

"The above named Carrier, having made written application to the Railroad Commission of the State of California for a permit to operate as a Radial Highway Common Carrier, pursuant to Chapter 223, Statutes of 1935, as amended, and having complied with the provisions of said Statute, is hereby granted this permit authorizing the transportation of property for compensation by motor vehicle over the public highways of the State of California as a Radial Highway Common Carrier, as defined in said Statute, * * *

"The rights and privileges herein granted shall not extend beyond the scope of this Permit or Chapter 223, Statutes of 1935, as amended, nor be construed to authorize the carrier to operate as a highway common carrier between fixed termini or over a regular route without having first obtained a certificate of public convenience and necessity or unless said carrier possesses a prior right so to do."

It would seem to follow naturally that unless such a permit was intended to be limited in respect to the area which it covered, there would be no difference at all between the privileges of a radial highway common carrier and those of an ordinary highway common carrier whose activities are regulated under the provisions of the Public Utilities Act, Deering's Gen. Laws Act 6386, sec. 50¾, and not the Highway Carriers' Act, Deering's Gen. Laws, Act 5129a, and who must procure a certificate of public convenience and necessity if he would operate at all. From the very use of the term "radial" it is evident that

such a common carrier must operate within a designated or fixed radius, even though within the limits of such a radius he is free to operate over any highway embraced within the designated area. That this is the proper interpretation of the term "radial highway common carrier" and of the language of the permit to which defendants refer is demonstrated by the decision in the Rampone case, *supra*, 39 C.R.C. at page 567, where the railroad commission states:

"A 'radial highway common carrier' is distinguished as one who dedicates and holds out his transportation services generally to the public, or a substantial portion thereof, for compensation, for the transportation of some certain variety or varieties of freight, and who does not usually or ordinarily operate between fixed termini or over a regular route, and who offers to serve anyone *within the scope of his dedication, which scope must be a clearly defined area.*

"A 'radial highway common carrier' may operate, *within this defined area*, over any public highway, subject, of course, to the possibility that frequent operations between fixed termini or over any definite route may transform his operations into those of a 'highway common carrier,' for which a certificate of public convenience and necessity is required." (*Italics added.*)

[7,8] Furthermore, if the only place where this area is designated is in the application rather than the permit itself, then the intendment is apparent that the two writings should be read together to determine the scope of the permit. It also could be expected that the permit would refer to the application; and, as appears, that is precisely what it does. Therefore, since the permit refers to the application, and the application does not vary the terms of the permit but instead merely explains them, and as the rule is that "Where a writing itself contains a reference to extrinsic matters, these matters may be shown for the purpose of explaining the writing." (32 C.J.S., Evidence, § 960, p. 902; 22 Cor. Jur., § 1577, p. 1181), there was no violation of the parol evidence rule in admitting said application in evidence.

Moreover, carrying the thought suggested by the idea of dedication a step further, it would seem to follow necessarily that he who proposes to dedicate a part of his activities to the public must be permitted to show the extent of his dedication and particularly the limits thereof; and if by mere administrative fiat contained in the permit the field of his dedication were enlarged beyond his purpose, this indeed would work a grave injustice upon him.

The other contention on this point, namely, that the language in question contained in the application is self-serving, fails to take into account the fact that such language does not purport to constitute the declaration of any fact, but merely signifies the intention of the applicant with regard to the scope of his activities and dedication: "That applicant proposes to operate motor vehicles for the transportation of property for compensation as a radial highway common carrier, under the provisions of Chapter 223, Statutes of 1935, as amended, within the general area set forth below, viz.: * * * All territory within a 150 mile radius from Oakland for trucks listed below."

[9] It thus appears that whatever self-serving quality could be read into this language would bring it within the exception to the rule of exclusion: "When intent is a material element of a disputed fact, declarations * * * that indicate the intent * * * are admissible in evidence as an exception to the hearsay rule." *Whitlow v. Durst*, 20 Cal.2d 523, 524, 127 P.2d 530, 531.

The cases cited by defendants on this question do not militate against the soundness of the distinction we have pointed out. The case of *McKnelly v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N.W. 169, holds merely that the declaration of a purported fact, viz: the physical condition of the applicant, contained in an application for an insurance policy is self-serving and incompetent to prove the fact. In the present case, if plaintiffs had stated in their application for a permit from the railroad commission that they had operated or were operating only within a given area, and then were attempting to prove the truth of that fact by such statement, the two cases might be deemed to be analogous. But this

was not the offer which plaintiffs made nor the ground on which the application was admitted. The other case cited by defendants on this point, *In re Estate of McCarthy*, 127 Cal.App. 80, 15 P.2d 223, appears to have no factual resemblance to the case at bar and is but another example of the general rule relating to self-serving declarations of deceased persons.

Defendants' second ground of attack on the judgment herein is based on the refusal of the trial court to give defendant's proposed instruction Number 9, which, substantially embodying the language of section 2195 of the Civil Code, reads:

"A common carrier of the property is liable, for the loss or injury to such property, even if such loss or injury is caused by an inherent defect, vice or weakness, or a spontaneous action of the property itself, the act of a public enemy of the United States or of this State, the act of the law, or an irresistible super-human cause, if his want of ordinary care exposes the property to the cause of the loss."

Section 2195 declares: "A common carrier is liable, even in the cases excepted to by the last section, if his want of ordinary care exposes the property to the cause of the loss."

The cases or causes referred to as excepted by section 2194 from those in which a carrier is liable for the loss of the freight from any cause whatever are:

"1. An inherent defect, vice, or weakness, or a spontaneous action, of the property itself;

"2. The act of a public enemy of the United States, or of this state;

"3. The act of the law; or,

"4. Any irresistible superhuman cause."

[10] It is evident from the manner in which defendants present their argument on this point that they recognize the fact that, unless there is in the record some evidence which would support a finding of the existence of one of those excepted cases to which the requested instruction would be referable, they have no standing to complain of the action of the trial court in refusing to give it. However, the evidence on which they rely to show such a case is

wholly insufficient. It consists of a mere surmise hazarded by one of their dispatchers who, when he was informed of the fire, expressed the thought that "maybe the paint on that load blew up." From this defendants urge: "There was thus a slight inference that the fire was the result of spontaneous action." They add: "There was also a stronger inference that a passerby may have started the fire." It goes without saying that such evidence would not warrant a finding of the existence of one of the exceptional cases above referred to.

[11] As the court stated in *Estate of Calkins*, 112 Cal. 296, 306, 44 P. 577, 580:

"In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists; and, when the evidence is not sufficient to justify such inference, the court should refuse to submit the question to the jury." (Citing cases.)"

[12] With regard to defendants' observation that an inference could have been drawn that a passerby may have started the fire, it is sufficient to point out that, on the hypothesis on which this argument is predicated and the claim of error in the refusal to give the instruction, namely, that plaintiffs were acting as a common carrier, the fact that a third party had started the fire would not have relieved them from liability, and therefore a finding thereon would have been immaterial. See 4 Cal. Jur., p. 870, sec. 45.

Defendants' third ground for appeal from the judgment is that the evidence was insufficient to sustain the verdict and judgment, it being contended that the evidence shows as a matter of law that the plaintiffs and their agents or servants were negligent. It is claimed that plaintiffs were negligent in sending out their trucking equipment on the trip without spare tires to take care of blow-outs such as occurred here; that Davis, the driver of the truck, was negligent in taking the equipment out at night knowing that the right front of

the rear trailer was overloaded and there was but one spare tire; and that Davis was negligent in leaving his truck unguarded.

[13] While such circumstances might be deemed to warrant the inference of negligence, they do not appear to be of such a kind as to compel the inference and foreclose all others. Under the law of bailments, as in other cases, the question of negligence remains almost invariably one of fact. *Travelers Fire Ins. Co. v. Brock & Co.*, 47 Cal.App.2d 387, 392, 118 P.2d 25; *Homan v. Burkhardt*, 108 Cal.App. 363, 367, 291 P. 624; *Webber v. Bank of Tracy*, 66 Cal.App. 29, 35, 225 P. 41; 4 Cal.Jur., p. 43, sec. 24.

[14, 15] Moreover the present case involves not only a question whether the plaintiffs and their employees exercised due care, but also, whether, assuming they did not, such failure was the proximate cause of the loss. It has been said that "the question of proximate cause is generally one for the trier of the fact, and it is only in those rare cases where reasonable minds cannot differ on the question that a court is justified in taking that question from the trier of the fact." *Kostouros v. O'Connell*, 39 Cal.App.2d 618, 622, 103 P.2d 1028, 1030.

In support of their argument defendants cite the case of *Sullivan v. Williams*, 107 Misc. 511, 176 N.Y.S. 710, 711, wherein it was held that the defendant was a common carrier, and the court observed "Even if the common carrier rule did not apply here, and the defendant were a mere bailee for hire, his failure to guard the truck and its contents would have been sufficient to fasten liability upon him."

The facts in that case were quite different from those in the present case, and at most the decision is authority for a rule that failure to guard a truck may under certain circumstances constitute negligence as a matter of law. We are in accord with the ruling of the trial court herein to the effect that the circumstances in the present case were not such as to warrant a withdrawal of the issue of negligence from the jury.

[16, 17] While we are cognizant of the rule that, in granting a new trial on the ground of error in giving or refusing to

give an instruction or for any other error of law, much is committed to the discretion of the trial court and an abuse of such discretion must appear before the order will be set aside (see, *Sheets v. Southern Pacific Company*, 212 Cal. 509, 516, 299 P. 71), we are equally mindful of the duty imposed upon courts by article VI, section 4½ of our Constitution, to deny a new trial for error of law unless such error is prejudicial. *Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 262, 143 P.2d 929. See, *Hayes v. Fine*, 91 Cal. 391, 400, 27 P. 772; *Springer v. Sodestrom*, 54 Cal.App.2d 704, 711, 129 P.2d 499; *Cheney v. McGarvin*, 7 Cal.App. 71, 74, 93 P. 386.

It is our studied conclusion that the record discloses no ground upon which a new trial should have been granted nor any reason for believing that a new trial can justly result in a judgment more favorable to defendants, and therefore the order setting aside the judgment and granting the new trial is reversed and the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.



75 Cal.App.2d 525

PEOPLE v. SEELY.
Cr. 4012.

District Court of Appeal, Second District,
Division 1, California.

July 26, 1946.

I. Criminal law ⇨576(4)

Where on day set for trial, within 60-day limitation period from filing of information, defendant was a fugitive from justice, and case was continued to a date beyond 60-day period and defendant was present in court on such date, having been recaptured, defendant could not complain of order granting People a further continuance in light of maxim that one cannot

take advantage of his own wrong. Pen. Code, § 1382.

2. Criminal law — 1171(1)

Misconduct of district attorney does not merit a reversal unless it is so flagrantly and obviously prejudicial that neither a retraction nor a rebuke from the court can destroy its influence.

3. Criminal law — 1171(1)

Where evidence against defendant was almost conclusive and there was no evidence to indicate that defendant was insane at time he committed offenses or at time of trial, defendant was not prejudiced by remarks of district attorney with respect to a finding of insanity made in response to similar arguments by defense counsel.

4. Criminal law — 570(1)

Evidence authorized conviction of first degree robbery as against defense of insanity.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Carl S. Seely was convicted of first degree robbery and from the judgment of conviction and from an order denying his motion for a new trial, the defendant appeals.

Judgment and order affirmed.

A. Maxson Smith, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant appeals from an order denying his motion for a new trial and also from the judgment herein based upon the jury's verdict finding him guilty of robbery of the first degree, and of certain prior convictions of a felony; and adjudging him to be an habitual criminal.

It is here urged (1) that the court erred in failing to dismiss the cause under section 1382 of the Penal Code; and (2) that the district attorney was guilty of prejudicial misconduct.

Section 1382 of the Penal Code provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

[1] The information in the instant prosecution was filed on September 11, 1945, therefore, pursuant to said section 1382, supra, appellant would normally be entitled to a trial on or before November 10th, the sixtieth day after filing of the information. The cause was set for trial on October 22nd, at which time it was continued to October 31st at the request of appellant. On the latter date, appellant was a fugitive from justice, he having escaped from custody on October 23rd. As a result, the court continued the trial to November 28th. On that date, appellant was present in court, having been apprehended and retaken into custody on November 20th, whereupon he moved for a dismissal of the action under the provisions of subd. 2 of section 1382, supra. The court denied said motion and reset the cause for trial on December 10, 1945. On the last named date, appellant renewed his motion for a dismissal which was denied, and the cause was "transferred to department 46 for trial."

Appellant concedes that under the holding in *People v. Santora*, 51 Cal.App.2d 707, 712, 125 P.2d 606, he could not properly object if his trial had been held on November 28th, since all previous delays or continuances had been had either at his request or caused by his escape. But, he maintains that he should have been tried on November 28th, and in the absence of good cause therefor, it was error to continue his trial to December 10, 1945, in the face of his objection thereto.

As heretofore stated, the sixty day period authorized by the statute elapsed on November 10, 1945, at which time appellant was a fugitive from justice. Under the familiar maxim of jurisprudence that "No man can take advantage of his own wrong", appellant by his wrongful absence

from custody lost the right to insist upon a trial within the period prescribed by section 1382, *supra*. As was so aptly stated in *Re Gere*, 64 Cal.App. 418, 422, 221 P. 689, 691: "It is conceded that the constitutional guaranty of a speedy trial and the provisions of section 1382 of the Penal Code, adopted in pursuance thereof, do not operate in favor of a fugitive from justice. It must also be true that the law on this subject should not be permitted to work to the advantage of one whose arrest has been delayed because of his own wrong."

Because the question is not here involved, this court does not hold that a fugitive defendant is entitled to a trial within sixty days of his recapture, as appellant was tried twenty days after recapture.

Appellant specifies as error the refusal of the trial court to instruct the jury to ignore certain alleged prejudicial remarks of the district attorney. After the trial had been completed and the jury retired for its deliberations, defense counsel moved "to have the jury instructed to disregard the district attorney's statement that I for a fee made a mistake in a statement of law, or attempted to mislead the jury. And I cite it as prejudicial misconduct. I also further move that the jury be instructed to disregard the district attorney's statement that if they return a verdict of not guilty by reason of insanity that it would mean that the defendant would walk out of court a free man, as a prejudicial misstatement of law." In reply thereto, the prosecuting attorney stated that the remarks so attributed to him were made by him "in answer to counsel's statement to the jury that if they find he is not insane he goes to state prison; if they find that he is insane he goes to the institution for the criminally insane. My statement to the jury was that if they find he was insane at the time of the commission of the offenses it constitutes an acquittal of those offenses; and if he is sane at this time, and

the court must so find in view of the doctors' statement that he is sane at this time, then there is nothing to hold the defendant. That I say, and I believe that is a correct statement of what the law is. And it was given in answer to counsel's statement to the jury as a faux pas on the part of counsel or a misstatement he made for hire. * * * I did say that we all can make mistakes, but a mistake for hire is something or other, I don't recall exactly what I said. However, if counsel asks for a personal apology for that, he is entitled to it, and I hereby apologize to him for making that remark. * * * So far as instructions to the jury are concerned, the jury is now deliberating, and I do not think that the court can now at this late time instruct the jury. The Court: It comes too late. The motion is denied."

[2] It is well-established law that misconduct does not merit a reversal "unless it is so flagrantly and obviously prejudicial that neither a retraction nor a rebuke from the court can destroy its influence." 4 Cal. Jur. 10-yr. Supp. 772, § 328, and cases there cited.

[3,4] An examination of the record herein reveals that the evidence against appellant was almost conclusive; there was no uncertainty in the identification of appellant or of the facts proving the commission of the crimes with which he was charged. There was no evidence to indicate that he was insane at the time he committed the crimes or at the time of trial. It therefore cannot be said that appellant was prejudiced by the remarks of the prosecuting attorney made in response to similar arguments made by defense counsel.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

75 Cal.App.2d 547

**BENTLEY v. INDUSTRIAL ACCIDENT
COMMISSION et al.**
Civ. 15275.

District Court of Appeal, Second District,
Division 3, California.

July 31, 1946.

Hearing Denied Sept. 19, 1946.

1. Workmen's compensation ⇐1983

Where workmen's attorney developed testimony disclosing probability that some neurological injury had been sustained in addition to other injuries and attorney studied reports of further examination and insurer did not admit the seriousness of injuries, an award of minimum attorney's fees of \$25 was inadequate.

2. Workmen's compensation ⇐1983

Attorneys appearing in compensation cases may not contract for fees in excess of those awarded by the commission, but they are entitled to have commission carefully appraise value of services shown to have been rendered in fixing fee.

3. Workmen's compensation ⇐1983

Factors to be considered by Industrial Accident Commission in fixing attorney's fee are importance of case to applicant, responsibility assumed by attorney, care employed by attorney to bring forth injuries of a nature not readily discernible and not admitted, time devoted and results obtained, which matters may appear of record, and which matters may be supplemented by other evidence as to expense and value of legal services.

4. Workmen's compensation ⇐1983

Attorney for workmen is not to be regarded as consenting to the fixing of a minimum fee by his failure to offer evidence as to value of his services particularly where record before referee and Industrial Accident Commission shows on its face that services of attorney involved considerable responsibility and that they were of substantial value.

5. Workmen's compensation ⇐1983

Attorneys fees in workmen compensation cases should not be fixed with sole purpose in view of saving the applicant

from expense and should not be so low as to discourage competent attorneys from accepting employment in industrial accident matters.

Original proceeding on the petition of Byron R. Bentley against the Industrial Accident Commission, Charles T. Martin and Pacific Indemnity Company for a writ of review, reviewing an award of attorney's fees by respondent's commission.

Award annulled with directions.

Byron R. Bentley, in pro. per.

R. C. McKellips, of San Francisco, and Edward A. Sarkisian and John A. Rowe, Jr., both of Los Angeles, for respondents.

SHINN, Justice.

A writ was issued herein for review of an award of attorney's fees by the Industrial Accident Commission. A return was made and the matter has been argued and submitted. The record shows that petitioner, an attorney at law, represented one Charles T. Martin as an applicant for compensation for an industrial injury sustained while working for Douglas Aircraft Company, Inc. The evidence at the hearing, including that furnished by medical reports of physicians, disclosed that petitioner therein, while going upstairs, slipped and fell, landing on the heel of his hand, twisting his body and injuring his neck. Following the injury he suffered pains in the neck and violent headaches which came on at least every 24 hours. The injury occurred on August 27, 1945, and the hearing was on October 25, 1945. At the hearing Mr. Martin was represented by his attorney and the defendants were also represented by counsel. A medical report was received from the defendants' physician, who first examined Mr. Martin. This report showed that Mr. Martin had been examined on August 28 and 31 and September 4 and that he appeared practically well but was instructed to return for further medication if his pain returned. Mr. Martin testified before the referee, being questioned by his own attorney and the attorney for the defendants. It appeared from his testimony

that in addition to other injuries he had a tremor in both hands. It was arranged that he should be examined by a neurologist and he submitted to such examination upon two occasions. A detailed report was made of these examinations, which concluded with the statement, "From the history and findings to date, there is definite evidence of pathological change in the left parietal area," and further observation was recommended. On October 25 the referee made findings to the effect that applicant had suffered temporary total disability from August 27 to and including October 25, 1945, "and continuing," and fixed compensation at maximum earnings of \$30 per week. An attorney's fee of \$25 was recommended. On December 5 an award was made in accordance with the findings of the referee. Petitioner herein applied for a rehearing as to the award of attorney's fees. The petition was passed upon by the same referee, who recommended that it be denied and it was denied. In his report the referee based his recommendation upon the fact that petitioner had offered no evidence as to the amount of work he had done or as to the value of his services, saying, "We cannot under these circumstances evaluate the value of attorney's fees in any case," and the referee then stated that he was allowing the minimum fee of \$25.

[1] The evidence before the referee disclosed the probability that some neurological injury had been sustained, and a further examination was ordered with respect to such claimed injury. The reports were made, and were studied by Mr. Martin's attorney. Mr. Martin considered that he had need for an attorney, sought the services of petitioner, who accepted the employment and rendered competent and efficient services. Defendants did not admit the seriousness of the injuries, and we cannot say that the results would have been as favorable to Mr. Martin if he had not had an attorney to advise him and present his case. Certainly it was no mere formal matter such as would have warranted only the award of a minimum fee.

[2-4] The fee allowed was quite inadequate under the circumstances, but more than that is involved in the instant pro-

ceedings. Attorneys appearing in such matters may not contract for fees in excess of those awarded by the Commission, and cannot expect such fees to be large. But they are entitled to have the Commission carefully appraise the value of the services which are shown to have been rendered. The importance of the case to the applicant, the responsibility assumed by the attorney, the care employed by the attorney to bring forth injuries of a nature not readily discernible and not admitted, the time devoted to the case and the results obtained all appear, although perhaps not fully, in the proceedings before the Commission. It is the privilege of attorneys to supplement the facts developed in the course of the proceedings by other evidence as to the extent and value of the legal services. If they offer no additional evidence, they are entitled to have their services carefully appraised by the referee in the light of the facts which are known to him. They are entitled to have a fee fixed from a consideration of all the factors which we have mentioned. It should not be necessary, except in unusual cases, for an attorney to offer evidence as to the value of his services, but he should in all cases have the assurance that his fee will be fixed in accordance with standard practices and that it will not be for a less amount than is customarily awarded for comparable services. He is not to be regarded in default nor as consenting to the fixing of a minimum fee by reason of his failure to offer evidence as to the value of his services. The record which was before the referee and the Commission shows that the services of the attorney involved considerable responsibility and that they were of substantial value. If an award of attorney's fees was not to be based upon the facts which were known to the referee and the Commission, the attorney should have been so advised and should have been allowed an opportunity to offer evidence as to all matters properly to be considered in fixing his fee. His petition for rehearing should have been granted for that purpose.

[5] Petitioner requested, upon rehearing, that his fee be fixed at \$100, and he insists that that would be a fair fee. We

think we should not express any opinion upon that subject, inasmuch as the Commission, upon a reconsideration of the matter, will review the evidence and give consideration to any evidence in addition to that which is before us. We deem it important, however, that attorney's fees in such matters should not be fixed with the sole purpose in view of saving the applicant from expense. The basis upon which fees are fixed should not be so low as to discourage competent attorneys from accepting employment in industrial accident matters. *Schilling v. Industrial Accident Commission*, 47 Cal.App. 190, 190 P. 373.

The award of \$25 as attorney's fees is annulled and the Commission is directed to proceed to make a new award in accordance with the views herein expressed.

DESMOND, P. J., and WOOD, J., concur.



75 Cal.App.2d 459

McLANE et al. v. STORR et al.
Civ. 15178.

District Court of Appeal, Second District,
Division 3, California,
July 22, 1946.

Rehearing Denied Aug. 16, 1946.

1. Appeal and error ☞1010(1)

Finding of trial court, being supported by substantial evidence, was binding on appellate court.

2. Lost Instruments ☞23(3)

Written assignment of purchasers' interests in contract for sale of realty was satisfactorily proved as a lost instrument.

3. Abatement and revival ☞47

Where purchasers after commencing action for specific performance of contract for sale of realty assigned their interests in contract and action to another, though assignee could properly be substituted as

plaintiff and litigation proceed in his name, such substitution was not necessary and litigation could proceed in names of original plaintiffs without filing supplemental complaint alleging assignment. Code Civ. Proc. § 385.

4. Abatement and revival ☞41

That plaintiffs after assigning their interests in contract for sale of realty and action for specific performance thereof gave quitclaim deeds conveying their interests in the realty to defendant to whom vendor had conveyed the realty after contract for sale thereof to plaintiffs' assignor had been recorded, did not end the controversy as to the realty, since action could proceed in names of plaintiffs after assignment, though they were no longer the real parties in interest. Code Civ.Proc. § 385.

5. Appeal and error ☞1071(6)

Where evidence was insufficient to support a finding that defendant in action for specific performance of contract for sale of realty was bona fide purchaser of the realty under quitclaim deeds from plaintiffs without notice of prior assignment to another of plaintiffs' interests in the contract and action, failure of trial court to make such finding was not prejudicial to defendant.

6. Vendor and purchaser ☞242

In action for specific performance of contract for sale of realty, defendant had burden of establishing his alleged status as bona fide purchaser under quitclaim deeds from plaintiffs without notice of previous assignment to another of plaintiffs' interests in the contract and action.

7. Vendor and purchaser ☞242

Vendor's subsequent grantee, having failed to sustain burden of establishing lack of knowledge or notice of prior unrecorded assignment of purchasers' interests in recorded contract for sale of realty and in action for specific performance thereof when for a valuable consideration grantee obtained from purchasers and recorded quitclaim deeds of their interests in the realty, was not a "bona fide purchaser without notice" of assignment, so as to render

his rights under deeds superior to those of prior assignee.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser Without Notice".

8. Vendor and purchaser ⇨238

Assignees of recorded contract for sale of realty were bona fide purchasers as respects vendor's subsequent grantee, and original purchaser, when he obtained reassignment of contract, acquired the same status with rights in realty superior to those of vendor's grantee, notwithstanding knowledge of deed to grantee when he took reassignment.

9. Appeal and error ⇨1099(1)

Decision on former appeal that specific performance was a proper remedy, was the law of the case, where evidence upon retrial was substantially the same.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Walter Scott McLane and another against Lloyd J. Storr and another for specific performance of a contract for sale of realty. From a judgment that John W. Mattox, assignee of plaintiffs, should be substituted as plaintiff and that defendants should convey the realty to him, named defendant appeals.

Judgment affirmed.

Martin Korstad, of Los Angeles, for appellant.

Barry Sullivan, of Los Angeles, for respondents.

WOOD, Justice.

Action for specific performance. Defendant Storr appeals from the judgment that John W. Mattox, the assignee of plaintiffs, should be substituted as plaintiff, and that defendants should convey the property to him.

Under a written contract, dated June 15, 1938, and recorded August 11, 1938, defendant Mrs. Van Eaton agreed to sell to John W. Mattox, and he agreed to buy from her, certain real property for the sum of \$318,

payable in installments of \$10 per month. Under a written assignment, dated May 15, 1939, and recorded on that day, Mattox assigned his interest in said contract to plaintiffs McLane. On March 15, 1941, when the balance due under the contract was \$20.23, plaintiffs wrote a letter to Mrs. Van Eaton stating that they desired to pay the balance due and obtain a deed to the property. She replied on March 19th stating that she could not comply with the request because the property was under attachment in a lawsuit, by a finance company, against Mattox, and further that she had sold her claim against him several months previously. On November 14, 1941, she sold and conveyed the property to defendant Storr for \$425.

In a prior trial, the judgment of the trial court was that specific performance should be denied, and that plaintiffs should recover \$384 (the reasonable value of the property) from defendant Van Eaton. On appeal that judgment was reversed (*McLane v. Van Eaton*, 60 Cal.App.2d 612, 141 P.2d 783), the court holding that specific performance was a proper remedy, that Storr had constructive notice of the contract between Mrs. Van Eaton and Mattox, and that he took the property subject to the rights of Mattox and his assignees, the plaintiffs McLane.

Upon the retrial on December 4, 1944, the evidence was apparently the same in substance as it had been in the former trial, except there was evidence on the retrial: (1) that, after the reversal of the former judgment, each of the plaintiffs McLane had made, executed and delivered to defendant Storr a quitclaim deed whereby each plaintiff quitclaimed all his or her right, title and interest in said property to defendant Storr for a total consideration to both of \$25; (2) that plaintiffs McLane, after the quitclaim deeds were executed, gave written instructions to their attorney to dismiss this action; (3) that on March 27, 1942, Mattox paid to the McLanes all the money they had put into the property, and they agreed to assign this cause of action and the contract to Mattox (which was after the complaint was filed on December 11, 1941, and before the first trial was

had on September 3, 1942), that on March 11, 1943, they executed a written assignment transferring and assigning all their interest in the action and contract to Mattox, and that said written assignment had been lost.

The trial court found that on March 23, 1942, prior to the execution of the quitclaim deeds from McLanes to Storr, the McLanes had assigned the contract to Mattox, and after said assignment was made and at the time the quitclaim deeds were executed, the McLanes had no title or interest in said property. The court also found that, at the time Mrs. Van Eaton conveyed the property to Storr in November, 1941, he had actual and imputed notice of the contract from Mrs. Van Eaton to Mattox and the assignment thereof by Mattox to the McLanes.

The judgment was that Mattox was entitled to be and was substituted as plaintiff, that as such plaintiff he was entitled to specific performance of the contract, and that Mrs. Van Eaton and Storr should convey the property to him.

[1,2] Appellant contends that the evidence was not sufficient to prove an assignment by the McLanes to Mattox. The finding of the trial court that in March, 1942, the McLanes assigned their interest in the contract and action to Mattox, being supported by substantial evidence, is binding upon this court. The written assignment was not produced at the trial, but it was proved as a lost instrument. Mattox testified that about March 11, 1943, he took Mr. and Mrs. McLane to an attorney and had an assignment of the contract and "judgment and everything" made to Mattox. Mr. McLane testified that in 1943 he and Mrs. McLane signed and executed a written assignment of the action and contract to Mattox, and that they acknowledged it before a notary public. Mr. Hupp, one of the attorneys for the plaintiffs, testified that he had had the assignment in his possession; that the last time he saw it was about three weeks before the trial herein, when it was in his office files; that when he looked for it a few days before the trial, he discovered it was lost; that he looked

through all his files and could not find it; that the instrument was dated March 11, 1943, signed by Mr. and Mrs. McLane, acknowledged by them before a notary public, and provided in substance as follows: "For value received, I hereby assign the judgment in the case of McLane against Van Eaton and Mattox [sic], and authorize said Mattox to collect all moneys due under said action and deposit in my name, and hereby assign the cause of action involved."

[3] Appellant also contends that if Mattox was the assignee of the McLanes he should have been substituted as plaintiff before or during the trial. He also contends that evidence as to the purported assignment from the McLanes to Mattox should not have been received, since such assignment was after the commencement of the action and there was no supplemental complaint alleging it. It was not necessary that such substitution be made before or during the trial, or that such assignment be alleged. The assignment having been made, whereby plaintiffs McLane transferred their interest in the contract and the action to Mattox, the litigation could proceed either in the names of the plaintiffs themselves, or a substitution of Mattox as plaintiff could have been made and then the litigation could have proceeded in his name. Section 385 of the Code of Civil Procedure provides in part: "In case of any other transfer of interest, the action * * * may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." In *McCartney v. Campbell*, 208 Cal. 647, at page 648, 284 P. 220, it was said: "Consequently, when plaintiff conveyed all her interest in the tract of land * * * the litigation could proceed either in the name of plaintiff herself or substitution may be had, and it may proceed in the name of the grantee. Section 385, Code Civ.Proc." In *Curtin v. Salomon*, 80 Cal.App. 470, at page 475, 251 P. 237, at page 239, wherein it was held proper, after judgment, to substitute an assignee of the plaintiff, the court said: "The record shows * * *

that during the continuance of the action all the rights of the plaintiff were assigned and set over to E. M. Casey. Section 385 of the Code of Civil Procedure expressly provides that in such cases the assignee may be substituted as the party to whose interest he has succeeded, or that the action may be continued in the name of the original party."

[4-7] Appellant also contends that the giving of the quitclaim deeds by the plaintiffs to him ended the controversy between them, because the title of plaintiffs under the contract from Mrs. Van Eaton to Mattox, which contract had been assigned to them by Mattox, was merged with appellant's claim of title under the deed to him from Mrs. Van Eaton. Since, as above stated, the action could proceed, after the reassignment, in the names of plaintiffs although they were not then the real parties in interest, the giving of the quitclaim deeds did not end the controversy as to the property. Another question, however, which is presented by the giving of the quitclaim deeds, is whether appellant was a bona fide purchaser under those deeds without notice of the assignment from the McLanes to Mattox. That assignment was made prior to the giving of the quitclaim deeds, but the assignment was not recorded. The quitclaim deeds, made in September, 1944, were recorded. The undisputed evidence was that a valuable consideration was paid by appellant for those deeds. If, therefore, appellant took title thereunder as a bona fide purchaser without notice of the claims of Mattox, his rights would be superior to those of Mattox under the unrecorded assignment from the McLanes. The trial court did not make a finding whether or not appellant was such a bona fide purchaser. An examination of the record discloses that this omission is not prejudicial to appellant. A finding that appellant was such a bona fide purchaser would not have been supported by the evidence. The burden was upon appellant to establish his status of bona fide purchaser without notice of the reassignment to Mattox. *Rabbit v. Atkinson*, 44 Cal.App.2d 752, 758, 113 P.2d 14; *James v. James*, 80 Cal.App. 185, 193, 251 P. 666. He failed to sustain

that burden. Mr. Taylor, who negotiated for the quitclaim deeds, and who was acting for appellant in paying the consideration for them, testified that before the deeds were obtained, appellant said he thought Mr. McLane was acting as a dummy for Mr. Mattox. Although appellant testified at the trial, he did not deny the testimony of Mr. Taylor. Appellant did not testify that he did not have notice or knowledge, before the quitclaim deeds were obtained, that the reassignment had been made. In *Rabbit v. Atkinson*, supra, 44 Cal.App. 2d at page 758, 113 P.2d at page 18, it was said: "Neither the appellant nor his grantor took the witness stand to testify as to whether or not they had notice or knowledge of respondents' rights or claims or that appellant was a purchaser in good faith, without notice, and for a valuable consideration. Appellant failed to sustain the burden of proof that the conveyance to him was taken in good faith and without constructive knowledge, at least, of the interests of respondents." Mr. McLane testified that he told Mr. Taylor, at the time he signed the quitclaim deed, that he did not own the property. Mrs. McLane testified that, prior to the signing of the quitclaim deeds, her husband told Mr. Taylor that he did not own any property. Upon the evidence herein, the court could not properly have found that appellant was a bona fide purchaser under the quitclaim deeds without notice of the assignment by the McLanes to Mattox.

It was decided on the former appeal, as above stated, and found as a fact on the retrial, that appellant took the deed from Mrs. Van Eaton, executed in November, 1941, with constructive notice of the outstanding contract from Mrs. Van Eaton to Mattox, executed and recorded in 1938.

[8] Mattox, of course, took the reassignment with knowledge of the deed from Mrs. Van Eaton to appellant, executed in November, 1941, but the McLanes were bona fide purchasers under the assignment to them of the original contract, and Mattox acquired the same status under the reassignment, notwithstanding his knowledge of the earlier deed by Mrs. Van Eaton to appellant.

[9] The decision on the former appeal that specific performance is a proper remedy herein is the law of the case.

The judgment is affirmed.

DESMOND P. J., and SHINN, J., concur.



JOHNSTON v. LONG et al.

Civ. 3614.

District Court of Appeal, Fourth District,
California.

July 30, 1946.

Hearing Granted Sept. 19, 1946.

1. Executors and administrators ⇨93(1)

Under statute, executors of decedent's estate, in continuing to operate decedent's automobile agency pursuant to terms of will, were not acting outside of their authority under the law, and the operation of decedent's business could not be considered a part of the personal or private business of the executors. Probate Code, § 572.

2. Executors and administrators ⇨93(1)

Under statute authorizing the continuance of a business operated by deceased, decedent's estate, and not the executors personally, is liable for general obligations necessarily incurred in running the business. Probate Code, § 572.

3. Appeal and error ⇨1064(1)

Executors and administrators ⇨451(3)

In personal injury action against one of executors of an estate of a decedent, both in his representative capacity and individually, arising out of continued operation of decedent's business pursuant to terms of will, where action was not brought until after estate had been closed and executors discharged and no attempt was made to have the estate made a party to the action, an instruction which led jury into belief that a judgment was sought against

executor only in order to hold the estate, and that any judgment against executor would have to be paid by the estate, constituted prejudicial error. Probate Code, § 572.

4. Executors and administrators ⇨119

An executor continuing to operate decedent's business pursuant to terms of will would be personally responsible for his own personal negligence in carrying on the business, regardless whether such negligence would also be imputed to estate, but negligence of an employee of the business could not be imputed to executor, so as to make him personally liable. Probate Code, § 572.

5. Executors and administrators ⇨450

A judgment in personal injury action against executor of estate of decedent in his individual capacity was without evidentiary support, where it appeared that plaintiff's injuries were sustained as result of alleged negligence of an employee in decedent's business, which defendant executor together with co-executor continued to operate pursuant to terms of a will, and there was no evidence of any personal negligence of defendant executor. Probate Code, § 572.

6. Damages ⇨132(1)

New trial ⇨77(2)

\$87,575 to man for having end of nose cut off, thereby necessitating plastic surgery to rebuild, was so excessive as to indicate that verdict was result of passion and prejudice.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Personal injury action by Harold R. Johnston against Ralph C. Long, Ralph C. Long, executor of the estate of C. A. Gray, deceased, and others. From an adverse judgment, the defendant Ralph C. Long and Ralph C. Long, executor of the estate of C. A. Gray, deceased, appeal.

Reversed.

Jennings & Belcher, of Los Angeles, and Monroe & McInnis, of San Diego, for appellant.

Forrest A. Betts, of Los Angeles, and Wm. H. Macomber, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries.

During his lifetime C. A. Gray owned and operated an automobile sales agency in the business district of San Diego. For several years prior to the death of Mr. Gray, and because of his illness, John Berger had been in complete charge of the operation of the business as manager and superintendent. Mr. Gray died on September 14, 1939. His will named Ralph C. Long, a banker of Beverly Hills, and A. J. Verheyen, an attorney of Los Angeles, both close friends, as executors. The will provided for the continued operation of the business and for distribution of the estate to trustees, to be operated for the benefit of the wife and daughter of the testator. Letters testamentary were issued to Long and Verheyen on September 28, 1939, and both duly qualified. Pursuant to the terms of the will the court ordered the executors to operate the business until such time as it was distributed to the trustees. In accordance with a wish expressed by the testator, Berger continued to actually operate the business as manager, going to Verheyen for any needed advice or assistance. Long took no part in the actual management or operation of the business, other than to concur as one of the executors in permitting Berger to operate the business. He knew nothing of the accident here in question until this action was brought.

On the morning of December 12, 1940, before the premises had been opened for business, the plaintiff, who was employed as a tank truck driver by the Union Oil Company, came to this agency for the purpose of delivering gasoline. The door to the automobile entrance was closed. This door was of the type which lifted to a position flat against the ceiling, having a counter-weight which was attached to the door by a wire cable, the two ends of the cable being fastened to the door by clamps held by bolts. As the plaintiff was opening this door one end of the cable pulled from

its clamp and the door, in falling shut, cut off the end of the plaintiff's nose. The Union Oil Company accepted its liability under the Workmen's Compensation laws and expended therein some \$14,000, including the cost of plastic surgery operations for the purpose of rebuilding the end of plaintiff's nose. This element was included in the damages here sought.

On August 2, 1941, the property in the estate was distributed to one J. O. Miller as trustee, and the estate was closed and Long and Verheyen were discharged as executors.

This action was brought on December 9, 1941. There were named as defendants, Miller as trustee, Long and Verheyen, both as individuals and as executors of the Estate of Gray, and the San Diego Planning Mill Company, which had repaired the door in question a few days before the accident. Although Long and Verheyen were sued as executors of the estate no attempt was made, the estate having been closed and these executors discharged before the action was brought, to secure the appointment of a personal representative for the estate. A demurrer filed by Miller as trustee was sustained without leave to amend, and a judgment in his favor has become final. At the opening of the trial it appeared that Verheyen had died, and the action was dismissed as to him and as to certain fictitious defendants. An objection to the introduction of any testimony as against Long as an executor of the Estate of Gray was overruled and the case went to trial against Long as an individual, Long as an executor of the Gray estate, and the planning mill company as defendants. Many unsuccessful attempts were made throughout the trial, by objection and motion, to eliminate from the case either Long as an individual, or Long as an executor of the Gray estate. Later, motions for a judgment notwithstanding the verdict and for a new trial were made and denied.

It appeared at the trial that one of the employees in connection with the business thus being operated by the estate was a Filipino named Felix Budhi. Among other things, it was his duty to see that the building was kept in proper repair. A short time

before the accident he noticed that the wire cable connecting this door with the counterweight had become worn. He reported this to Berger, who directed him to call the planing mill, which had installed the door several years before, and have the door repaired. The planing mill sent one Bostrom, who was experienced in that type of work, to make the repairs. Bostrom did so, putting on a new cable which he attached to the door by the same clamps which had been previously used for that purpose. While it seems rather clear that this accident was caused by the failure of Bostrom to properly tighten the bolts in these clamps, the jury specifically found there was no negligence on the part of the planing mill or its employee.

The claim of negligence on the part of any employee of the automobile agency is based on the failure of Budhi to weld a nut on the end of the wire cable, the theory being that this would have prevented the cable from slipping through the clamp even though the clamp was not sufficiently tightened. It appears that soon after the door was originally installed Budhi, as an added precaution, had welded such a nut on the end of the cable. This was not done again after these repairs were made. There was evidence that such welding was not recommended by the manufacturer of this door hardware, that it had never been done in installing other doors of this type, and that such welding would injure and weaken the cable itself. There was, of course, conflicting evidence in which Bostrom testified that when he completed his work he told Budhi to proceed to weld the nuts on the cable. Budhi testified that Bostrom told him that no such welding was necessary.

The court instructed the jury that no action could be maintained against the estate of the decedent, but gave another instruction which authorized the jury to find against all of the defendants. The jury returned a verdict for \$87,575 in favor of the plaintiff and "against the defendant Ralph C. Long, an individual acting as executor of the estate of C. A. Gray, deceased." The quoted language was contained in a form submitted to the jury in accordance with the theory the plaintiff had developed during the trial. A question im-

mediately arose as to the meaning of the verdict. At the request of counsel for the planing mill the jury, having indicated such a purpose and intent, was permitted to bring in another verdict against the plaintiff and in favor of the planing mill. A judgment was entered thereon which has become final. A request was made by counsel for Long, individually and as an executor, that the jury be requested to clarify its verdict by indicating whether it intended to find against Long as an individual or against him as an executor of the estate. The court refused to do this, saying: "I think the verdict of the jury as returned is clear and is not confused." Thereupon counsel for Long remarked that he did not understand it; that he did not know whether it was a verdict against Long individually or against Long as executor; and that "I don't think the jury knows either." The foreman of the jury then replied: "It says right there, against Long as executor of the estate." Judgment was entered in the language of the verdict that the plaintiff "recover from said defendant Ralph C. Long, an individual acting as executor of the estate of C. A. Gray, deceased the sum of \$87,575.00," with costs. From that judgment Long, both individually and as executor, has appealed.

The appellants contend, among other things, that an executor may not be sued in his representative capacity after he has been discharged and the estate closed; that the verdict is so indefinite and uncertain that it does not disclose whether the jury intended to find against Long as an individual or against him as executor; that the confused manner in which the issues were presented to the jury prevented a fair trial on the issue of Long's individual liability; that any negligence of an employee in a business being thus continued by an estate may not be imputed to an executor, who was personally without fault; and that an executor may not be held liable for any possible negligent act of his coexecutor.

The respondent concedes that Long was not personally negligent but argues that where an executor, as authorized by the court, operates a business in behalf of an estate he does so under the rules applicable to principal and agent or master and serv-

ant; that it was not possible here to sue the estate; that it was necessary to sue the executors personally; that since, in justice, the estate should ultimately pay any judgment it was necessary to sue the executors, both as such and personally, in order to show that their acts were done in carrying on the business of the estate; that after judgment is thus rendered against an executor personally it may then be determined whether or not, in justice, the executor should be reimbursed by the estate; that this must be done in another action and cannot be done in this action; and that the verdict and judgment were in the form made necessary by this peculiar situation, and correctly described the person against whom the judgment must stand until such time as the ultimate liability is determined. In practical effect, it is argued that because liability cannot be directly imposed upon the estate an executor, regardless of personal negligence on his part, may be held personally liable until such time as liability may be indirectly imposed on the estate.

Formerly, an executor was not permitted to bind the estate and if he elected to carry on the business of the decedent he did so at his own risk. In *re Estate of Burke*, 198 Cal. 163, 244 P. 340, 44 A.L.R. 1341. This was on the theory that in carrying on the business the executor was going beyond his duty and was doing something he was not authorized to do. An exception was sometimes made, however, when the continuance of the business was expressly authorized by the will. In *re Estate of Ward*, 127 Cal.App. 347, 15 P.2d 901. It was also usually held that an estate is not liable for torts committed by the executor. *Rapaport v. Forer*, 20 Cal.App.2d 271, 66 P.2d 1242. This was based on the sound principle that where an executor, acting outside of his authority and power under the law, commits a wrong, it is his own act and he is personally responsible to anyone injured thereby.

[1,2] In 1929, an amendment was adopted, which now appears in section 572 of the Probate Code, permitting the court to authorize the executor to continue the

operation of a decedent's business. In the instant case, the executors were authorized to continue this business both by such a court order and by the terms of the will. It clearly appears, therefore, that in operating this business they were not acting outside of their authority and power under the law. And in no sense can the operation of a decedent's business under order of the court be considered a part of the personal or private business of the executor. First *Nat. Trust & Sav. Bank v. Industrial Acc. Comm.*, 213 Cal. 322, 2 P.2d 347, 78 A.L.R. 1324. Since the change in the law authorizing the continuance of the business operated by the deceased it is well established that the estate, and not the executor personally, is liable for the general obligations necessarily incurred in running the business. *California Emp. etc., Comm. v. Hansen*, 69 Cal.App.2d 767, 160 P.2d 173, 175. In that case, after stating that the purpose of section 572 of the Probate Code was to permit such a business to be continued under the direction of the court for the benefit of the estate, it was said: "The effect of that section is to make claims arising under such circumstances a charge against the estate rather than one against the administrator or executor personally."

The confusion throughout the trial of this case, and continuing on the presentation of this appeal, arises from the fact that it has not yet been definitely determined, since the change in the law, whether or not such a claim as this is chargeable against the estate, rather than against the executor personally, where it arises as an incident to the continued operation of the business and without personal fault on the part of the executor. As a practical matter, the occurrence of such an accident is a risk which is inherent in the operation of any business under modern conditions where authority must be delegated to and duties carried out by various agents. Such a risk is necessarily involved in the operation of a business of any size, and is one which cannot be avoided by the executor, no matter how careful he himself may be. On principle, and in justice, such a risk should be borne by the estate and its beneficiaries, the real employers, for whose

benefit and in whose interest the business is being continued. While technically an estate must be sued through the personal representative, the latter merely represents the state and he himself is but an agent of the estate. He has no direct personal interest in the continuance of the business and he should not be personally held liable because of a risk he is ordered to assume, when he is without personal fault.

When properly raised, the question of the liability of an estate and the beneficiaries thereof for damages under the circumstances here appearing should be considered and, if necessary, the rules of law applicable should be reexamined and restated in the light of actual conditions brought about by the change in the law to which we have referred. On this appeal the question suggested cannot be decided since the estate had been closed and the executor discharged before the action was brought, and no attempt was made to appoint a new personal representative for the estate and make it a party to the action. Nevertheless, the former executors were sued, both personally and as executors, and the issues were confused throughout the trial on the theory that, whether or not the executors had been personally negligent, the remaining executor was liable because he had acted as an executor of the estate for whose benefit the business was being run, and that in some vague way it was both possible and necessary to fix liability upon him personally, in order to protect the rights of the respondent, and in order that a just liability should eventually be imposed upon the estate. This theory was constantly presented to the jury throughout the trial, it was repeatedly argued in the trial court, and again here, and the form of the verdict was ambiguously worded for the express purpose of leading the jury to find in accordance with that theory.

It is here argued that the question of whether or not, in justice and good conscience, the amount for which Mr. Long is held liable should be paid by the estate must be decided in another forum and should not be considered here. It was argued in the trial court by respondent's

counsel, and is argued here, that "Long is in this case for only one reason and that is that he was the executor whom the answer admits was running the business. The law says that we can't sue the estate, we must sue the executor and we must sue him as an individual but we do not sue him as Long. We sue him as Ralph C. Long, the individual, who is the executor"; that it was necessary to sue this individual "in order to get at the estate which was running the business of C. A. Gray Motor Company"; that Long was an agent of the estate and "The courts are never going to permit this estate to escape the responsibility"; that there can be no question "that he is not individually responsible, unless he was guilty of malfeasance or of frauding the estate, something of that sort"; that "We sued Mr. Long individually and we sued him in his individual capacity as the executor of the estate, and any position which Mr. Long has in this case is due entirely to his appointment as executor by the court under the will"; and that the plaintiff is entitled to recover from the estate but that you have to recover against the individual to establish the responsibility of the estate. It is further argued here that "in justice, since he was not himself personally negligent, the corpus of the estate, * * * should eventually bear the legal responsibility for this judgment"; that the form of the verdict is correct since the designation of Long as an executor of the estate helps to make the distinction "that the business which the defendant was managing at the time of the accident, and out of which the action arose, was not his 'own personal business'"; that the judgment is enforceable against Long personally but that he may "institute action seeking to have the burden of payment responsibility placed where it should be, on the corpus of the estate"; and that "It is perfectly apparent to all who heard the case, or who have read the transcript, that the ultimate responsibility * * * should fall upon, and should be paid from, the estate."

This theory was repeatedly presented to the jury throughout the trial and was reflected in the instructions given. It was

inevitable that it should confuse and mislead the jury and it affirmatively appears that this result occurred. While, technically, the words in the verdict and judgment describing Mr. Long as acting as the executor are merely descriptive and the judgment is in fact against him personally, it appears without question that the jury thought they were bringing in a verdict against "Long as executor of the estate." While this appeared before the jury was discharged the court refused to have the matter corrected or a verdict returned in accordance with the real intention of the jury.

[3] Although the estate could not have been here held liable, not having been made a party to the action, Long was entitled to have the question as to his personal liability fairly determined without having that issue inseparably mingled and confused with another issue. It could not have been other than prejudicial to Long to not only thus confuse the issue but to lead the jury into the belief that a judgment was sought against Long only in order to hold the estate, and that any judgment rendered against Long would have to be paid by the estate. There is no difference in principle between the actual situation here and a case where the jury is improperly told that any judgment rendered against the defendant will be paid by an insurance company. Aside from any other consideration, the manner in which the case was tried and submitted, and the errors in connection with receiving the verdict, require a reversal of the judgment.

[4] The respondent concedes, as he must, that Long was not personally guilty of any act of negligence. He had nothing personally to do with the operation of this business and any liability on his part must be based upon the fact that he was acting as an executor of the estate for which the business was being operated, and that the supposed negligence of Budhi, in failing to weld a nut on the end of this cable, is by law imputed to Long personally. What we have already said with respect to where the liability should rest is applicable here. The change in the law which permits an executor to continue the operation of a

business, and makes this a part of his duty, necessarily affects his responsibility for any torts which may occur in connection with, and as a result of, the operation of the business. For his personal negligence, committed in carrying on the business, he would be personally responsible, whether or not such negligence is also to be imputed to his employer, the estate. But there is a very real distinction between such personal negligence, and a negligent act committed by an employee in the business which the executor is required to operate. The latter can be attributed to the executor only when, in accordance with other rules of law, it can be imputed to him. The very fact that he is required to run such a business which belongs to others, for their benefit and not for his own, makes the rule of imputed negligence inapplicable to him, in such a case as this, since it does away with all the reasons for the rule. The operations being continued can in no sense be considered as the personal business of the executor. *First Nat. Trust & Sav. Bank v. Industrial Acc. Comm.*, 213 Cal. 332, 2 P.2d 347, 78 A.L.R. 1324. He is himself but an agent of the estate, carrying out the orders of the court, and the real master and the real principal is the estate. Imputed negligence, of any kind which would be possible here, has always been based upon the relationship of master and servant or principal and agent. If imputed at all, the negligence of such an employee in a business being operated by an estate should be imputed to the real master or principal, and cannot be imputed to an intervening servant or agent who is himself without fault.

The precise question, under these circumstances, has not been passed upon in this state. Under similar circumstances, it was held in *Fetting v. Winch*, 54 Or. 600, 104 P. 722, 38 L.R.A.,N.S., 379, 21 Ann. Cas. 352, that a judgment for damages against an executor must rest upon the principle of respondeat superior or upon his personal negligence, and that where he had no personal interest as a devisee and had merely acted as an executor he could not be held personally liable for the negligence of an employee of the estate. Although the facts were different there is

a tacit recognition of similar principles in *Campbell v. Bradbury*, 179 Cal. 364, 176 P. 685, where a building was being operated by the guardian of an incompetent, and a third person was injured by the fall of an elevator being operated by employees of the guardian. The court, after observing that the responsibility of the guardian who had actual charge of the building was based upon his duty to employ the elevator operator and to control the building, and after citing cases in support of the proposition that damages so arising should be treated as a part of the expense of maintaining the business, held that it was erroneous to impose liability on the guardian solely because, as such, he was in control and management of the property, and that liability for the negligent operation of the elevator, owned by and operated for the benefit of the incompetent, should be imposed on her.

[5] Since there was no evidence of any personal negligence on the part of Long, it must be held that any negligence on the part of Budhi, which may here appear, could not be imputed to Long, and that the judgment against Long personally is without evidentiary support.

[6] Under the views above expressed but little discussion is required on the other points which are raised. A number of the instructions are attacked. Some of these were misleading under the circumstances, several were conflicting, and at least two were erroneous per se. In the main, these errors were the natural result of the way in which the issues had been confused throughout the trial. The contention that the amount of the verdict is excessive must also be sustained. It is not only out of line with the financial value of any loss or pain suffered, but that it was the result of passion and prejudice is rather clearly indicated by the argument here made in support of it.

This is a strange case. The real owner of the business in which the accident occurred, the estate, was never brought in as a party to the action. The real negligent party, the planing mill, has been absolved. The executor who was in actual charge of operating the business has been released,

while the former executor who actually had nothing to do with the matter in question, and who was admittedly not personally negligent, has been made solely responsible merely because he happened to be one of the executors.

Moreover, the case was so tried that the jury would inevitably be, and it clearly appears that it was, misled. And the verdict was entered without correction when it affirmatively appeared that something entirely different was intended. It seems obvious that the resulting judgment against Long personally cannot be permitted to stand.

The judgment is reversed.

MARKS, J., concurs.



75 Cal.App.2d 770

**In re LA SOCIETE FRANCAISE DE
BIENFAISANCE MUTUELLE.**

**LA SOCIETE FRANCAISE DE BIEN-
FAISANCE MUTUELLE v.**

KUCHEL.

Civ. 13066.

District Court of Appeal, First District,
Division 2, California.

Aug. 14, 1946.

Hearing Denied Oct. 10, 1946.

1. Statutes ⚡220

The amendment to the statute exempting charitable corporations from inheritance taxes on a gift requiring work of a corporation to be devoted exclusively to charitable works does not by such additional requirement show legislative intent that under the Act before the amendment, a corporation would be tax exempt if it engaged in any charitable function, no matter how small. Gen.Laws, Act 8495, § 6(1) (b).

2. Taxation ⚡876½

Evidence established that although La Societe Francaise de Bienfaisance Mutuelle

performs certain charitable functions, it is in fact an association for the mutual advantage of the members who have paid admission fees and continued to pay dues, and it is not entitled to exemption from inheritance tax upon a gift to it. Gen.Laws, Act 8495, § 6(1) (b).

3. Charities ⇨20(1)

A gift or a transfer of property may be made for a charitable purpose to either a charitable or noncharitable institution.

4. Taxation ⇨876(2)

A gift of realty to a noncharitable hospital corporation reserving a life estate in the grantors in return for grantors' being taken in by the corporation as life boarders, with remainder to corporation free from any restrictions as to its use, was an unrestricted gift to a noncharitable institution, and was not entitled to exemption from inheritance tax. Gen.Laws, Act 8495, § 6(1) (b).

5. Taxation ⇨876(2)

Hospital corporation which extended its activities so as to make available its facilities to nonmembers, and which in order to benefit its members charged more to nonmembers for services, and which received a substantial portion of its income from the rendering of services to nonmembers, was not engaged in or devoted to charitable, benevolent, or public work, entitled to exemption, from inheritance tax on a gift. Gen.Laws, Act 8495, § 6(1) (b).

Appeal from Superior Court, San Francisco County; Robert McWilliams, Judge.

Proceeding in the matter of the application of La Societe Francaise De Bienfaisance Mutuelle, a corporation, against Thomas H. Kuchel, as Controller of the State of California, for a decree establishing the fact of the death of Germain Pouchan and Louise Pouchan, his wife. From an order holding plaintiff subject to an inheritance tax upon a gift of real property, plaintiff appeals.

Order affirmed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

171 P.2d—35

James W. Hickey, Inheritance Tax Atty., State of Cal., and Raymond G. LaNoue, Deputy Inheritance Tax Atty., State of Cal., both of Sacramento (Charles J. Barry, Asst. Inheritance Tax. Atty., State of Cal., of San Francisco, of counsel), for respondents.

NOURSE, Presiding Justice.

The plaintiff appeals on the judgment roll from an adverse order holding it subject to an inheritance tax upon a gift of real property. The trial in the superior court was had upon a stipulation of facts which incorporated the report of the inheritance tax appraiser from which it appears that in February, 1936, Germain Pouchan and his wife Louise conveyed the real property to the corporation reserving unto themselves a life estate upon an agreement executed by all parties that the Societe would admit the grantors to the hospital operated by it, and known as the French Hospital, as life boarders with all the privileges of hospital care and treatment together with board and maintenance. It was stipulated "That there were no conditions or restrictions in or attached to the said grant of the remainder of said property to the said corporation, and it was free to devote such property or its proceeds to such use as it saw fit, at or upon the death of the survivor of said grantors. * * *

The conditions of the grant were fully executed. The grantors moved to the hospital and were cared for as stipulated. Louise Pouchan died in November, 1937. Germain died in December, 1939. The value of the property conveyed was appraised at more than thirteen thousand in excess of the accommodations and services rendered the grantors upon which a tax of \$971.86 was declared by the order from which this appeal is taken.

[1,2] The appellant argues that it is exempt from any tax upon a gift of this nature under the provisions of section 6 (1) (b) of the Inheritance Tax Act, Stats. 1935 p. 1274, Deering's Gen. Laws, Act No. 8495. The material portion of the section, as it stood at the time of the transfer, reads: "(b) All property transferred to societies, corporations and institutions now

or hereafter exempted by law from taxation, or to any public corporation, or to any society, corporation, institution, or association of persons engaged in or devoted to any charitable, benevolent, educational, public, or other like work * * *." It is appellant's theory that since the section was amended in 1941 to insert the word "exclusively" between the words "persons" and "engaged" the legislature in 1935 must have intended to exempt any corporation or person who engaged in any charitable function no matter how small. The argument goes beyond all reasonable bounds as it would require an interpretation of the section exempting from the tax every corporation, society or institution which contributed to any charity in the course of its operation as a purely business and financial institution. The appellant has heretofore litigated the question whether it is a business or a charitable institution and the courts have uniformly held that it is not charitable. In *Brown v. La Societe Francaise, etc.*, 138 Cal. 475, 477, 71 P. 516, 517, the supreme court, in 1903, held that the Societe was "merely an association for mutual profit or benefit, similar in its essential nature to other societies formed for such purposes." In *re Estate of Dol*, 182 Cal. 159, 187 P. 428, the Societe Francaise de Los Angeles, a counterpart of the San Francisco organization, contended that it was not a charitable institution where a gift was made to it within thirty days of the death of the testator. The supreme court held that the society was not a charitable or benevolent society within the meaning of section 1313 of the Civil Code and rested the decision on the *Brown* case. In *La Societe Francaise, etc. v. California Employment Commission*, 56 Cal.App.2d 534 at page 544, 133 P.2d 47, at page 52, a proceeding to determine the liability of the society for contributions under the California Unemployment Insurance Act, Stats. 1935, p. 1226, Deering's Gen.Laws, Act No. 8780d, the court fully reviewed the manner of organization and the operation of the Societe and held that while it "performs certain charitable functions, it is in fact an association for the mutual advantage of the members who have paid admission fees and continue to pay dues."

This disposes of the contention that the appellant is a society engaged in or devoted to charitable work and as such exempt from the taxing provisions of the Act.

[3, 4] But the appellant argues that, assuming that it is not a charitable corporation this particular transfer was "for a charitable purpose" and so exempt from the tax. It relies upon cases holding that a gift or a transfer of property may be made for a charitable purpose to either a charitable or non-charitable institution. The authorities are discussed at length in *Re Estate of Henderson*, 17 Cal.2d 853, 112 P.2d 605, and nothing need be added here except that notation should be made of the court's comment on the failure of the court in *Re Estate of Dol*, supra, to consider the difference between the cases involving the charitable status of the institution and those involving the charitable nature of the particular gift. The rule of the decision, in so far as it relates to the question presented here, is found in the paragraph commencing on page 859 of 17 Cal.2d, on page 609 of 112 P.2d, and reading: "If a group of individuals agree to contribute equal amounts into a fund to be used for the benefit of all, such a group may well be said to be non-charitable in nature because each individual is providing only for his own welfare and does not intend to make a free contribution toward the assistance of others. If an outsider, however, receiving no benefits from the organization, makes a gift to it, that gift may well be a charitable one if the members of the organization are sufficiently numerous and it is organized for a purpose beneficial to society such as providing for medical assistance to its members. Such a donor has the charitable purpose of assisting those members of a large group who become sick, without any benefit to himself, and the gift thus may be a charitable one."

It should be noted that the court said that such a gift "may" become a charitable one. But the parties stipulated: "That there were no conditions or restrictions in or attached to the said grant of the remainder of said property to the said corporation, and it was free to devote such property or its proceeds to such use as it saw fit, at or

upon the death of the survivor of said grantors." The grantors were not "outsiders." The transfer was expressly made for their own benefit and if one or both had continued to live longer they might have consumed all the benefits of the transfer. Whatever was left after payment for their care and medical treatment the corporation was free to use for its own benefit—free from any restrictions. It was therefore an unrestricted gift to a noncharitable corporation limited only by the condition that such portion of the gift as became necessary should be expended solely for the benefit of the grantors.

[5] Appellant argues that it should be exempted from the tax under the provisions of the statute exempting associations engaged in or devoted to "public, or other like work." Cases are cited from other jurisdictions which hold certain types of hospitals to be "public" charities. It would serve no useful purpose to cite them. Long before the original inheritance tax act was passed in 1935 our supreme court in the Brown case held that appellant was not a public charity, that it was "merely an association for mutual profit or benefit." In December, 1945, the United States Circuit Court of Appeals of this circuit, in a proceeding by the same society to test its liability under the Social Security Act, reached the same conclusion. In that case, *United States v. La Societe Francaise*, etc., 9 Cir., 152 F.2d 243, at page 245, the court gave a clear résumé of the nature of appellant's organization and the manner of the conduct of its affairs. We quote:

"The by-laws of the French Mutual Benevolent Society state 'the society is founded on the basis of mutuality for the treatment of sick members * * *'. The underlying purpose of its organization, as we understand it, was to afford its members the best possible medical, hospital and surgical attention at the lowest possible cost. Recognizing the financial return that would be available by expanding its activities so as to make available to non-members its facilities for treatment it entered that field. This resulted in greatly increased operations and greatly increased income

and feeling that its members should benefit from this enlargement of its business it charged a greater fee for non-members than for members. This assisted in the betterment of its plant and all other facilities which afforded the opportunity for more complete and better treatment of members at lower cost, a service which *inured* to the benefit of members.

"This service was of value. The proceeds that made it possible flowed from the business venture of treating non-members. Such business venture is not a charity in any sense of the word. No member of the Society in receiving the more adequate treatment at a lower cost would consider himself an object of charity but rather that he was reaping the benefit of a wise decision in electing to become a member of an organization which, through its well-managed business activities, had made the added results available to him. The receipt of 37% in 1940 and 67% in 1944 of the total income from non-members demonstrates that the activities of the Society in the non-charitable line was quite considerable and quite substantial.

"The Society has never paid dividends to anyone but profits may inure to the benefit of a private share holder other than by monetary dividend payments. *Northwestern Municipal Association, Inc. v. United States*, 8 Cir., 99 F.2d 460.

"The case of *United States v. Proprietors of Social Law Library*, 1 Cir., 102 F.2d 481, is relied on by the Society, but the Government correctly points out this distinction: 'There are points of similarity in the cases. But the vital one is lacking—the proprietors did not benefit at the expense of the outsiders.'"

The same distinction may be made here. The parties stipulate that for the "four fiscal years ending February 29, 1940, the daily average number of hospitalized patients was 180.75, and the total annual average number of patient days at its hospital was: Members: 45,565; non-members: 20,322; that said figures are exclusive of calls and consultations by members of the outpatient department, and which during said period, annually averaged

35,381; that said outpatient department comprises consultations by members at the clinic at said hospital, calls by staff physicians at members' homes, and calls by members at offices of staff physicians."

Under these circumstances it is idle to argue that the Societe is "engaged in or devoted to" charitable, benevolent, or public work.

Order affirmed.

GOODELL and DOOLING, JJ., concur.



75 Cal.App.2d 764

SANTA ANA INDEPENDENT v. CALIFORNIA NEWSPAPER PUBLISHERS' ASS'N, Inc.
Civ. 3438.

District Court of Appeal, Fourth District,
California.

Aug. 12, 1946.

1. Newspapers ⇨3(5)

A petition which contained all of matter required by section 6000 defining a newspaper of general circulation was not insufficient to give court jurisdiction of proceeding to establish newspaper as one of general circulation for publications and official advertising because petition failed to allege that newspaper was not one of the kind described in section 6001 relating to other kinds of newspapers. Government Code, §§ 6000, 6001.

2. Newspapers ⇨3(5)

In proceeding to establish a newspaper as one of general circulation for publications and official advertising, evidence disclosing that newspaper was published and distributed in manner well calculated to reach the widest possible circulation among all classes of people in the community was sufficient to establish that newspaper was one of general circulation. Government Code, § 6000.

3. Newspapers ⇨3(4)

Under statute relating to proceeding for establishment of a newspaper as one of general circulation for publications and official advertising and referring to newspaper published "at regular intervals", quoted phrase contemplates a weekly paper as well as a daily. Government Code, § 6000.

See Words and Phrases, Permanent Edition, for all other definitions of "At Regular Intervals".

4. Newspapers ⇨3(5)

The statute requiring a notice of proceeding to establish a newspaper as one of general circulation for publications and official advertising to be published for "10 days" refers to a period of ten consecutive days and not to different period of time, and hence a notice published in weekly newspaper on three dates within ten-day period was sufficient. Government Code, § 6021; Pol.Code, §§ 12, 3259.

See Words and Phrases, Permanent Edition, for all other definitions of "Ten Days".

5. Newspapers ⇨3(5)

In proceeding to establish a newspaper as one of general circulation for publications and official advertising, evidence sustained finding that newspaper had bona fide subscription list of paying subscribers. Government Code, § 6000.

6. Appeal and error ⇨1008(1)

In proceeding for establishing of weekly newspaper as one of general circulation for publications and official advertising, whether newspaper had a bona fide subscription list of paying subscribers was a question of fact for trial court.

7. Appeal and error ⇨169

A matter raised for first time on appeal would not be considered.

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Proceeding in the matter of the proposed ascertainment and establishment of the standing of the Santa Ana Independent as a newspaper of general circulation, which

was contested by the California Newspaper Publishers' Association, Inc. From a judgment establishing the Santa Ana Independent as a newspaper of general circulation, the contestant appeals.

Affirmed.

Lloyd S. Nix and Henry F. Walker, both of Los Angeles, for appellant.

R. M. Crookshank, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is a appeal from a judgment establishing a newspaper as one of general circulation. The court, after finding that proof of publication of notice had been duly made and that time for hearing had been fixed by the court, found "that 'The Santa Ana Independent' is a newspaper of general circulation published for the dissemination of local and telegraphic news and intelligence of a general character and has been established, printed, published and circulated weekly on Friday of each week in the City of Santa Ana, County of Orange, State of California, for one year or more next preceding the date of the filing of said petition; that it is a newspaper published for the dissemination of local and telegraphic news and intelligence of a general character and has a bona fide subscription list of paying subscriptions; that said newspaper has an average circulation throughout said year of 14,500.00; that of the persons receiving said paper approximately 2,500 have signed subscriptions whereby they agree to pay ten cents per month for said paper; that of this number approximately 500 are paid to date, and 2,000 are delinquent."

[1,2] The appellant first contends that the petition filed was insufficient to give the court jurisdiction in such a proceeding. While it is conceded that the petition contained all of the matter required by section 6000 of the Government Code, it is argued that it failed to allege that this newspaper was not one of the kind described in section 6001 of that code. The first of these sections defines a newspaper of general circulation, and the other describes another kind of paper. It would seem logical

that the recital of facts which would bring a newspaper within the kind described in section 6000 should be considered as sufficiently distinguishing it from one of the kind described in section 6001, especially in the absence of a demurrer. It is admitted that the petition here sufficiently alleged the matter required under section 6000, and the court found those facts to be true. As a practical matter, it would have added nothing to have included allegations of a negative nature, with respect to the matters covered by section 6001, when the facts bringing the matter within the provisions of section 6000 were affirmatively alleged. No demurrer was filed, the matter was not raised in the trial court, and we must hold that no lack of jurisdiction appears in this respect. It is further argued, in this connection, that there was also a failure of proof in this regard. While no witness was asked a direct question relative to this matter the evidence, as a whole, clearly disclosed that this newspaper was not published for distribution to a particular class but that, on the other hand, it was actually published and distributed for the purpose of reaching, and in a manner well calculated to reach, the widest possible circulation among all classes of people in the community. Moreover, in addition to the mode and extent of its distribution, the character of the paper in this regard was disclosed to the court, as a copy was introduced into evidence with a stipulation that it was a fair sample of the paper as regularly issued.

It is next urged that there is a further jurisdictional defect in that the notice required by section 6021 of the Government Code was not published a sufficient number of times. That section requires that the notice "shall be published for 10 days: (a) In the petitioning newspaper, and (b) In some other newspaper if the court so directs."

The petition in this matter was filed on June 5, 1945. This was a weekly paper published on Friday of each week, and on June 23, 1945, an affidavit was filed that the required notice had been regularly published in the issues of said newspaper on June 8, 15 and 22, 1945. On the same day, the court signed an order reciting

that the petition and notice had been duly published as directed by an order of the court made and entered on June 5, 1945, and fixing June 29, 1945, as the day for hearing the matter.

The appellant contends that this publication was for three days only; that the statute required publication on ten separate days; and that where such a newspaper is published weekly compliance with the statute can only be had by publishing once a week for ten weeks.

[3,4] Section 12 of the Political Code provides that the time in which any act is required to be done shall be computed by excluding the first day and including the last. Section 3259 provides that a "day" is the period of time between any midnight and the midnight following. It would reasonably seem that the expression "10 days" was intended to refer to ten such consecutive periods, in the absence of anything showing a contrary intention. Section 6000 of the Government Code refers to a newspaper published "at regular intervals." Beyond doubt, this contemplates a weekly paper as well as a daily. Section 6021, requiring such a notice to be published for "10 days", applies to a weekly newspaper as well as to one published daily. This period of ten days, reasonably, should be computed by excluding the first and including the last day. The statute provides for that particular period, and since it applies to weekly newspapers and provides that the notice shall be published in the petitioning paper, it seems rather clear that the intention was to provide for publication in such issues of a weekly newspaper as would be published during the period provided for. Of course, the usual rules would apply to make sure that the publication covered the full period of ten days, and this would be fully covered by three publications in a weekly paper.

It would be unreasonable to hold that the language of this statute was intended to require publication for ten weeks, or seventy days, in a weekly newspaper, but to require publication for only ten days in a daily. The natural and usual meaning of the expression "for 10 days" is that it

refers to a period of ten consecutive days and not to a different period of time. The period of time and not the number of publications is designated. In *Tilton v. Russek*, 171 Cal. 731, 154 P. 860, 863, the court said, in referring to a different statute, "The expression, 'publication for ten days,' found in section 22 of the act, does not require any specific number of publications. It designates a period of time during which the publication is to be made." If the legislature had intended to provide for publication on ten separate days in the case of a weekly newspaper it could, and undoubtedly would, have said so. In numerous other cases where there was some such intention it has provided for publication "once a week" for a given number of weeks. The fact that the statute provides for publication for ten days in the petitioning newspaper itself, and further provides for publication in some other paper if the court so directs, indicates an intention to provide for a rather limited publication, safeguarded by the provision for further publication in any case where this seems necessary or advisable. From a factual standpoint, it may be observed that the record on this appeal is a complete demonstration of the adequacy of the notice in this particular instance.

It is next contended that the evidence is not sufficient to support the court's finding that this newspaper "has a bona fide subscription list of paying subscribers." There was evidence that between 14,500 and 15,000 copies of this paper were printed and distributed each week during the preceding year; and that of these over 11,000 were distributed in Santa Ana, about 2500 in nearby towns in Orange County, and the remainder in other places or by mail. There were slightly over 2000 paying subscribers and most of the remaining copies distributed were what are commonly called "throw-aways", being delivered to residences in Santa Ana and surrounding towns, regardless of whether or not the paper had been subscribed for. The publisher of the paper testified that there were 2059 "paid subscribers for the year between June 5, 1944, and June 5, 1945", and that these subscrip-

tions were at a monthly rate. He further testified that probably three-fourths of these subscribers were in arrears on the day he testified, but that he could not state as to just how many were in arrears on particular days during the year in question. He further testified that "It has been a case of collection is all", and that during the year in question he had had an average of 2000 paying subscribers. When asked whether an average of three-fourths of the paid subscribers were in arrears during the year in question, he replied: "When I testified three-fourths are probably in arrears, now is due to the inability to get kids to collect, but this three-fourths testimony I gave is what is right now. I don't know what it was during those periods, and I have no way of knowing." He further testified that these three-fourths of the subscribers who were in arrears "are still subscriptions but still indebted to the paper," that how far they were in arrears "varies from month to month", and that there were no delinquencies where the paper was delivered by mail. He further testified that the copies mailed averaged about 537 copies, of which about 200 went to places outside of this state, 110 to subscribers in Santa Ana and 107 to subscribers in nearby towns in Orange County; that during the year in question about 200 of the mailed copies went to paid subscribers; that none of these were in arrears; and that some of the mailed copies went to service men. It may fairly be inferred from the evidence that there were 300 paid-up subscribers in the City of Santa Ana, in addition to any delinquent paying subscribers.

[5,6] While the appellant, by analysis and inference, brings out possible conflicts in portions of the testimony, it cannot be

held that the evidence is insufficient to support the court's finding in this regard. The question was one of fact for the trial court and his decision may not be reversed on appeal in view of the evidence. In re Green, 21 Cal.App. 138, 131 P. 91; In re Simpson, 62 Cal.App. 549, 217 P. 789; Baldwin v. Brown, 193 Cal. 345, 224 P. 462; In re Johnson, 4 Cal.App.2d 308, 40 P.2d 836. There is nothing in the cases of In re Herman, 183 Cal. 153, 191 P. 934; In re McDonald, 187 Cal. 158, 201 P. 110; In re David, 98 Cal.App. 69, 276 P. 419; or In re Monrovia Evening Post, 199 Cal. 263, 248 P. 1017, which requires a reversal under the evidence in this case.

[7] Some contention is further made that there was not a sufficient showing of diversity made here, by way of showing the occupations of the various subscribers. The statute does not particularly require such a showing, although it may be advisable or even necessary in some cases. There was here a most complete showing of an unusually wide distribution in the city of Santa Ana and in surrounding towns in that county. This, necessarily, involved a wide diversity in the respect mentioned. It seems probable that appellant's real objection to this proceeding has been caused by the manner in which a wide distribution and diversity were secured, rather than by any lack in these respects. In any event, the evidence, with the reasonable inferences therefrom, is sufficient to support the court's findings. Again, this matter is raised for the first time on appeal and was not raised in the trial court where any facts, if material to a just decision, should have been produced.

The judgment is affirmed.

GRIFFIN, J., concur.

75 Cal.App.2d 514

ARMSTRONG v. ALLEN.

Civ. 13016.

District Court of Appeal, First District,
Division 1, California.

July 25, 1946.

Rehearing Denied Aug. 24, 1946.

Hearing Denied Sept. 16, 1946.

1. Automobiles ⇨245(72)

Whether a mistake, in judgment by a pedestrian while crossing a street as to the speed and danger of an approaching automobile, constitutes contributory negligence, is a question for the jury.

2. Automobiles ⇨245(72)

In action by pedestrian against motorist for injuries sustained by pedestrian when struck by automobile while crossing a four-lane street at place other than marked crossing, whether pedestrian was guilty of contributory negligence was for jury.

3. Negligence ⇨6

The standard to determine whether the omission to do something which a reasonably prudent person should have done or refrained from doing under certain circumstances is negligence in a civil action is not necessarily regulated by criminal statutes.

4. Trial ⇨296(3)

Where instruction stated that "the law provides" that on all roadways of sufficient width a vehicle shall be driven on right half of, and as close as practicable to right-hand curb or edge of, roadway, except when overtaking and passing another vehicle or when placing a vehicle in lawful position for making a left turn, without stating that the law was part of the Vehicle Code, any vice in subsequent instruction that, if jury found from the evidence that either party violated any provision of the Vehicle Code, such violation constituted negligence as a matter of law, was vitiated. Vehicle Code, § 525.

5. Appeal and error ⇨882(12)

Where trial court accepted defendant's proposed instruction favorable to defendant, and modified it to apply to either plaintiff or defendant, defendant on appeal could

not base error on the general proposition of law stated in the instruction.

6. Trial ⇨296(3)

In action by pedestrian against motorist for injuries sustained by pedestrian when struck by automobile while crossing a four-lane street at place other than crosswalk, allegedly erroneous instruction that the law provides that, on all roadways of sufficient width, a vehicle shall be driven on right half of, and as close as practicable to right-hand curb or edge of roadway, except when overtaking and passing another vehicle or when making left turn, was remedied by other instructions. Vehicle Code, § 525.

7. Trial ⇨228(1)

An instruction standing alone may be contrary to one litigant's theory, but that does not establish the instruction as prejudicially erroneous, if it is an instruction applicable to the fact.

Appeal from Superior Court, Contra Costa County; Benjamin C. Jones, Judge.

Action by Lloyd Samuel Armstrong against Herbert Ethan Allen to recover for injuries sustained when struck by defendant's automobile while walking across street. From a judgment in favor of plaintiff, the defendant appeals.

Judgment affirmed.

John J. Taheny, of San Francisco, for appellant.

M. Mitchell Bourquin and Robert E. Burns, both of San Francisco, for respondent.

WARD, Justice.

The defendant appeals from a judgment in an action for personal injuries rendered after a jury verdict in favor of plaintiff.

The plaintiff, a pedestrian, was injured shortly after midnight when crossing from west to east on a four lane 68 foot highway, known as San Pablo Avenue in San Pablo in Contra Costa County. The pedestrian plaintiff, in the service of the United States Navy, with a Miss Chambers, personnel counselor at one of the Richmond shipyards in Contra Costa County,

had visited a resort where dancing and service of intoxicating liquors were permitted. Upon leaving the resort, plaintiff, with his companion, after looking up and down the street, started to proceed across the street without recourse to a marked crossing to reach a parked car on the opposite side of the highway. The night was drizzly and visibility poor. Defendant was driving north with his wife and two companions to his place of business, a bar, to collect the cash at closing time. No other traffic was proceeding north or south.

[1,2] The plaintiff's theory of the accident was that defendant was coming at an excessive speed with his left wheels over the dividing line between the north and south traffic and that plaintiff was hit when he realized his companion had not seen the car and reached forward to pull her out of the way of the automobile which was bearing down on them partially on the wrong side of the street. He testified that he saw the car about a block away when he started to cross the street and that there were no cars coming from his left. The defendant's theory of the accident was that he was proceeding within the inner lane of north traffic, not over the center line, at a reasonable speed and that plaintiff, primarily because he was intoxicated, walked into the rear end of his car and failed to see or judge accurately his distance from the approaching car. There is evidence to support either theory. "Whether a mistake in judgment by a pedestrian when crossing a street, as to the speed and danger of an approaching vehicle constitutes contributory negligence, is a question for the jury." *Kirk v. Los Angeles Ry. Corp.*, 26 Cal.2d 833, 839, 161 P.2d 673, 676; see, also, *Lang v. Barry*, 71 Cal.App.2d 121, 161 P.2d 949.

The propriety of instructions concerning Vehicle Code, § 525, is the main question in dispute. The court instructed:

"The law provides that on all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right hand curb or edge of the roadway, except when overtaking and passing another vehicle or when placing the vehicle in lawful position for making a left turn.

"In this connection the law provides that in roadways divided into three or more lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

"The defendant had the right in accordance with the law already stated to you to drive his car in either of the two lanes on the easterly side of the highway, under the duty imposed upon him of exercising the care of an ordinarily prudent person acting under like circumstances."

"If you find from the evidence that either party violated any provision of the Vehicle Code, you are instructed that such violation constituted negligence as a matter of law; and if you find that such violation on the part of the plaintiff proximately contributed to the happening of the accident, he cannot recover."

The court also instructed in language usually approved on the subject of proximate cause.

Appellant contends that the instruction covering the requirement that vehicles should be driven "as close as practicable to the right hand curb or edge of the roadway" could not be considered the proximate cause of the accident on the facts of this case. He argues that the giving of such instruction took away his theory of the case from the jury—that he had a right to be in the inner lane of traffic proceeding north on the four lane street.

[3-5] Preliminarily, it should be noted that the standard to determine whether the omission to do something which a reasonably prudent person should have done or refrained from performing under certain circumstances is not necessarily regulated by criminal statutes. "It has been held that the foregoing rule of the road, particularly the portion thereof in *italics* [sec. 525 above quoted], was designed for the benefit of vehicles traveling in the same direction as the one upon whom the duty rests. [Citing cases.] In *Whitfield v. Debrincat*, 50 Cal.App.2d 389, 123 P.2d 591, it was held not applicable to cars traveling in opposite directions; the provision with relation to passing to the

right of vehicles coming from the opposite direction was declared pertinent. It has been determined that it is for the benefit of pedestrians. See *Sartori v. Granucci*, 204 Cal. 28, 266 P. 280; *Skulte v. Ahern*, 22 Cal.App.2d 460, 71 P.2d 340; *Casalegno v. Leonard*, 40 Cal.App.2d 575, 105 P.2d 125. And to a car passing a car parked at the curb. *Christiansen v. Hollings*, 44 Cal.App. 2d 332, 112 P.2d 723. The rule is elastic. It is not a rigid rule the violation of which under all circumstances constitutes negligence as a matter of law. [Citing cases.] A court may or may not accept the standard of conduct prescribed in a criminal statute as a basis of a civil suit for negligence, and if it does not, the trier of fact must determine whether the actor has conducted himself as a man of ordinary prudence. *Clinkscales v. Carver*, 22 Cal.2d 72, 136 P.2d 777. The standard fixed by a criminal statute is not necessarily under all circumstances the standard in a civil action for negligence. Its violation may not constitute negligence as a matter of law where such violation occurs as the result of acts in emergencies under the proper circumstances." *Mathers v. County of Riverside*, 22 Cal.2d 781, 784, 785, 141 P.2d 419, 421. The rule with respect to sec. 525 is enunciated in the *Mathers* case, *supra*, that where sudden peril is involved, violation of the Vehicle Code does not necessarily constitute negligence per se but may be left to the jury. Further, in connection with the holding in the *Mathers* case, it should be noted that the instruction complained of here was not stated to be a section of the Vehicle Code; it states merely, "The law provides." Consequently any vice in the subsequent instruction concerning the violation of a section of the Vehicle Code's being "negligence as a matter of law" is vitiated. It must also be noted that the holding in the *Mathers* case involves a review of alleged errors in an appeal from an order granting a new trial, and not, as here, a review of alleged errors in instructions on appeal from a judgment after a motion for new trial has been denied. *Stamper v. Schemmel*, 69 Cal.App.2d 449, 456, 159 P.2d 66. The holding in the *Mathers* case may be epitomized in the following quotation (22 Cal.2d at pages 786, 787,

141 P.2d at page 422): "It cannot be said that the trial court abused its discretion." Moreover, the defendant proposed the instruction that violation of any provision of the Vehicle Code constituted negligence as a matter of law. The trial court accepted the proposed instruction which was favorable to defendant and modified it to apply to either plaintiff or defendant. Defendant should not now be permitted to base error on the general proposition of law stated therein. Any claim that the modification made by the judge erroneously stated the law is without merit. Finally, it must be determined that in the present case there is no question of sudden peril in connection with the applicability of sec. 525 as there was in the *Mathers* case. However, the above quoted portion of the *Mathers* case is pertinent inasmuch as it cites, with apparent approval, the cases relied upon by respondent in support of the trial court's instruction although it is to be noted that the court's attention was not directed to the point here urged. *Sartori v. Granucci*, 204 Cal. 28, 266 P. 280; *Casalegno v. Leonard*, 40 Cal.App.2d 575, 105 P.2d 125; *Weihe v. Rathjen Mercantile Co.*, 34 Cal.App. 302, 167 P. 287; *Skulte v. Ahern*, 22 Cal.App.2d 460, 71 P.2d 340; *Christiansen v. Hollings*, 44 Cal.App.2d 332, 112 P.2d 723.

With respect to the principal question presented by this appeal, i.e., whether the instruction on sec. 525 in its entirety should have been given on the facts of this case, it must be said that all of the cases examined are distinguishable on their facts. None of them involved a four lane highway or street, save perhaps *Skulte v. Ahern*, *supra*, wherein the distinction is not noted. An examination of the wording and history of the pertinent sections of the Vehicle Code indicates that perhaps these cases are not controlling in the present instance.

In 1935, St.1935, p. 181, the applicable portions of sec. 525 read as follows: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, *and as close as practicable to the right-hand curb or edge of, such roadway*, except as follows: (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing

such movement. (b) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn. (c) When the right half of a roadway is closed to traffic while under construction or repair. (d) Upon a roadway designated and signposted for one-way traffic *or upon a roadway divided into three or more clearly marked lanes for traffic.*" (Emphasis added.)

Sec. 526 read in part: "Whenever any roadway has been divided into three or more clearly marked lanes for traffic the following rules *in addition to all others consistent herewith* shall apply: (a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. * * * (c) Official signs may be erected directing slow moving traffic to use a designated lane or allocating specified lanes to traffic moving in the same direction and drivers of vehicles shall obey the directions of every such sign." (Emphasis added.)

Section 529 read in part: "(a) The driver of a motor vehicle may pass upon the right a vehicle which is making or about to make a left turn. (b) Upon a city street with unobstructed pavement of sufficient width for two or more lines of moving traffic in each direction the driver of a vehicle may overtake and, allowing sufficient clearance, may pass another vehicle proceeding in the same direction either upon the left or right under conditions permitting such movement in safety." In 1937, the italicized portion of paragraph (d) of sec. 525 was deleted. Stats.1937, p. 619.

In 1939, St.1939, p. 2198, sec. 529 was completely redrafted to read as follows: "(a) The driver of a motor vehicle may overtake and pass to the right of another vehicle only under the following conditions: (1) When the vehicle overtaken is making or about to make a left turn. (2) Upon a city street with unobstructed pavement of sufficient width for two or more lines of vehicles in each direction. (3) Upon a one-way street. (4) Upon any highway outside of a city with unobstruct-

ed pavement of sufficient width and clearly marked for four or more lines of moving traffic. (5) Upon a highway divided into two roadways where traffic is restricted to one direction upon each of such roadways. (b) The driver of a motor vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving upon the shoulder of the highway. (c) The provisions of this section shall not relieve the driver of a slow moving vehicle from the duty to drive as closely as practicable to the right-hand edge of the roadway." Finally, the Legislature in 1945, St. 1945, p. 990, deleted the underscored portion of the first paragraph of sec. 525 as it read in 1935. This review indicates that the "close as practicable" phrase is not intended to be applicable to laned highways unless a slow moving vehicle is involved.

[6, 7] However, it is unnecessary on the facts of this case to hold that the instruction was erroneous, because were it erroneous in its inception the later instruction stated the law applicable to the facts, and the jury was left to decide the basic problem presented by the facts—namely, upon which side of the center line was the automobile operated. Each side submitted its instructions covering its theory and the instructions when read as a whole are not prejudicial to appellant. An instruction standing alone may be contrary to one litigant's theory but that does not establish the instruction as prejudicially erroneous if it is an instruction applicable to the facts.

Appellant also contends that the instructions are erroneous by reason of plaintiff's theory that he was rescuing someone from the path of an oncoming car. Plaintiff's companion's neglect may have been a cause of the accident but this argument disregards the possibility of concurrent negligent acts.

The jury could have concluded that defendant failed to keep a proper lookout in view of the condition of his lights on a rainy night, or that speed was the cause of the accident. The instructions when read in their entirety do not direct a finding in favor of plaintiff. The court instructed

that speed alone did not establish negligence and instructed on the "right of way" and the reasonable use of the faculties of sight and hearing. General instructions on burden and quantum of proof, credibility of witnesses, negligence, contributory negligence, proximate cause, etc. were sufficiently covered. The theory of defendant that the accident did not occur as a result of driving at an excessive speed with the left wheels over the dividing line was presented by the facts, and the court covered such theory in its instructions. If any of the instructions appears to be incorrect, it was legally remedied and healed by other instructions.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; EDMONDS, J., dissenting.



ADAMS v. ADAMS.

Civ. 15270.

District Court of Appeal, Second District,

Division 3, California.

July 23, 1946.

Rehearing Denied Aug. 6, 1946.

Hearing Granted Sept. 16, 1946.

1. Divorce ☞203, 291

That pursuant to statute, the relief granted to a plaintiff in a divorce action, if no answer be filed, cannot exceed that which is demanded in the complaint does not deprive the court of the statutory power to provide for the maintenance of children and the wife where a divorce is granted for an offense of the husband. Code Civ.Proc. § 580; Civ.Code, § 139.

2. Divorce ☞161

If the trial court in a divorce case is of the opinion that an award of alimony is proper where a default has been entered to a complaint for divorce which fails to contain a prayer for alimony, the court may order that the default be set aside, the prayer of the complaint amended to

demand alimony and that the complaint as amended be served upon the defendant.

3. Divorce ☞161

In a divorce action where the complaint upon which an interlocutory judgment of divorce was had in default action was amended in substance and not merely in form, filing of the amendment to the complaint operated to open the default.

4. Divorce ☞249(2)

In action for divorce, a defaulting party may be bound by both the decree and the property settlement agreement where provisions of the latter are modified or superseded by such decree.

5. Appeal and error ☞959(1)

Pleading ☞236(1)

The statutes give the trial court a wide discretion in the allowance of the filing of an amendment to any pleading, and an order authorizing the filing of such amendment will not be disturbed in the absence of a clear showing of an abuse of judicial discretion. Code Civ.Proc. §§ 470, 473.

6. Appeal and error ☞959(1)

Pleading ☞236(5)

Under statute, the trial court is invested with discretionary power to permit and even to order the pleadings of the parties to be amended at any stage of the trial and even after its submission, so as to make such pleadings conform to the proof, and discretion will not be interfered with upon appeal, except in cases of its manifest abuse. Code Civ.Proc. § 470.

7. Pleading ☞43, 49

Neither the caption of complaint nor the prayer is conclusive as to its nature, nor is the designation given it by counsel, and the whole of the pleading must be looked to as well as all the facts.

8. Divorce ☞104

In divorce action, the substantial change made by an amendment in both the allegations and prayer of complaint, service upon defendant of notice of motion for leave to file amendment, his presence with counsel at such hearing, personal service upon him of written amendment together with alias summons advising of his right to appear in response thereto, followed by

his default after having full knowledge of the nature of additional relief and award sought by plaintiff, were conclusive upon defendant and he could not claim to have been misled or to be wrongfully prejudiced by the permitted amendment. Code Civ.Proc. §§ 470, 473.

9. Divorce ⇨249(2)

The general rule that parties to actions affecting real property may control the disposition of the interests involved and that the judgment of the court will be made to conform to such disposition, has no application to divorce cases.

10. Divorce ⇨236

In action wherein a divorce is granted to the wife, a broad discretion is vested in the trial court in the allowance of permanent support to her even in the face of contracts of property settlement wherein such support moneys are expressly waived.

11. Divorce ⇨236, 249(2)

Where divorce is granted to the wife, the court has full power to examine a contract of property settlement wherein support moneys are expressly waived and inquire into the facts surrounding its execution, and may in the exercise of a proper discretion, accept or reject it in whole or in part and may dispose of the community property in spite of the agreement, if the provision made, is against public policy, or not sufficient for the wife's needs, and may provide for her support without requiring the return of what she received under the agreement.

12. Divorce ⇨249(2)

Where a divorce is granted to the wife, the court in examining contract of property settlement wherein support moneys are expressly waived may determine that all or part of such agreement is consistent with good morals and is not in violation of the policy of the law, and as to such valid portions may indorse its approval, but in the exercise of its powers as a court of equity, may decline to follow other provisions which may fail to meet the test.

13. Divorce ⇨203

Where wife was granted an interlocutory judgment of divorce by default, court

could modify terms of property agreement or make a new agreement for the parties who were otherwise competent to contract between themselves, notwithstanding the absence of pleading attacking the validity of the property agreement, or asking a reformation thereof upon appropriate grounds.

14. Appeal and error ⇨865

While a defendant whose default has been taken may appeal from the succeeding judgment, such an appellant is not privileged to urge as a ground for reversal the insufficiency of the evidence upon which the trial court based its findings and judgment, and defendant must confine his attack to the consideration of jurisdiction or of the sufficiency of the pleadings.

15. Divorce ⇨236, 297

In action for divorce, court after husband's default as to both the original complaint and an amended "complaint to conform to proof", had jurisdiction to approve property settlement of parties except as to a limitation concerning payment for support of a child, and to further order defendant to pay plaintiff specified weekly sums for definite periods.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for divorce by Jean Ann Adams against George Bryan Adams. From an interlocutory judgment of divorce, defendant appeals.

Affirmed.

Courtney A. Teel, of Los Angeles, for appellant.

David A. Matlin and H. Elliott Pownall, Jr., both of Los Angeles, for respondent.

KINCAID, Justice pro tem.

While this appeal is from the interlocutory judgment of divorce in a default action, complaint is particularly made of that portion of such judgment which provides for the support and maintenance of plaintiff, subject to the further order of the court.

The original complaint for divorce was filed November 17, 1944, alleging acts of

cruelty on the part of defendant toward plaintiff. Such complaint further alleges the parties to have been married on October 15, 1938, their separation on June 1, 1944, that there is one male child the issue of the marriage, aged a little over two years, that a property settlement agreement has been entered into between the parties which is attached to and made a part of the complaint, that the custody of such minor should be awarded to plaintiff and that defendant should be ordered to pay plaintiff for the support and maintenance of plaintiff and such child the sum of \$25 per week for the period of one year commencing September 2, 1944, the sum of \$75 per month for a period of six months thereafter, and then the sum of \$50 per month for the support and maintenance of said child only, subject to the further order of the court.

The property settlement agreement attached to the complaint is dated July 1, 1944, and among other things provides for the division of the community property of the parties whereby plaintiff receives title to the household furniture and furnishings, a 1940 Plymouth Coupe automobile, and \$975 in cash. Defendant further agrees to maintain in effect a \$3,000 life insurance policy for the benefit of plaintiff and their child. Defendant receives, by virtue of the agreement, a 1940 Plymouth Sedan automobile and 94 shares of stock of the par value of \$10 per share. The agreement further provides for payments to be made by defendant to plaintiff in the amounts, at the times, and for the support and maintenance of the individuals, as are alleged in plaintiff's complaint, plaintiff specifically waiving any right to support and maintenance for herself other than for the period of 18 months, beginning September 2, 1944, as provided therein.

The default of the defendant was subsequently entered after service of the complaint and summons upon him and the case came on regularly for trial. After having introduced proof as to the cruelty charges by plaintiff and a corroborating witness, the property settlement agreement was submitted to the court and its approval was requested. Under questioning by the court, the plaintiff then testified that while she

was not employed and was staying at home, she had worked prior to her marriage and for a short while subsequent to the separation, during which latter period she earned \$155 a month and that her husband is employed as a plant manager earning about \$400 a month. The judge thereupon indicated that he would not approve the property settlement agreement and ordered a continuance of the case, suggesting the possibility of a stipulation by the defendant that the property settlement agreement might be amended whereby he would agree to pay plaintiff the sum of \$50 per month for the support and maintenance of herself and her minor child until the further order of the court, and that if defendant should refuse to so stipulate, that defendant be served with an amended complaint which would include a prayer for payment of such support moneys for both plaintiff and the minor child until such time as the court orders a different amount.

Some four months later plaintiff, through her counsel, served upon defendant a motion for leave to file amendment to her complaint and on April 20, 1945, the defendant appeared specially and in company with his present counsel and opposed the granting of the motion for leave to file such amendment. The court thereupon granted leave to file the same, whereupon such amended pleading was filed, denominated "Amendment to Complaint to Conform to Proof." Such pleading had the effect of amending paragraph VII and the prayer of the original complaint by adding the words "plaintiff and" in both places therein, so as to include plaintiff with the minor child for support and maintenance by the defendant in the sum of \$50 per month from a date 18 months following September 2, 1944, until the further order of the court. An alias summons was issued by the clerk of the court on May 4, 1945, directing the defendant to answer the amendment to complaint to conform to proof in such action within ten days after the service upon him of such document, and such alias summons and amendment to the complaint were regularly served on defendant on May 9, 1945. On May 29, 1945, the defendant having failed to appear and answer the plaintiff's amendment to complaint to conform

to proof, his default was duly entered there-to. On December 20, 1944, the court having found that defendant had defaulted, both to the original complaint and to the amendment to the complaint to conform to proof, ordered entered an interlocutory judgment of divorce in behalf of plaintiff, in which the property settlement agreement of the parties was approved except as to the limitation therein with reference to the payments of \$50 per month, and further ordering defendant to pay plaintiff \$25 per week, commencing on September 2, 1944, and continuing for a period of one year therefrom, and the sum of \$75 per month for a period of six months thereafter, and then the sum of \$50 per month for the support and maintenance of plaintiff and of said minor child subject to the further order of the court.

[1,2] Defendant contends that the trial court erred in allowing alimony to plaintiff for a period subsequent to that set forth in the property agreement where the prayer of the original complaint failed to request it. In support of his position he cites the cases of *Majors v. Majors*, 1945, 70 Cal. App.2d 619, 161 P.2d 494; *Eddy v. Eddy*, 1944, 64 Cal.App.2d 672, 149 P.2d 187; *Peck v. Peck*, 1942, 52 Cal.App.2d 792, 127 P.2d 94; *Darsie v. Darsie*, 1942, 49 Cal. App.2d 491, 122 P.2d 64. Such cases hold that, pursuant to section 580, Code Civil Procedure, the relief granted to a plaintiff in a divorce action, if no answer be filed, cannot exceed that which is demanded in the complaint. But such cases recognize the further principle that the "foregoing conclusion does not deprive the court of the power given it under section 139 of the Civil Code to provide for the maintenance of children and the wife where a divorce is granted for an offense of the husband. Should the trial court be of the opinion that an award of alimony is proper in a case where a default has been entered to a complaint for divorce which fails to contain a prayer for alimony, the court may order that the default be set aside, the prayer of the complaint amended to demand alimony and that the complaint as amended be served upon the defendant." *Darsie v. Darsie*, *supra*, 49 Cal.App.2d at pages 494, 495, 122 P.2d at page 66.

[3,4] The filing of the amendment to the complaint, where, as here, the pleading is amended in substance and not merely in form, operates to open the default. *Gutleben v. Crossley*, 1936, 13 Cal.App.2d 249, 253, 56 P.2d 954; *Sheehy v. Roman Catholic Archbishop*, 1942, 49 Cal.App.2d 537, 539, 122 P.2d 60. A defaulting party may be bound by both the decree and the agreement where provisions of the latter are modified or superseded by such decree. *Robertson v. Robertson*, 1939, 34 Cal.App. 2d 113, 117, 93 P.2d 175; *Newell v. Newell*, 1915, 28 Cal.App. 784, 154 P. 32.

[5-7] Defendants claim that the court was without power to order the pleadings amended during the trial is without merit. Sections 470 and 473, Code of Civil Procedure, give the trial court a wide discretion in the allowance of the filing of an amendment to any pleading. An order authorizing the filing of such amendment will not be disturbed in the absence of a clear showing of an abuse of judicial discretion. *Vallera v. Vallera*, 1944, 64 Cal.App.2d 266, 269, 148 P.2d 694; *Burrows v. Burrows*, 1936, 18 Cal.App.2d 275, 278, 63 P.2d 1135. "Under the provisions of section 470 of the Code of Civil Procedure, the trial court is invested with discretionary power to permit and even to order the pleadings of the parties to be amended at any stage of the trial of the cause, and even after its submission, so as to make such pleadings conform to the proofs, and it has been uniformly held that this discretion will not be interfered with upon appeal except in cases of its manifest abuse." *Gartlan v. C. A. Hooper & Co.*, 1918, 177 Cal. 414, 422, 170 P. 1115, 1118. See also *Richter v. Adams*, 1941, 43 Cal.App.2d 184, 187, 110 P.2d 486. The allowance of such amendment was within the sound discretion of the court. *Rabbit v. Atkinson*, 1941, 44 Cal.App.2d 752, 759, 113 P.2d 14. Nor was defendant misled by the designation given the amendment as being one to "conform to proof" so as to be entitled to rely upon proof necessarily limited to the allegations and prayer of the original complaint upon which his default had been entered. Neither the caption of the pleading nor the prayer is conclusive as to its nature, nor is the designation given it by counsel. The whole of the pleadings

must be looked to as well as all the facts of the case. *Hutchason v. Marks*, 1942, 54 Cal.App.2d 113, 114, 128 P.2d 573; *Sullivan v. Compton*, 1943, 61 Cal.App.2d 500, 502, 143 P.2d 357.

[8] The substantial change made by the amendment in both the allegations and prayer of the complaint, the service upon defendant of the notice of motion for leave to file the amendment, his presence with counsel at such hearing, the personal service upon him of the written amendment together with alias summons advising of his right to appear in response thereto followed by his default after having full knowledge of the nature of the additional relief and award sought by plaintiff, are conclusive upon defendant in this respect and defendant cannot now claim to have been misled or to be wrongfully prejudiced by the permitted amendment.

[9-13] Defendant further contends that in the absence of pleadings attacking the validity of the property agreement, or asking a reformation thereof upon appropriate grounds, a court is without power to modify its terms or make a new agreement for parties otherwise competent to contract between themselves. It now seems well settled, however, that the general rule to the effect that parties to actions affecting real property may control the disposition of the interests involved and that the judgment of the court will be made to conform to such disposition, has no application to divorce cases. *In re Lazar*, 1940, 37 Cal.App.2d 327, 330, 99 P.2d 342; *Roberts v. Roberts*, 1927, 83 Cal.App. 345, 350, 256 P. 826. In actions wherein a divorce is granted to the wife a broad discretion is vested in the trial court in the allowance of permanent support to her even in the face of contracts of property settlement wherein such support moneys are expressly waived. The court has full power to examine the contract and inquire into the facts surrounding its execution and may in the exercise of a proper discretion, accept or reject it in whole or in part and may dispose of the community property in spite of the agreement if the provision made is against public policy, or not sufficient for the wife's needs and may

provide for her support without requiring the return of what she received under the agreement. *Auclair v. Auclair*, 1946, 72 Cal.App.2d 791, 801, 165 P.2d 527; *In re Lazar*, supra, 37 Cal.App.2d 327, 99 P.2d 342; *Lazar v. Superior Court*, 1940, 16 Cal. 2d 617, 620, 107 P.2d 249; *Robertson v. Robertson*, supra, 34 Cal.App.2d 113, 116, 93 P.2d 175; *Kelly v. Kelly*, 1933, 129 Cal. App. 325, 328, 18 P.2d 781; *Moog v. Moog*, 1928, 203 Cal. 406, 408, 264 P. 490. Under such circumstances the court may further determine, after considering the provisions of such an agreement and the evidence relating thereto, that all or part of such agreement is consistent with good morals and is not in violation of the policy of the law and as to such valid portions may endorse its approval, but in the exercise of its power as a court of equity may decline to follow other provisions which may fail to meet these tests. A clause of such an agreement wherein a wife waives her right to any future maintenance by her husband may be disapproved by the court even though it approves the balance of such agreement. *Roberts v. Roberts*, supra, 83 Cal.App. 345, 351, 256 P. 826.

[14, 15] The defendant further asks us to review the sufficiency of the evidence to support the part of the judgment of which complaint was made. While a defendant whose default has been taken may appeal from the succeeding judgment, such an appellant is not privileged to urge as a ground for reversal the insufficiency of the evidence upon which the trial court based its findings and judgment. Such a defaulting appellant must confine his attack to the consideration of jurisdiction or of the sufficiency of the pleadings. *Reed Orchard Co. v. Superior Court*, 1912, 19 Cal.App. 648, 662, 128 P. 9, 18; *Crackel v. Crackel*, 1911, 17 Cal.App. 600, 121 P. 295; *San Gabriel Valley Bank v. Lake View Town Co.*, 1906, 4 Cal.App. 630, 633, 89 P. 360; *Lester v. Beer*, 1946, 74 Cal.App.2d Supp. 984, 168 P.2d 998. As previously indicated the relief granted by the trial court was within the scope of the complaint as amended and the court did not exceed its jurisdictional powers.

The judgment is affirmed.

WOOD, J., concurs.

SHINN, Acting Presiding Justice.

I concur in the judgment and in the opinion in so far as the statements therein are applicable to the facts of the case. I do not, however, agree that the court can properly approve a property settlement agreement in part and at the same time render a decree which is contrary to the terms of the agreement in material respects. If the agreement is not acceptable, the court should either decline to approve it and make no disposition of the community property, or cause the entire matter to be placed in issue for trial. If a man should give his wife all the community property in consideration of her waiving other support, the court should not award her the property, by virtue of the agreement, and at the same time award her support money. But the defendant had an opportunity to defend when he was served with the amended complaint, which stated a cause of action for support, and on appeal from the default judgment may not complain of errors which do not go to the question of jurisdiction.



75 Cal.App.2d 478

PEOPLE v. MADDOX.

Cr. 2389.

District Court of Appeal, First District,
Division 1, California.

July 24, 1946.

1. Criminal law ☞1201

Prior conviction statutes, under which punishment for a given conviction is increased if record shows a prior conviction, are constitutional as against contention that evidence of prior conviction necessarily prejudices the finder of fact against accused on the main charge. Pen.Code, § 644.

2. Rape ☞51(1)

Evidence authorized conviction of rape.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Eljoe Maddox was convicted of rape with a prior conviction of robbery and from the judgment of conviction and an order denying a new trial, he appeals.

Judgment and order affirmed.

Eljoe Maddox, of Represa, in pro. per.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

By information defendant was charged with rape together with a prior conviction of robbery. He pleaded not guilty to the rape and stood mute on the charge of prior conviction. He and his counsel waived a jury trial. The court found him guilty of the rape, and likewise found that he had suffered the charged prior conviction. From the judgment of conviction and from the order denying his motion for a new trial the defendant appeals in propria persona, the public defender having refused to prosecute the appeal.

[1] Defendant's principal contention is that the evidence is insufficient to support the judgment on the rape charge. He also urges, without citation of authority, that the prior conviction statutes, Pen.Code, § 644, are unconstitutional for the reason that evidence of a prior conviction necessarily prejudices the finder of fact against the accused on the main charge. There is no merit in either contention.

So far as the constitutionality of prior conviction statutes is concerned, the point is no longer an open question. *People v. Rose*, 26 Cal.App.2d 513, 79 P.2d 737; see, also, cases collected 8 Cal.Jur., p. 641, § 614; 4 Cal.Jur., Ten Year Supp., p. 1032, § 614. No contention is made that in form the prior was not properly charged, proved or found.

[2] The evidence on the rape charge amply demonstrates the guilt of the defendant. The complaining witness, who was but 19 years of age, on May 25, 1945, resided in an apartment house on 7th Street in Oakland. The defendant occupied the adjoining apartment. It was connected

with that of the complaining witness by a door which was supposed to be kept locked and which was nailed shut on the defendant's side. The witness testified that on the night in question she returned home from work about midnight; that she went to bed about 1:00 a. m.; that there was considerable noise in defendant's apartment indicating that he was having a party; that before she went to sleep the defendant talked to her through the locked door telling her that "they" (apparently the police) had taken his guests; that she went to sleep; that she awakened about 2:00 a. m. with a coughing spell; that defendant started talking to her again, recommending a treatment for the cough; that she again went to sleep and awakened at 4:30 or 5:00 a. m. to find defendant standing at the foot of her bed dressed in blue-striped shorts and a white upper; that she put on her light and attempted to get up; that defendant told her if she was "going to holler or scream he was going to kill" her; that he grabbed her by the throat; that he then removed his shorts and got into her bed and committed forcible rape upon her. She identified a pair of distinctively colored shorts and a white upper as resembling the garments she saw on defendant on the morning in question. When defendant was arrested some time after 8:00 a. m. he was wearing these shorts and upper.

The complaining witness further testified that she had never been in defendant's room, and that before May 25th he had never been in her room; that upon completion of the act defendant told her that he was going to return to her room again and that if she said anything to anybody about what had happened he would kill her; that the connecting door between the two rooms had been opened; that she did not scream during the act because she was in fear of her life; that after the act she was terrified and hysterical and remained

in bed until about 8:00 a. m. when she informed another tenant in the apartment of what had occurred and the police were called. The defendant was arrested in his room a short time later. The arresting officer found a key in the possession of defendant that fitted the lock in the connecting door. The nails on the defendant's side of the door had been bent so that the door could open. When arrested the defendant, according to the arresting officers, was suffering from a very bad "hang-over."

Defendant took the stand in his own defense. He denied committing the acts charged, denied opening the connecting door, and denied ever having been in the complaining witness' room. He admitted talking to the girl through the closed door about 1:00 a. m., but testified that he then left the house and visited several places and did not return until about 7.00 a. m. No witnesses were produced to corroborate this story.

From this brief summary it is obvious that the evidence is sufficient to support the finding of guilt, and that this court has no power to disturb the finding. *People v. Cline*, 117 Cal.App. 181, 3 P.2d 575; *People v. Lay*, 66 Cal.App.2d 889, 153 P.2d 379; see, also, *People v. Schneider*, 36 Cal.App. 2d 292, 98 P.2d 215; *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Perkins*, 8 Cal.2d 502, 66 P.2d 631; *People v. Tedesco*, 1 Cal.2d 211, 34 P.2d 467. We have carefully examined the transcript. There were no errors in the admission or exclusion of evidence. The record demonstrates that defendant was given a fair trial, and that the trial judge carefully protected all of the constitutional and statutory rights of defendant.

The judgment and order appealed from are affirmed.

KNIGHT and WARD, JJ., concur.

75 Cal.App.2d 591

SMITH v. WIGET et al.
Civ. 13098.

District Court of Appeal, First District,
Division 1, California.
Aug. 1, 1946.

1. Dismissal and nonsuit ⇨60(2)

Period under statute providing that clerk may in its discretion dismiss any action for want of prosecution on motion of defendant and after due notice to plaintiff, whenever plaintiff had failed for two years after action is filed to bring action to trial, commences to run from the filing of the original complaint and not from the filing of any subsequent amended complaint. Code Civ.Proc. § 583.

2. Appeal and error ⇨931(1)

An appellate court will never indulge in presumptions or inferences to reverse a judgment or order.

3. Appeal and error ⇨931(1)

Every intendment and presumption, not inconsistent with the record, must be indulged in by an appellate court to support the trial court's action.

4. Appeal and error ⇨901

If a litigant is dissatisfied with an order or judgment of the lower court, it is his duty to present to the appellate court a proper record showing the alleged error.

5. Appeal and error ⇨714(5)

Statements of alleged facts in briefs without support in a proper record must be disregarded by an appellate court, particularly where discretion was vested in the trial court.

6. Dismissal and nonsuit ⇨60(3)

Dismissing action on defendants' motion because of plaintiff's failure to bring the action to trial two years and seven months after action was commenced was not abuse of discretion notwithstanding alleged facts that plaintiff's counsel was ill during period when cause was at issue and died shortly before motion to dismiss was filed, that plaintiff had little time to attend to his personal affairs, that negotiations for settlement were pending and that there

were family matters that could consume a large part of plaintiff's time. Code Civ. Proc. § 583.

7. Dismissal and nonsuit ⇨72

Filing by plaintiff of memorandum to set a cause for trial after defendants had moved to dismiss the action because plaintiff had failed for two years and seven months after commencement of action to bring the action to trial, did not require denial of motion to dismiss. Code Civ.Proc. § 583.

8. Appeal and error ⇨684(2)

Contention that denial of plaintiff's motion for a continuance was an abuse of discretion could not be considered on appeal, where there was no record to show the basis for the requested continuance.

Appeal from Superior Court, Contra Costa County; A. H. Bray, Judge.

Action by Earl W. Smith against Clark Hamilton Wiget and others. From an order granting defendants' motion to dismiss the action on ground that it was not brought to trial within two years of the date it was filed, the plaintiff appeals.

Order affirmed.

Jay Monroe Latimer, of San Francisco, for appellant

Tinning & DeLap, of Martinez, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from an order of the trial court made on a noticed motion of defendants dismissing his action on the ground that it was not brought to trial within two years of the date it was filed. Plaintiff failed to file any counter-affidavits in the court below, and no reporter's transcript has been filed, the appeal being prosecuted on a clerk's transcript.

The motion to dismiss was made under § 583 of the Code of Civil Procedure, which, so far as pertinent here, reads as follows: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due no-

tice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial. * * *

The pertinent dates are as follows:

March 22, 1943—original complaint filed.

June 30, 1943—demurrer to complaint filed.

July 12, 1943 (filed July 13, 1943)—order made sustaining demurrer with leave to amend.

July 28, 1943—first amended complaint filed.

September 7, 1943—demurrer to first amended complaint filed.

September 13, 1943 (filed September 15, 1943)—order made overruling demurrer as to first cause of action, with leave to amend.

September 21, 1943—second amended complaint filed.

October 23, 1943—answer to first cause of action filed, and demurrer to second cause of action.

November 8, 1943—demurrer to second cause of action overruled.

November 10, 1943—answer to second cause of action filed.

October 22, 1945—notice of motion to dismiss and affidavit in support filed.

November 2, 1945—plaintiff filed a memorandum to set cause for trial.

November 5, 1945—after a hearing, order made dismissing action and denying plaintiff's motion for a continuance.

[1] It is thus apparent that the motion to dismiss was filed two years and seven months after the action was commenced, and over twenty-three months after the cause was at issue. The statutory period commences to run from the filing of the original complaint and not from the filing of any subsequent amended complaint. *Rosefield Packing Co. v. Superior Court*, 4 Cal.2d 120, 124, 47 P.2d 716. A hearing on demurrer is not a trial within the meaning of the statute. *Meier v. Superior Court*, 55 Cal.App.2d 675, 678, 131 P.2d 554; *Breakstone v. Giannini*, 70 Cal.App.2d 224, 231, 160 P.2d 887. It is quite clear, therefore, that the two-year period specified in the statute commenced to run on March 22, 1943.

The appellant must concede that § 583 by express language confers on the trial court discretion to dismiss after the expiration of the two-year period, but he urges that here

the trial court abused its discretion in granting the motion. In support of this contention he argues that certain matters were brought to the attention of the trial court on the hearing of the motion that were disregarded, and that such conduct constituted an abuse of discretion as a matter of law. He contends that he orally called the attention of the trial court to the fact that his counsel was ill during the period the cause was at issue and died shortly before the date the motion to dismiss was filed; that he worked in the shipyard during the war and, as a result, had little time to attend to his personal affairs; that negotiations for a settlement were pending during part of the time; that there had been family matters that consumed a large part of his time. He also contends that the filing of the memorandum to set on November 2, 1945, automatically voided the prior motion to dismiss and required, as a matter of law, that the motion to dismiss be denied.

[2-6] The difficulty with appellant's position is that, except for the last-mentioned contention, there is no record of any kind to support his assertions. He did not see fit to file a counter-affidavit in the trial court, nor were the oral proceedings reported. It is elementary that an appellate court will never indulge in presumptions or inferences to reverse a judgment or order. Every intendment and presumption not inconsistent with the record must be indulged in to support the action of the trial court. If a litigant is dissatisfied with an order or judgment of the lower court it is his duty to present to the appellate court a proper record showing the claimed error. See many cases collected and commented upon 2 Cal.Jur. p. 852, § 499; see, also, *Whitney v. Redfern*, 41 Cal.App.2d 409, 413, 106 P.2d 919. Statements of alleged fact made in the briefs without support in a proper record must be disregarded. *California S. F. Corp. v. Bessolo & Gualano*, 118 Cal.App. 327, 331, 5 P.2d 480. These rules apply with particular force where discretion is vested in the trial court. In such case the claimed abuse of discretion must be shown by a proper record. In the present case, except as to the contention that the filing of the memorandum to

set voided the motion to dismiss, there is no record at all to substantiate appellant's charges. None of the claimed unsupported contentions, even if there were a record, would compel the conclusion that, as a matter of law, there had been an abuse of discretion. *Barry v. Learner*, 113 Cal.App. 651, 299 P. 82; *Elmhurst Packers v. Superior Court*, 46 Cal.App.2d 648, 116 P.2d 487. It is obvious, therefore, that these contentions, inasmuch as no abuse of discretion has been shown, must be held to be without merit.

[7] The contention that the filing of the memorandum to set required the motion to dismiss to be denied requires but scant consideration. No authority is cited by appellant to support this assertion. It will be noted that the memorandum to set was not filed until after the two-year period had elapsed and until after the motion to dismiss had been filed. It has long been the law that the filing of a memorandum to set, even if filed before the expiration of the two-year period, does not, as a matter of law, show compliance with § 583. In the case of *Steinbauer v. Bondesen*, 125 Cal. App. 419, 14 P.2d 106, the court was discussing § 583 when the statute provided that the two-year period started to run from the date of filing the answer. At page 426 of 125 Cal.App., at page 109 of 14 P.2d, it is stated: "To meet the provisions of that section [§ 583] requiring that the action be brought to trial within two years after the filing of the answer, it was not sufficient that the plaintiff should have had the action set for trial, or be in court ready for trial. The trial must have been actually begun. [Citing case.] The burden is upon the plaintiff to call to the attention of the court the necessity for setting the trial for a time within the period fixed by the section. [Citing case.] The duty rests upon the plaintiff at every stage of the proceeding, to use diligence and to expedite his case to final determination. [Citing case.] Unless it is made to appear that there has been a gross abuse of discretion, the decision of the trial court will not be disturbed on appeal. [Citing case.]"

[8] The appellant also contends that upon the hearing of the motion to dismiss he

was denied a continuance, and this denial he claims constituted an abuse of discretion. There is no record to show the basis for the claimed continuance and in such circumstances this claim of error cannot be considered.

The order granting the motion to dismiss is affirmed.

WARD, J., and SCHOTTKY, J. pro tem., concur.



75 Cal.App.2d 476

PEOPLE v. TIDWELL.

Cr. 643.

District Court of Appeal, Fourth District,
California.

July 23, 1946.

1. Criminal law ⇐1159(3)

Conflicts in the evidence are for the trial court.

2. Criminal law ⇐997

Where defendant had pleaded guilty because he had allegedly been induced by statements of probation officer and attorneys that probation would probably be granted if he pleaded guilty, but it appeared that he merely hoped that he would be granted probation, denial of defendant's petition for writ of error *coram nobis* brought on ground that defendant had pleaded guilty because of fraud, duress or mistake was not a breach of discretion on the part of the trial judge.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

P. R. Tidwell was convicted of drawing and passing an insufficient fund check with intent to defraud, and he appeals from an order denying a petition for writ of error *coram nobis*.

Order affirmed.

Samuel Hurwitz, of Orange, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from an order denying a petition for writ of error coram nobis.

Petitioner was arrested for drawing and passing an insufficient fund check with intent to defraud. An information was filed against him. He appeared without counsel for arraignment on Feb. 1, 1946. The matter was continued to Feb. 15, 1946, to permit him to employ counsel. On that date he again appeared without counsel and the public defender was appointed to represent him. A plea of guilty was entered and defendant asked to be placed on probation. On March 1, 1946, probation was denied and he was sentenced to confinement in the penitentiary for the term prescribed by law, "Sentence to run Concurrently with Case #C-5563." While there is no direct evidence on the subject, the record justifies the inference that defendant was on probation at the time the check in question here was passed.

The petition for a writ of error coram nobis was filed on March 11, 1946. It was alleged that defendant "plead guilty because of fraud, duress or mistake and would not have so plead but for such fraud, duress and mistake."

Defendant was arrested by a deputy sheriff of Orange County accompanied by a police officer from Bell. He testified that he told the payee of the check that he was not sure that he had funds to cover it but that he expected to make additional deposits; that if the check was returned by the bank unpaid he would take it up with cash if the payee would notify him; that he communicated these facts to the arresting officers; that they told him that unless he "would cooperate with the Orange County authorities in connection with the above numbered case and plead guilty that they would make it as 'rough' upon the defendant as they could and file additional charges against affiant in Los Angeles County, but

that if he would plead guilty to said charge that they would not prosecute him upon such additional checks"; that the deputy sheriff made other threats against him.

[1,2] The deputy sheriff was called as a witness and flatly contradicted this evidence. Thus we have the familiar circumstance of the trial judge believing the testimony of one witness and rejecting the evidence of another. Conflicts in the evidence are settled in the trial court. Further, it rather clearly appears that these alleged threats did not induce the plea of guilty, but that the plea was induced by the hope that defendant would be granted probation and not sentenced to the penitentiary.

Defendant's mother was active in his behalf. She interviewed the probation officer, a deputy district attorney, and the public defender or his deputy. She testified that the probation officer told her that he would recommend probation and that he did not believe the trial judge would send defendant to the penitentiary; that the deputy district attorney told her he would join in the recommendation for probation with strict supervision; that both attorneys told her that with these recommendations they believed probation would be granted, though one of them told her they were not binding on the trial judge and no one knew what his final decision would be; that she communicated the substance of these conversations to defendant and thought it best for him to plead guilty.

Probation for defendant was recommended but was denied. The probation officer, the attorneys, defendant's mother and defendant all guessed wrong, but no fraud, duress or misrepresentation was practiced on defendant to induce his plea. What was said in *In re Hough*, 24 Cal.2d 522, 150 P.2d 448, 454, in quoting from *People v. Schwarz*, 201 Cal. 309, 257 P. 71, should be controlling here: "There the defendant was led by the advice of his counsel to believe that he would get less punishment if he changed his plea to guilty than he would receive if he stood trial and was convicted. In this hope, however, he was disappointed. The court rightly held that with full knowledge of the consequences

which might follow he should not be permitted to speculate upon the action of the court.' "

Defendant relies strongly on the case of *People v. Savin*, 37 Cal.App.2d 105, 98 P. 2d 773, in which this court affirmed an order of the trial court granting the writ of error coram nobis. That order was affirmed because the case was a close one and we could not hold as a matter of law that there was a breach of judicial discretion on the part of the trial judge in granting the writ. In accordance with that ruling we hold in the instant case that there was no breach of discretion on the part of the trial judge in denying the writ.

The order is affirmed.

BARNARD, P. J., concurs.



75 Cal.App.2d 426

In re CLIPPINGER'S ESTATE.

BETHEL v. BREARTON et al.
Civ. 15395.

District Court of Appeal, Second District,
Division 2, California.

July 19, 1946.

Rehearing Denied Aug. 5, 1946.

Hearing Denied Sept. 16, 1946.

1. Trial ⇨398

Finding that by the term "trustees" the testator meant the directors of the home referred to in will and finding that the nine persons who were directors at the time of testatrix' death were the residuary beneficiaries as individuals, with no requirement that the funds should be used for the benefit of the home, were inconsistent.

2. Wills ⇨439, 440

The primary purpose of the interpretation of a will is to ascertain the testator's intent as disclosed by the language he has used, and such intention must be sought for and carried out. Probate Code, § 101.

3. Wills ⇨440, 441

Where an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which the will was made. Probate Code, § 105.

4. Wills ⇨494

Residuary clause in will leaving to the "trustees" of the order of the Eastern Star Home at designated place residue of testatrix' estate, evidenced testatrix' object to provide a fund for the use of the home and not to make a personal bequest to the persons who were trustees or directors of the home.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustees".

5. Wills ⇨488

Evidence showed that by bequest of residuary estate to trustees of the order of the Eastern Star at designated place, testatrix intended to provide a fund for the use of the home and not to make a personal bequest to persons who were trustees or directors of the home.

6. Wills ⇨455

Testatrix' intent and not the terminology used in will must prevail. Probate Code, § 101.

7. Wills ⇨448

A construction of a will preventing intestacy is to be favored over one that results in intestacy, but the court is without power to insert into the will by way of a construction some undeclared purpose which may be imagined to have been in testator's mind, though if the legal effect of the expressed intent is intestacy, it will be presumed that the testator designed that result. Probate Code, § 102.

8. Wills ⇨470

In the interpretation of will, the language used must be liberally construed with a view to carrying into effect what the will as a whole shows to have been the real intent of the testator.

9. Charities ⇨4

Under a bequest to the trustees of the order of the Eastern Star at a designated

place, the bequest was to the trustees of the home for the use and benefit of inmates of home, and fact that will did not provide that the estate should go to the institution for corporate purposes, did not militate against the validity of the trust.

10. Charities ⇨20(3)

Wills ⇨15

Under bequest of residuary estate to the trustees of the order of the Eastern Star Home at a designated place, the home which was an unincorporated charitable association was entitled to take under the will but where the death of the testatrix occurred within six months after the execution of the will, the home was entitled to only one-third of the residue of the estate, and the testator died intestate as to the remaining two-thirds. Probate Code, §§ 27, 41-43.

11. Charities ⇨34

A gift to a charitable institution is for the benefit of its inmates, and a devise to a society organized for a charitable purpose without a declaration of use to which the gift is to be put is given in trust to carry out the objects for which the organization was created

12. Charities ⇨23

If the founder of a charitable trust describes its general nature he may leave the details of the administration to be settled by the trustees.

13. Wills ⇨494

A bequest to the trustees of an institution is not a gift to them as individuals but the bequest goes to the institution itself.

14. Charities ⇨4, 18

A gift of residuary estate to the order of the Eastern Star Home at a designated place would not fail by reason of the absence of technical words creating a trust or the failure of the testatrix to name a trustee.

15. Trusts ⇨25(1)

Technical language is not necessary to the creation of a trust, and if it appears from the whole instrument that the property bequeathed is to be dealt with for the benefit of others, the court will affix to it the character of a trust and will impose

fiduciary duties upon the party receiving the property.

16. Charities ⇨18, 23

A charitable trust will not be permitted to fail for want of a legal trustee nor is it impaired by the failure of the donor to give directions for the expenditure of the income.

17. Charities ⇨47

When appointing a trustee to administer a trust where none has been designated by the testator or the donor, the court must determine the qualifications and capabilities of the appointee, whether he is legally required to be a resident of the state in which the appointment is made or whether the court may designate a resident of another state, and the amount and character of the security that will be required of him for the faithful performance of his duties.

18. Executors and administrators ⇨314(1)

The court is without power to make an order determining who may take under a will except on a petition for partial or final distribution or to determine heirship, and where petition of executor was for none of such purposes, an order made thereon purporting to direct the manner in which the estate should be distributed was void.

19. Appeal and error ⇨176

Where same counsel appeared in proceeding to determine heirship for both directors of Home and the Grand Chapter and filed separate objections for each in opposition and Grand Chapter was not referred to in findings or in decree appealed from and objections of directors as individuals were sustained and residue of estate was awarded to latter, Grand Chapter would be deemed to have concurred in appellee's objections to validity of order appealed from and to have abandoned any claim to any portion of the estate.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Nellie E. B. Clippinger, deceased, on petition by Clara L. Bethel, to determine heir-

ship which was contested by John L. Brearton and others and to which the Citizens National Trust & Savings Bank, executor, was made a party. From an adverse decree the petitioner appeals.

Reversed and remanded with directions.

Frank E. Gray, of Los Angeles, for appellant.

Michael F. Shannon, and Thomas A. Wood, both of Los Angeles, for respondents.

WILSON, Justice.

Decedent died December 13, 1943, at the age of 76 years. She left a holographic will dated June 25, 1943, in which, after giving directions concerning her funeral and burial and making some small personal bequests, she directed as follows: "Seventh: I give any balance there may be to the trustees of the Order of the Eastern Star Home at Rockford Illinois, in the names of Miss Elza Barker (deceased) who was an early member of Eastern Star Chapter No. 53, of Rockford, Illinois, and Mrs. Nellie Barker Clippinger a member of Acacia Chapter No. 21 of Los Angeles, California."

Since the will was executed less than six months prior to decedent's death, appellant, who is her half sister and her only surviving heir at law within the classification of section 41 of the Probate Code, on the assumption that said bequest was for a charitable use (Probate Code, §§ 41, 42, 43), filed a petition to determine heirship.

The nine directors of the Eastern Star Home of Rockford, Illinois, in their own behalf individually and personally and not in their capacity as directors and not in behalf of the home, filed objections to the petition asserting that by the terms of said provision in the will the testator bequeathed the residue of her estate to them "to have and to hold as tenants in common and not otherwise." The "Grand Chapter, Order of the Eastern Star of the State of Illinois, for the use and benefit of the Eastern Star Home at Rockford, Illinois," through the same counsel who appeared for said directors individually, also filed objections to said petition and prayed that the residue of the estate be distributed to said Grand

Chapter. No mention is made of the Grand Chapter in the findings or in the decree and presumably its petition was abandoned.

The court made findings of fact and entered a decree reciting that appellant is a half sister and heir at law of decedent and a legatee under the terms of said will; that she was not entitled to the distribution of any portion of the estate except the sum of \$25, which was bequeathed to her by the will; that by the residuary clause above quoted the true designation of the parties referred to therein is not "the trustees" but is "the directors of the Eastern Star Home of Rockford, Illinois"; that nine individuals named in the findings and in the decree (respondents) were, at the time of decedent's death, the directors of said home, and that they took as the residuary beneficiaries under said clause of the will "as individuals, as tenants in common." From said decree appellant has appealed.

[1] 1. Did the testator intend her estate to go to the institution or to the directors personally? The declarations in the findings and in the decree (1) that by the term "trustees" the testator meant the directors of the home and (2) that the nine persons who were directors at the time of her death were the residuary beneficiaries as individuals, with no requirement that the funds should be used for the benefit of the home, are inconsistent. If decedent intended that the estate should go to the home she did not intend it to pass to any person or persons without conditions for its use.

[2, 3] A will is to be construed according to the intention of the testator. (Probate Code, § 101.) The primary purpose of the interpretation of a will is to ascertain the testator's intent as disclosed by the language he has used (In re Estate of Henderson, 161 Cal. 353, 357, 119 P. 496; Estate of McCray, 204 Cal. 399, 402, 268 P. 647), and his intention must be sought for and carried out. In re Estate of Dwyer, 159 Cal. 664, 669, 115 P. 235. " * * * when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, * * *." Pro-

bate Code, § 105; *In re Estate of Marti*, 132 Cal. 666, 668, 61 P. 964, 64 P. 1071; *Kauffman v. Gries*, 141 Cal. 295, 299, 74 P. 846; *In re Estate of Farelly*, 214 Cal. 199, 203, 4 P.2d 948.

[4, 5] When we here consider the words or the circumstances separately, or the two conjointly, we find no difficulty in construing the will. The words evidence that the testator's object was to provide a fund for the use of the home and not to make a personal bequest.

Among the circumstances under which the will was made and which must be considered in aid of its construction are these: The testator was apparently alone in the world; she made no mention of her husband and it will be assumed that she was a widow; the only relatives mentioned are her half sister (appellant) and her half brother, to whom she bequeathed \$25 each and whom she described as "practically strangers to me," and a sister who died in 1929; the bequest now in question was made to the trustees of the home in Rockford, and it was made "in the names of Miss Elza Barker (deceased) who was an early member of Eastern Star Chapter No. 53, of Rockford, Illinois, and Mrs. Nellie Barker Clippinger," the testator; she directed that her body be buried in Rockford, and that the grave marker be purchased there; a bequest was made to the trustees of the cemetery for the upkeep of her grave. All these matters show clearly that her mind was centered in Rockford, and that she intended that her entire estate, except for minor personal bequests totaling \$200 in cash in addition to her trunk and personal effects, should pass to the Eastern Star Home maintained there. The employment of the words "in the names of" demonstrate that the bequest was to be a memorial to Miss Barker and herself.

[6] Since decedent bequeathed only \$25 each to her half brother and half sister because they were "practically strangers" to her, it would stretch credulity to the breaking point to conclude that she intended that the remainder of her estate, which is stated to be about \$17,500, should go to nine persons "as individuals, as tenants in common" who, as far as the record discloses, were

complete strangers to her. She no doubt was unaware of the fact that the persons in charge of the home were designated as directors and not as trustees, but the intent and not the terminology will prevail in the construction of the will. The fact that she referred to them as trustees of the home is the clearest indication that she intended the home and not the individuals to succeed to her property.

No indication appears in the will, nor can any inference be drawn from the language used by the testator, that decedent intended her estate to go to respondents individually without constraint upon the manner in which the proceeds should be used. The construction placed on the will by the trial court would defeat her manifest purpose that the memory of Miss Barker and herself should be perpetuated among the inmates of the home who were intended to be the recipients of her bounty. She obviously had in mind a benefit to the home and the amelioration of the condition of those who were cared for therein.

[7, 8] While a construction of a will preventing an intestacy is to be favored over one which results in an intestacy (Probate Code, § 102; *In re Estate of Mallon*, 34 Cal.App.2d 147, 153, 93 P.2d 245), nevertheless the court, in pursuing its duty to ascertain a testator's intention, is without power to insert into the will by way of construction "some undeclared purpose which may be imagined to have been in his mind" (*In re Estate of Spreckels*, 162 Cal. 559, 567, 123 P. 371, 374, and if the legal effect of the expressed intent is intestacy it will be presumed that the testator designed that result. It is elementary that in the interpretation of wills the language used must be liberally construed with a view to carrying into effect what the will as a whole shows to have been the real intent of the testator. *In re Estate of Hoytema*, 180 Cal. 430, 432, 181 P. 645.

To read into a will under which the estate is bequeathed to the trustees of a charitable institution an intent that it should go to unnamed, unknown and unthought of individuals, without restriction upon the use of the funds, would render the rules of construction of wills as uncertain as the an-

swer obtained by a maiden as she plucks petals from a daisy, murmuring meanwhile, "He loves me, he loves me not."

The cases cited by respondents do not sustain their personal claim to a distribution of the estate. In *O'Donnell v. Murphy*, 17 Cal.App. 625, 120 P. 1076, the decedent stated in her will that it was her desire to erect a suitable memorial to her husband in Golden Gate Park but that there was some doubt as to whether a donation for that purpose would or would not be considered a charity or an unlawful trust and would be set aside; for that reason she had abandoned the idea. She bequeathed to Adolph B. Spreckels and R. H. Lloyd, two of the park commissioners of the City and County of San Francisco, the sum of \$200,000. The language of the will was unambiguous and expressly stated that she did not intend to create a trust. The designation of the devisees as park commissioners was merely an identification of the individuals and did not indicate any intent on the testatrix' part that they should take the money as trustees. She no doubt had confidence in the men and was satisfied that they would not appropriate the money to their own use but would, of their own accord, erect the desired memorial, but there are no words tending in the slightest to create a trust or to direct the purpose for which the money should be expended. In *Re Estate of Ward*, 125 Cal.App. 717, 14 P.2d 91, 92 the testator bequeathed a sum of money "to the person who at my death shall be the pastor in charge of St. Patrick's Roman Catholic Church * * * to be used by such person to procure masses to be said for the repose of my soul." This was held to be a personal bequest to the pastor without direction as to the places in which or the persons by whom the Masses should be said, and that the testator did not intend to impose any obligation on the pastor other than to see that the Masses were said. He was not required to go beyond his own efforts to fulfill the obligation—there was no trust by reason of the fact that the obligation imposed upon the pastor did not go to the use and disposition of the money. In *Flood v. Ryan*, 220 Pa. 450, 69 A. 908, 22 L.R.A., N.S., 1262, 13 Ann.Cas. 1189, the testator gave his estate to a church and

a charitable institution and provided that if he died within 30 days after the execution of the will he bequeathed his residuary estate to the Most Rev. P. J. Ryan, Archbishop of Pennsylvania, absolutely. This was held to be a personal bequest to the archbishop, and not a trust, and that he took the estate as an individual. In testifying in court he stated that he was morally bound to use the money as the testator had intended it to be used if he had survived more than 30 days after the execution of the will, but the court held that the commendable mental attitude of the archbishop did not create a trust. In *Re Estate of Robinson*, 63 Cal. 620, a sum of money was left "to the mayor, common council and commonalty of the City of San Francisco" in trust to be invested and the interest thereon paid out to the destitute women and children of the city in such manner as the mayor and common council might deem proper and beneficial. This was held to be a valid bequest for charitable purposes. These cases show that when a testator intends to create a trust the courts so hold and when a personal bequest is made a trust is not imposed—the testator's intent is found and made effective.

The vice of respondents' position, as well as of the decree, is disclosed by the unusually frank statement in their brief that they "are not, under the terms of the will here involved, called upon to use the gift for a charitable purpose. It is an outright gift to the trustees without restriction and without limitation. The trustees may dispose of the property in any manner that they see fit." Such is the result, as we have already pointed out, that would follow the affirmance of the decree.

The construction placed on the will by the trial court is totally at variance with the benevolent intention of decedent. The decree that the estate, contrary to her wishes, should go to individuals without any direction or safeguard as to the purpose for which the property is to be used cannot be sustained.

[9,10] 2. The bequest to the trustees of the home was for the use and benefit of its inmates. The fact that the will does not provide that the estate shall go to the insti-

tution "for corporate purposes" does not, as argued by respondents, militate against the validity of the trust. By reason of the finding that respondents as individuals were entitled to the estate it was unnecessary for the court to find and it did not find whether the Eastern Star Home is or is not a charitable organization. However, it is referred to and treated throughout the briefs as an unincorporated charitable association. As such it is entitled to take under the will. Probate Code, § 27; In re Estate of Winchester, 133 Cal. 271, 274, 65 P. 475, 54 L.R.A. 281. But the bequest to it is subject to the inhibitions of sections 41, 42 and 43 of said code. The death of the testator having occurred within six months after the execution of the will, the home is entitled to only one third of the residue of the estate, and the testator died intestate as to the remaining two thirds.

[11, 12] A gift to a charitable institution is for the benefit of its inmates (In re Estate of McDole, 215 Cal. 328, 332, 10 P. 2d 75; In re Estate of DeMars, 20 Cal.App. 2d 514, 516, 67 P.2d 374), and a devise to a society organized for a charitable purpose without a declaration of the use to which the gift is to be put is given in trust to carry out the objects for which the organization was created. In re Estate of McDole, supra, 215 Cal. at page 334, 10 P.2d at page 77 and cases cited; In re Estate of Henderson, 17 Cal.2d 853, 855, 857, 112 P.2d 605. If the founder of a charitable trust describes its general nature he may leave the details of the administration to be settled by trustees. Russell v. Allen, 107 U.S. 163, 167, 2 S.Ct. 327, 27 L.Ed. 397, 399. In the case last cited the institution for which the trust was created was neither organized nor incorporated during the lifetime of the donor.

[13] A bequest to the trustees or to the treasurer of a university or of an institution is not a gift to them as individuals but the bequest goes to the university or the institution itself. New York Institution for the Blind v. How's Ex'rs, 10 N.Y. 84, 91; Trustees of University of Georgia v. Denmark, 141 Ga. 390, 81 S.E. 238, 241; Morgan v. Durand, 51 Misc. 523, 101 N.Y. S. 1002, 1008; In re Durand, 56 Misc. 235,

107 N.Y.S. 393, 398; Manice v. Manice, 43 N.Y. 303, 387; Currin v. Fanning, 13 Hun., N.Y., 458, 461; In re Gray's Estate, 81 Misc. 79, 142 N.Y.S. 1067, 1069; Hornbeck's Executor v. American Bible Society, 2 Sandf.Ch., N.Y., 133, 135, 139. A devise for "the building of a new church house" is a gift to the church (Kelley v. Welborn, 110 Ga. 540, 35 S.E. 636, 637) and a bequest to the consistory of a church is to the church. Consistory, etc., v. Brandow, 52 Barb., N.Y., 228 233. A bond or a promissory note in favor of "the standing committee" of a society or in favor of the directors of a company is in legal effect made to the society or the company. New York African Society v. Varick, 13 Johns., N.Y., 38; Bayley v. Onondaga, etc. Co., 6 Hill, N.Y., 476, 477, 41 Am.Dec. 759; Newport Mechanics' Mfg. Co. v. Starbird, 10 N.H. 123, 125, 34 Am.Dec. 145.

[14] 3. The trust will not fail by reason of (a) the absence of technical words creating the trust, or (b) the failure of the testator to name a trustee. The failure of decedent to name a trustee or to express clearly her intention to create a trust does not destroy the effect of her intent so to do. It is the duty of the court to ascertain the intention of the testator, and in performing that duty it should disregard the fact that the will does not name a trustee or use the words "upon trust." Estate of McCray, 204 Cal. 399, 402, 268 P. 647; Taber v. Bailey, 22 Cal.App. 617, 620, 135 P. 975; Morgan v. Durand, 51 Misc. 523, 101 N.Y.S. 1002, 1006.

[15] Technical language is not necessary to the creation of a trust, and if it appears from the whole instrument that the property bequeathed is to be dealt with for the benefit of others, the court will affix to it the character of a trust and will impose fiduciary duties upon the party receiving the property. Colton v. Colton, 127 U.S. 300, 310, 8 S.Ct. 1164, 32 L.Ed. 138, 142; In re Estate of Shaw, 198 Cal. 352, 361, 246 P. 48; In re Estate of McDole, 215 Cal. 328, 332, 10 P.2d 75.

[16] A charitable trust will not be permitted to fail for want of a legal trustee (In re Estate of Upham, 127 Cal. 90, 94, 59 P. 315; In re Estate of DeMars, 20 Cal.App.2d

514, 516, 67 P.2d 374; Estate of McDole, supra; In re Estate of Winchester, 133 Cal. 271, 274, 65 P. 475, 54 L.R.A. 281); nor is it impaired by the failure of the donor to give directions for the expenditure of the income. In re Estate of Budd, 166 Cal. 286, 289, 135 P. 1131; Estate of DeMars, supra; 2 Restatement, Trusts, sec. 397, p. 1190, and comments f and g under said section, p. 1194.

[17] When appointing a trustee to administer a trust where none has been designated by the testator or the donor, the court must determine, among other things, the qualifications and capabilities of the appointee, whether he is legally required to be a resident of the state in which the appointment is made or whether the court may designate a resident of another state, and the amount and character of the security that will be required of him for the faithful performance of his fiduciary duties in carrying out the purposes of the trust.

4. The effect of the previous order instructing and directing the executor. Several months prior to the filing of appellant's petition the executor of the estate filed a petition for instructions reciting that it had been ascertained that there was no official body of said home known as trustees; that the Grand Chapter, Order of Eastern Star of the State of Illinois, was incorporated as a nonprofit, eleemosynary corporation or lodge, and that the Eastern Star Home at Rockford was one of the charitable institutions operated and maintained by it for the benefit of elderly or dependent members of the order; that the executor believed that decedent intended by said bequest to give the residue of her estate to said Grand Chapter. After a hearing the court made an order dated and filed September 5, 1944, finding and instructing the executor that such was decedent's intent and directing that upon distribution of the estate the residue should be distributed to said Grand Chapter for the use and benefit of said home.

[18] Respondents' contention that said order is void and of no effect must be sustained. The court is without power to make an order determining who may take under a will except upon a petition for partial or final distribution to determine

heirship. The petition of the executor was not for any of such purposes and the order made thereon purporting to direct the manner in which the estate should be distributed is void. In re Estate of Thramm, 67 Cal.App.2d 657, 659, 155 P.2d 119.

[19] Since the same counsel appeared in the instant proceeding for both the directors of the home and the Grand Chapter and filed separate objections for each in opposition to appellant's petition which is now under consideration, and since the Grand Chapter is not referred to in the findings or in the decree appealed from and the objections of the directors as individuals were sustained and the residue of the estate was awarded to the latter, the Grand Chapter will be deemed to have concurred in respondents' objections to the validity of the order of September 5, 1944, and to have abandoned and relinquished its claim, if any it had, to any portion of the estate.

The decree appealed from is reversed with directions to the trial court (1) to make and file findings of fact as follows: that decedent intended that the residue of her estate should go to the Eastern Star Home of Rockford, Illinois; that said home is a charitable institution and that by reason thereof the bequest fails as to two thirds of said residue and decedent died intestate as to said interest; that said home shall receive one third of said residue and appellant Clara Louise Bethel shall receive the remaining two thirds; (2) to make and file conclusions of law in accord with said findings; (3) to enter a decree and to distribute the estate in accord with said findings and with this opinion; (4) to strike from the findings of fact and conclusions of law now on file in the superior court all matter in conflict with the findings herein directed to be made or in conflict with this opinion; (5) to appoint a legally qualified trustee or trustees to whom, upon the furnishing of appropriate security, shall be distributed the one-third share of the residue of the estate to which said home is lawfully entitled.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

75 Cal.App.2d 557

DUARTE et ux. v. POSTAL UNION LIFE
INS. CO.

No. 12950.

District Court of Appeal, First District,
Division 1, California.

Aug. 1, 1946.

Rehearing Denied Aug. 31, 1946.

Hearing Denied Sept. 19, 1946.

1. Appeal and error ⇨930(1)

On appeal by one contending that jury's verdict was not supported by the evidence, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible.

2. Appeal and error ⇨989

When a verdict is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

3. Appeal and error ⇨996

Where two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury or the trial court.

4. Appeal and error ⇨931(1)

On appeal, all conflicts must be resolved in favor of respondents and all reasonable and legitimate inferences must be indulged in to support a finding or judgment.

5. Pleading ⇨398

In action against insurer to recover amount paid for single-premium fully-paid endowment policies because policies were not issued, alleged variance between allegations and proof was not fatal where answer containing numerous special issues showed that defendant could not have been misled. Code Civ.Proc. § 469.

6. Appeal and error ⇨1170(3)

Where trial occupied many days and all issues appeared to have been understood by the parties, appellate tribunal is not inclined to decide matter upon tech-

nical question of pleading. Const. art. 6, § 4½.

7. Insurance ⇨92

Evidence sustained finding that general manager and member of board of directors were in complete charge of legal reserve life insurance company and that they authorized agent to accept building and loan certificates and to issue binding receipts for single-premium fully-paid endowment policies, and hence a contract which agent had with company limiting his authority was not controlling.

8. Insurance ⇨198(2)

Where agent, under instructions from general manager and member of board of directors who were in complete charge of insurer, secured building and loan certificates by promising certificate owners single-premium fully-paid endowment policies as evidenced by binding receipts, that such agreement could not properly be made by an insurer under the Insurance Code did not relieve insurer from obligation to return to owners consideration received upon failure to deliver such policies.

9. Principal and agent ⇨158

A principal who puts an agent in position that enables agent, while apparently acting within his authority, to commit a fraud upon third persons, is subject to liability to such third persons for the fraud.

10. Corporations ⇨1

Generally, a corporation is an entity separate from its stockholders, with distinct liabilities and obligations, but when necessary to redress fraud and protect third persons' rights, or prevent a palpable injustice, law and equity will interfere and cast aside legal fiction of corporate existence and deal with corporation and stockholders as identical entities with identical duties and obligations.

11. Judgment ⇨713(3)

A finding in prior case that corporation was the alter ego of an insurance company could not be considered as res judicata where there were different parties plaintiff and a different record.

12. Corporations ⇐1

Before courts will disregard corporate entity of one corporation and treat it as the alter ego of another, even though the other may own all the stock of the former, it must further appear that there is such a unity of interest in ownership that individuality of the one corporation and the owner or owners of its stock has ceased, and further that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice.

13. Corporations ⇐1

Before court will disregard corporate entity of one corporation and treat it as the alter ego of another, bad faith in one form or another must be shown.

14. Insurance ⇐32

Evidence sustained finding that a corporation was the alter ego of insurance company rendering company liable for acts of the corporation in obtaining building and loan certificates in consideration of single-premium fully-paid endowment policies which were never delivered.

15. Trial ⇐396(3)

Insurer could not claim that findings that insurer defrauded insured were without support in the record, where judgment was awarded to insured on contracts, and findings as to fraud merely explained manner in which transaction upon which action was based was carried out.

16. Appeal and error ⇐1008(1)

In action to recover money paid for single-premium fully-paid endowment policies which were never issued to plaintiffs, trial judge who had opportunity of observing and hearing the plaintiffs for many hours on the witness stand was qualified to make finding that plaintiffs had little education.

17. Witnesses ⇐267

The extent of cross-examination of a witness is largely within sound discretion of trial judge.

18. Witnesses ⇐269(2)

Where insurer's agent was called as witness by insured who sued to recover money paid on endowment policies which

were never issued, but insured limited their direct examination to instructions given the agent by manager and member of board of directors of insurer, and insured did not question agent as to his conversations with insured upon direct examination, trial court properly refused to permit insurer to cross-examine the agent regarding such conversations, especially where there was nothing to prevent insurer from calling agent as insurer's witness and asking him regarding such conversations.

19. Appeal and error ⇐882(17)

Defendant could not complain of court's finding whose language was the same as the language set forth in affirmative defense in defendant's answer.

20. Insurance ⇐198(6)

If plaintiffs received anything of value from insurance company or its agents, or if plaintiffs were legally chargeable with loss of stock obtained by them, plaintiffs would not be permitted to recover the full amount of consideration paid for endowment policies which were not delivered.

21. Appeal and error ⇐110

An order denying defendant's motion for new trial was nonappealable.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Frank Henry Duarte, also known as Frank H. Duarte, and as F. H. Duarte, and his wife, against the Postal Union Life Insurance Company to recover a sum of money and interest under binding receipts executed by defendant's agent by terms of which defendant agreed to issue to plaintiffs single premium fully paid two-year endowment policies, or to return to plaintiff the premiums paid. From a judgment for plaintiffs, and from an order denying defendant's motion for a new trial, defendant appeals.

Judgment affirmed in part and reversed in part with directions, and appeal from order dismissed.

Aiken, Kramer, Aiken & Baer, of Oakland (Walker, Adams & Duque, of Los Angeles, Markell C. Baer, of Oakland, and

Irving M. Walker, of Los Angeles, of counsel), for appellant.

William H. Hollander, Jesse G. Benson, Lewis E. Lercara, and Alfred C. Skaife, all of Oakland, for respondents.

SCHOTTKY, Justice Pro Tem.

Plaintiffs, Frank H. Duarte and Helen Hill Duarte, his wife, brought an action against defendant, Postal Union Life Insurance Company, to recover the sum of \$23,368, plus interest. The complaint was based upon two so-called binding receipts dated March 14, 1935, executed by one Green as the agent of defendant, by the terms of which receipts defendant agreed to issue to plaintiffs single premium fully paid two year endowment insurance policies in the aggregate amount of \$23,368, or to return to plaintiffs the premiums paid. Plaintiffs seek the return of said sums because the endowment policies were not issued. The answer of defendant denied all of the material allegations of the complaint, including the allegation that Green was acting as the agent of defendant and also set forth affirmative allegations and defenses to which reference will hereafter be made. The cause was tried before the court without a jury, and judgment was entered in favor of plaintiffs for \$15,077.51, being the sum of \$9,207 with interest at 7 per cent from March 14, 1935, the date of the receipts, to January 11, 1945, the date of the judgment. This is an appeal from the judgment and from the order denying defendant's motion for a new trial.

The fourth amended complaint was based upon the binding receipts which recite that Frank H. Duarte in one cause of action, and Helen Hill Duarte in the other, have paid certain sums of money in connection with applications to defendant Postal Union Life Insurance Company for the issuance by that company of certain insurance policies. It is alleged that the sum of \$13,368 was paid by Mr. Duarte and the sum of \$10,000 by Mrs. Duarte, which sums were full premiums for the policies to be issued. The receipts were attached to the complaints as exhibits and each contained a provision that "If the Company declines to issue the insurance applied for, the con-

sideration received will be returned on surrender of this receipt."

Each receipt was signed by "H. B. Green, Agent." The complaint alleged that H. B. Green was a life insurance agent of defendant, duly licensed under the provisions of section 633a of the Political Code; that he executed the receipts and received from plaintiffs sums aggregating \$23,368, and that he was acting within the scope of his authority as agent. The complaint further alleges that plaintiffs did everything that was required to be done by them under the provisions of said receipts, that they have at all times been ready, willing and able to surrender said receipts to defendant upon payment to them of the sum referred to in the receipts, but that the defendant has failed to deliver the insurance policies and has failed to make repayment of the sums referred to in the receipts.

Defendant in its answer denies that either of the plaintiffs paid any money or consideration to it, or that Green, acting as agent of the defendant, received any money or other consideration from plaintiffs or executed the receipts. Defendant further denies that plaintiffs have performed the things to be done by them or that plaintiffs have been ready or able to surrender the receipts. Defendant further denies that it has failed or refused to issue the policies of life insurance and alleges that it has never received any applications or premiums therefor. Defendant then alleges that Green, Bouer and Malone, doing business as Postal Underwriters, Inc., with intent to defraud plaintiffs, and without the knowledge of defendant, induced plaintiffs to deliver to them Mercantile Building and Loan certificates of the face value of \$23,368, and of the market value of \$9,759.91; that Green, Bouer and Malone sold these certificates for \$9,759.91 and retained the money to their own use; that Green, Bouer and Malone did not intend that plaintiffs should receive the life insurance policies or the repayment of the money and that subsequently plaintiffs caused the arrest and prosecution of the three for embezzlement and grand theft of said certificates with the result that they were convicted and sentenced to San Quentin.

Defendant in its 29 page answer also sets up numerous affirmative defenses. The substance of these is that the agreement or agreements that plaintiffs entered into with Green were without the authority or knowledge of defendant; that defendant received no consideration from plaintiffs and that said agreements were for the sole benefit of plaintiffs, Green and Postal Underwriters, Inc.; that plaintiffs received 4 payments of \$210.31 each and 976 shares of stock of defendant under said agreement; that said purported agreement was ultra vires, against public policy, and in violation of the Insurance Code; that said action was barred by subdivision 1 of section 339 of the Code of Civil Procedure.

The court found in substance as follows:

That on March 14, 1935, plaintiffs assigned to defendant investment certificates of the face value of \$23,368 and of the market value of \$10,048.24; that this assignment was made pursuant to the agreements evidenced by Exhibit "A" and Exhibit "B" attached to the fourth amended complaint—that is to say, the receipts delivered by Green to plaintiffs and signed "H. B. Green, Agent"; that the defendant did not issue the life insurance policies to plaintiffs and that plaintiffs had offered to surrender the receipts.

That Green was a life insurance agent of defendant; that as such agent, and acting within the scope of his authority, he received the certificates and executed the receipts; that plaintiffs fully performed all things required of them under the provisions of the receipts and offered to return the receipts to defendant upon the return to plaintiffs of the consideration delivered by plaintiffs, but defendant had failed and refused to return such consideration or its money equivalent.

That the policies called for by said receipts were fully paid up policies in the respective sums of \$13,368 and \$10,000; that due demand had been made upon defendant and there was due from defendant to plaintiff the market value of the certificates, to-wit, the sum of \$10,048.24.

In connection with Paragraph IV of the amended answer to the fourth amended complaint, it found that Green, Bouer and

Malone with intent to defraud plaintiffs, induced plaintiffs to deliver to them the certificates; that Green sold the certificates and delivered the proceeds to Underwriters; that Underwriters was the alter ego of defendant; that Underwriters was the duly authorized agent of defendant to receive "said funds"; that the acts of Green, Bouer and Malone were "with the consent and knowledge of the defendant through its officers and agents"; that Green, Bouer and Malone never intended that plaintiffs should receive life insurance policies or the repayment of money as promised; that Green, Bouer and Malone were indicted and convicted on fifteen charges of grand theft and embezzlement in fifteen transactions identical in form involving the purchase of pass-books (certificates); that defendant received the original applications for insurance in connection with which the receipts were issued; that defendant received premiums and considerations for the issuance of such insurance policies through the receipt by Green and Underwriters of the certificates and the money for which the certificates were sold; that on the 25th day of May, 1935, and at all times subsequent thereto defendant refused to issue the policies of insurance referred to in the receipts and that each of the plaintiffs had little education and that Mrs. Duarte was impaired in her hearing.

That plaintiffs transferred the certificates to defendant under and pursuant to the written agreement evidenced by the receipts; that such receipts were executed with the authority, knowledge and consent of defendant and were ratified and confirmed by it.

That, in addition to the promises of defendant contained in the receipts, Green agreed that the defendant would pay plaintiffs ninety per cent of the face value of their certificates; that said sum would be paid in monthly payments of one per cent for a period of two years and the balance at the end of two years, and that said payments would be secured by the life insurance policies called for by the receipts.

That there was "no novation and no new agreement" on the 14th day of April, 1935;

that Green never intended that plaintiffs should receive the insurance policies referred to in the receipts; that plaintiffs did not discover "said fraud * * * until the end of April or in May of 1936, when defendant sent premium notices to plaintiffs"; that the repurchase contract was executed by plaintiffs but was part of a design on the part of defendant to mislead plaintiffs and obtain their certificates; that said repurchase contract is signed by Underwriters, the alter ego of defendant; that plaintiffs did not know until 1936 that defendant and Underwriters were not one and the same corporation; that Green on April 14, 1935, delivered to plaintiffs 976 shares of the stock of defendant, but said stock was the personally owned stock of B. D. Malone; that said stock was subsequently stolen from plaintiffs by their attorney, one Lenahan; that its transfer from Malone to plaintiffs did not cause defendant any loss; that said stock did not have a value in excess of about \$3 per share; that as part of the scheme of defendant to defraud plaintiffs, Green on April 14, 1935, took plaintiffs' application for policies in the respective amounts of \$15,000 and \$6000; that such policies were delivered but were "void documents" because the first premiums had not been paid; that the delivery of these policies was calculated by defendant to, and did, cause plaintiffs to believe until May of 1936 that they had received fully paid two year endowment policies as promised; that plaintiffs received four monthly payments of \$210.31 from Underwriters and should account therefor; that the terms of the repurchase agreement have never been carried out by Underwriters except as to the payments aforesaid; that there was a settlement of all affairs between Underwriters and defendant and mutual releases executed between them.

That in addition to the authorization contained in his written agency contract Green was authorized by Malone, the general manager of defendant, to and he did make with various persons over a period of one and one-half years the same type of transaction that he made with plaintiffs and it was on fifteen of these similar transactions that

Green, Malone and Bouer were convicted of grand theft and embezzlement.

That Green inserted in the receipts the word "full" in place of the word "first" but was authorized by defendant to do so; that defendant and Green had, or should have had, full knowledge of insurance laws, rules and regulations but plaintiffs did not have; that plaintiffs did know that they could not withdraw money on their certificates and that Mercantile Building & Loan Association was in default in the payment of interest; that the premium ordinarily required for the policies called for by the receipts was \$22,548.85, which fact was known to defendant but unknown to plaintiffs.

That the causes of action stated in the fourth amended complaint are not barred by subdivision 1, section 339 of the Code of Civil Procedure.

That B. D. Malone was the general manager of defendant and had full power and authority to do each of the acts mentioned in the findings.

[1-3] Defendant in its 100 page opening brief makes numerous contentions, chief among which is a vigorous and forceful attack upon the sufficiency of the evidence to support the judgment. Before discussing the specific contentions of defendant it is well to quote from *Juchert v. California Water Service Co.*, 16 Cal.2d 500, at page 503, 106 P.2d 886, at page 888: where our Supreme Court said: "As is always true on such appeals, all conflicts must be resolve in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183; *Tread-*

well v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483."

With this familiar and well settled rule in mind, we shall summarize briefly the factual situation as shown by the record in this case and the inferences which may reasonably be drawn therefrom.

Plaintiffs are husband and wife, and at the time here involved were of the ages of 51 and 53 respectively. The wife's hearing was impaired, and the court found that they were both of little education. The husband was a mechanic and they operated a garage at Livermore.

Defendant is a legal reserve life insurance company. Early in November, 1934, B. D. Malone and F. J. Bouer acquired the stock of defendant, and on November 10, 1934, B. D. Malone was made general manager and given "general supervision, direction and control of the business" of defendant (rep. tr. p. 443). Malone continued to be general manager until November 29, 1935, and Bouer was a member of the board of directors until December 29, 1934. It is a fair deduction from the record that Malone and Bouer completely controlled and dominated the affairs of defendant during the time that Malone was general manager.

Early in December, 1934, Malone and Bouer incorporated the Postal Underwriters, Inc., but said corporation never held any organization meeting or elected any officers, but was formed to work in conjunction with the handling of the business of the defendant Postal Union Life Insurance Company, which Bouer and Malone owned and controlled. So close was the connection between the defendant Postal Union Life Insurance Company and the Postal Underwriters, Inc. (hereinafter referred to as "Underwriters"), that as found by the court and supported by the record, the office of Underwriters was a room in the building owned by defendant; its vice-president, T. J. Olsen, was in the employ of and paid by defendant; an employee of defendant received its mail; and its secretary and bookkeeper was the private secretary of B. D. Malone, general

manager of defendant. Underwriters had an insurance agency contract from defendant. It acquired the business of Empire Securities Company (which had had an insurance agency with defendant) and assumed its obligations, including its obligation to defendant for the premiums on the single-premium endowment policies which had been written by Green through Empire Securities. Green became an employee of defendant on December 7, 1934, at a salary of \$50 a week, and continued as such employee to May 31, 1935. He was employed as an insurance solicitor under a written contract and also as a "General Representative" in which latter capacity his duties consisted of finding agents who would solicit applications for insurance.

In December of 1934 the Insurance Department of the state told William A. Munster, the actuary of the defendant, who had charge of passing on applications for insurance and collecting premiums, that no more of the single-premium endowment policies were to be written by defendant, and that the defendant must promptly collect the premiums on such policies as had been written and in connection with which the premiums had not been paid over to defendant by Empire Securities.

About December 15, 1934, Bouer told Green the Insurance Department was insisting that some \$48,000 of two-year endowment policies which Green had placed in Monterey County had to be removed as Postal Union obligations. Bouer asked Green to go out and exchange stock of the defendant for these policies, and asked him if he could exchange notes or contracts of Underwriters secured by Postal Union stock for these policies. In February, 1935, Malone confirmed Bouer's instructions and told Green to sell Underwriters' contracts and take life insurance on the purchaser of these contracts for the contract amount. Green was told to give the purchaser a "binding receipt" of defendant for the face amount of the policy until the contract with Underwriters was signed, and then to pick up the receipt.

Sometime in February, 1935, Green called on plaintiffs. They testified that they were the owners of pass-book certifi-

cates in the sums of \$13,368 and \$10,000 respectively, and that Green introduced himself as a "special representative" of the defendant, showing to plaintiffs cards and letters which had been furnished to him by defendant, and told plaintiffs that defendant was prepared to purchase their certificates for 90 cents on the dollar; that Green offered to give them fully paid up insurance policies for the amount stated in the pass-books, and "a contract that would pay us one per cent per month, and to run for two years" and "at the end of the two years, this full amount of our face value—of our 90% of our face value * * *." Green urged plaintiffs to inquire of the Insurance Commissioner about the financial standing of defendant, which Mrs. Duarte did, and was told that it was "sound." On or about March 14, 1935, plaintiffs accepted the offer, and endorsed in blank and handed to Green their certificates. At the same time Green gave plaintiffs the binding receipts, which stated that the full premium had been paid (which was the same amount as the face value of the pass-books); that if the policies were not written, plaintiffs, upon surrender of the receipts, were to receive back the consideration which they had given to secure the policies. There was nothing in the receipts showing what type of policy was to be issued. At the same time plaintiffs signed applications for the insurance. The applications never came to the attention of Munster, the actuary for defendant. The certificates were immediately sold by Green when he received them from plaintiffs for \$9,759.91. Green retained \$283 and turned over the balance to Underwriters.

On March 22, 1935, plaintiffs sent defendant a wire to the effect that Green had not returned with the two policies. Munster wrote Bouer that defendant had not received the applications, and, receiving no answer from Bouer, referred the matter to Malone, who told Munster the applications "would be coming in."

On April 14, 1935, Green delivered to plaintiffs 976 shares of stock of the defendant company, issued in the names of plaintiffs, which belonged to Malone and Bouer. At the same time a contract, which had

been signed by Underwriters, was executed by plaintiffs, whereby Underwriters agreed to purchase the 976 shares of defendant's stock, and to pay 24 monthly payments of \$210.31 each, and a final payment, that would bring the total payment to 90% of the face value of plaintiffs' certificates. Early in May, 1935, Green told plaintiffs that defendant did not wish to write so much insurance on Mrs. Duarte, and that they would write \$15,000 on Mr. Duarte and \$6000 on Mrs. Duarte. New applications were made out for policies in these amounts, but they were for 31 annual premium policies. The old receipts were not taken up. On May 9, 1935, plaintiffs executed to Underwriters an assignment of the insurance policies to be issued under the second applications. That same month defendant issued the policies to plaintiffs; and on May 18, 1935, Munster forwarded the policies to Underwriters, with a letter stating that definite arrangement for premium payments should be made before releasing the policies to Green. The plaintiffs received the policies, and signed receipts for them, but no demand was made upon them for payment of the premiums on said policies. Between April and September, 1935, plaintiffs received four of the monthly payments of \$210.31 from Underwriters provided for in the repurchase contract, but early in 1936 plaintiffs wrote defendant saying that they needed their money. Munster replied that the check which they wrote about was not due from defendant, that their letter should have been addressed to Underwriters, which was a different company, and that their letter had been turned over to Underwriters. He also informed them that their premiums on the insurance policies which had been issued to them had not been paid, and that under the circumstances the assignments were not effective. On February 3, 1936, plaintiffs wrote Underwriters requesting it to pay the delinquent installments due under the repurchase contract. About May 1, 1936, plaintiffs received notice of the annual premium due on their policies, and they replied that their policies were paid up policies. Munster answered that plaintiffs' policies were not in force because no premium had been paid. This action followed,

to compel the return of the consideration, under the terms of the "binding receipts."

Other facts shown by the record will be set forth in our discussion of the various contentions. Defendant's first contention is that there is a fatal variance between the allegations of plaintiffs' complaint and the proof. Defendant argues that the record does not show that the certificates were given in consideration of the receipts, but does show that there was a contract for the sale by plaintiffs and a purchase by Green of plaintiffs' certificates at a price of 90% of the face value of the certificates; that the certificates were not delivered primarily for the purpose of securing or as consideration for any insurance policies; that the insurance policies were a mere incident of the transaction between plaintiffs and Green; that by the subsequent assignments to Underwriters of the policies which were issued, which assignments were made without plaintiffs receiving any explanation as to why they were to be made, it is obvious that plaintiffs intended to part with all title to the insurance policies and that plaintiffs looked to the repurchase contract with Underwriters as the source of the payment of the purchase price of their certificates. In other words, defendant contends that the proof showed that plaintiffs surrendered their certificates in order to secure the payments promised by the repurchase contract, and that *that* contract was the consideration for the delivery of their certificates to Green; and that therefore there was a fatal variance in the pleadings (which alleged that the certificates were given as consideration for the receipts) and the proof (which defendant claims showed that the certificates were given in consideration for the repurchase contract); also that the court's finding that the certificates were given in consideration for the receipts is, for the same reason, not in conformity with the proof.

[4] If we were compelled by the record to conclude that the evidence could be given no other construction than the one defendant has given it, we might agree with this contention. However, under the familiar rule as to the function of an appellate

tribunal, all conflicts must be resolved in favor of a respondent and all reasonable and legitimate inferences must be indulged in to support a finding or judgment. The allegation in the complaint is supported by the testimony of Mr. Duarte, who testified that Green said "he was authorized to offer us 90 per cent of the face value of these books, *and in return* give us a policy for my wife, in the amount of \$10,000, and one for myself in the amount of \$13,000, payable in two years—a fully paid up policy in two years"; that on March 14, 1935, they turned over their pass-books to Green and received the "binding receipts" in return; that "that was the receipts we were given for our pass-books"; and that the "binding receipts" were attached to the applications for the insurance. It was not until a month later that the transaction took place about the stock, and then only after plaintiffs had complained to defendant that they had not received their policies. (*Italics added*)

[5] As pointed out by plaintiffs, section 469 of the Code of Civil Procedure provides that "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits," and the voluminous answer containing numerous special defenses filed by defendant shows that defendant could not have been misled or prejudiced by the allegations of the complaint.

[6] Furthermore, where, as here, the trial of a case has occupied many days and all the issues appear to have been understood by the parties, an appellate tribunal is not inclined to decide the matter upon a technical question of pleading. We are mindful of section 41½ of Article VI of our state Constitution which provides that "No judgment shall be set aside, or new trial granted, in any case, on the ground of * * * improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opin-

ion that the error complained of has resulted in a miscarriage of justice."

Defendant's second contention is that the findings that Green was the agent of defendant and acted within the scope of his authority in his transactions with plaintiffs is without support in the evidence.

The court found that Green was a life insurance agent of defendant, and that, acting within the scope of his authority, he received the certificates from plaintiffs and executed the binding receipts upon which plaintiffs' action is based. Defendant contends that this finding is not supported by the evidence; that the evidence shows that Green was acting outside his authority; that Green did not derive his authority to act for the defendant under his written contract, because his contract stated the types of policies Green was entitled to solicit and it did not include the single-premium endowment policies; furthermore, that after the Insurance Department told the company it was not to write any more single-premium endowment policies, it ceased to do so, and that Bouer instructed Green, in December, 1934, that he was not to take any applications for single-premium endowment policies. Therefore, defendant contends that Green was acting absolutely outside his authority in giving "binding receipts" covering this type of policy.

Furthermore, defendant argues that the employment of Green as a "special representative" did not authorize him to act for defendant in these transactions, because it is uncontradicted that his duties under this employment consisted solely of finding agents who would solicit applications for insurance.

Defendant also contends that the instructions received by Green from Bouer and Malone—to "see about raising the money [needed to complete a contemplated merger] anyway, pass-books, securities, cash * * *" and to sell Underwriters' contracts and take out insurance on the purchaser, give the purchaser a binding receipt and pick it up when the purchaser signed the contract—did not authorize Green to act for the defendant; that the defendant would derive no benefit there-

from, but would lose the insurance when the receipt was picked up; but that such a transaction would benefit Underwriters, and that therefore the instructions must have been given for the benefit of Underwriters, and not defendant.

Plaintiffs argue that it was not material that defendant should have obtained any benefit from the transactions, but that, in any event, the evidence shows that on December 18, 1935, all of the obligations of Underwriters to the defendant and the obligations of the defendant to Underwriters were cancelled and released from each to the other, and that thereby defendant received as a result of the pass-book transactions \$21,000 in cash and obtained practically all of the assets of Underwriters, which included the sum realized from the sale of the pass-books obtained from the plaintiffs.

Defendant also contends that the binding receipts themselves contained the provision that the receipt would not be valid for any purpose if any erasures or additions were made, and that where the printed receipt read "Received * * * the first premium," Green had crossed out the word "first" and written in the word "full."

Plaintiffs contend that an examination of the photostatic copy of the "binding receipt," which appears in their brief, will show that the crossing out of "first" and inserting the word "full" did not constitute an alteration within the meaning of section 1700 of the Civil Code, because it did not change the legal effect thereof; that the meaning of the words "full" and "first" in this instance is exactly the same, in view of the fact that there was only one premium contemplated.

Defendant argues, also, that the applications which were signed by plaintiffs for the policies they did not receive, as well as the policies issued to and received by plaintiffs, plainly stated that no statements or promises made by the person soliciting the policy should be binding on the company unless reduced to writing, and that therefore plaintiffs were clearly informed that Green had no authority to act for defendant in such a transaction.

Defendant cites *Toth v. Metropolitan Life Insurance Co.*, 123 Cal.App. 185, 11 P.2d 94, in support of the proposition that under Green's contract of employment he had no authority to bind defendant to issue the two-year endowment policies. It was there held that a mere soliciting agent had no authority to enter into a parol contract of insurance; also that where an applicant signed a written application which expressly provided that the soliciting agent had no right or authority to bind the company by any promises or purported oral agreements, the agent had neither actual nor ostensible authority to make a purported oral contract of insurance. The court said, 123 Cal.App. at pages 192, 193, 11 P.2d at page 96: "Defendant had the right to thus limit the authority of its soliciting agents and such a limitation of authority has been frequently upheld in this state. *Iverson v. Metropolitan Life Ins. Co.*, 151 Cal. 746, 751, 91 P. 609, 13 L.R.A., N.S., 856; 14 Cal.Jur., p. 460. A mere soliciting agent or other intermediary operating between the insured and the insurer has authority only to initiate contracts, but not to consummate them, and cannot bind his principal by anything he may say or do during the preliminary negotiations. 14 Cal.Jur. p. 457; *Browne v. Commercial Union Assur. Co.*, 30 Cal.App. 547, 554, 158 P. 765; *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 124, 138 P. 708, 52 L.R.A., N.S., 670. The evidence in the case at bar shows without contradiction that Thomas was only a soliciting agent. He therefore had no authority to make any contract of insurance, either oral or written; and, even if we assume that he attempted to make an oral contract to insure decedent, his lack of authority so to do would prevent such purported oral contract from being valid or effective. * * * Thomas, therefore, had neither actual nor ostensible authority to make the purported oral contract relied upon by appellant, and consequently no completed contract of insurance on the life of the decedent, either oral or written, was ever entered into by decedent and defendant. An insurer is not bound by representations or purported agreements made by an unauthorized agent. 14 Cal.Jur. p. 458; *Fidelity & Cas. Co. v.*

Fresno Flume & Irr. Co., supra [161 Cal. 466, 119 P. 646, 37 L.R.A., N.S., 322]."

Plaintiffs do not question the rule laid down in the *Toth* case, but plaintiffs contend that said rule is only applicable to the instant case if the factual situation pictured by defendant is the only one that can be sustained by the record. Plaintiffs argue that the record supports the finding that Green was the agent of defendant and acted within the scope of his authority in the transaction with plaintiffs.

[7] We believe that it may fairly be inferred from the evidence that Malone and Bouer were in complete charge of defendant corporation and that they instructed and authorized Green to accept the building and loan certificates of plaintiffs and to issue to them the binding receipts upon which the action is based. There is, therefore, in this case no question of an agent violating his instructions or exceeding his authority, but it is a case in which the agent is merely carrying out the instructions of those in charge of the affairs of defendant corporation. Under such circumstances the type of written contract that Green had with defendant corporation would not be controlling when it is clear from the record that he was given the instructions under which he had acted in his dealings with plaintiffs by Malone and Bouer, who were in charge of the corporation.

[8] Defendant argues further that Malone would have no power to authorize Green to enter into such an agreement with plaintiffs on behalf of the corporation because as general manager he could not authorize any act outside the usual course of business and beyond the powers usually reposed in general managers. However, the record shows that on November 10, 1934, Malone was made general manager and given "general supervision, direction and control of the business" of defendant and was given power to "employ and discharge employees, contract with and in all other respects deal in and with persons and properties of this Corporation as the best interests of this Corporation and the new management thereof shall require." It is evident from the manner in which the

affairs of defendant were conducted from that time on that the directors of defendant corporation and Malone interpreted this resolution to mean that Malone was to be in full and complete charge of all of the affairs of the corporation. It must be borne in mind that the defendant corporation was then in difficulties, that Malone and Bouer had acquired practically all of its stock and that thereupon the then general manager, Sam Sadowski, was replaced by Malone, and that from that time until November 29, 1935, Malone was in complete control of defendant corporation, and with the aid of Bouer directed and dominated the affairs of defendant corporation and the actions of the employees thereof. As part of that management and control Malone and Bouer organized the Underwriters, which corporation, it may fairly be inferred from the evidence, was controlled, used, managed and manipulated by Malone and Bouer in connection with and as part of their management of defendant Postal Union Life Insurance Company. Under instructions from Malone and Bouer, Green went to plaintiffs and secured their building and loan certificates by promising them a fully paid insurance policy, as evidenced by the binding receipts. The fact that such an agreement could not properly be made by an insurance company under the Insurance Code does not refute the fact that Malone as general manager did instruct and authorize Green to make such agreement with plaintiffs, nor does it relieve defendant from the obligation to return to plaintiffs the consideration received, upon the failure to deliver to plaintiffs the policies called for in said binding receipts.

Defendant also argues that it did not adopt or ratify the contract made by Green nor was Malone's knowledge of the transaction chargeable to defendant, and defendant cites cases on the question of "imputation of knowledge." However, from what we have heretofore stated as to the domination and control of defendant by Malone, it is unnecessary to discuss this contention, as we are unable to understand how defendant can escape liability for the acts of Malone whom the directors placed in full charge of the affairs of defendant corporation.

[9] As is said in the case of *Rutherford v. Rideout Bank*, 11 Cal.2d 479, at pages 483 and 484, 80 P.2d 978, at page 981, 117 A.L.R. 383:

"The rule is clearly stated in the Restatement of the Law of Agency, sections 261 and 262.

"Section 261: 'A principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.'

"The illustrations and the comment found under these two sections are convincing. Under section 261 it is said: 'The principal is subject to liability under the rule stated in this section although he is entirely innocent, although he has received no benefit from the transaction, and, as stated in section 262, although the agent acts solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.'

"The Restatement of the Law of Agency has been generally endorsed by this court in *Speck v. Wylie*, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, and the particular principles announced in sections 261 and 262 have been applied by this court in *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280 (followed in *Pacific Postal Tel. Co. v. Bank of Palo Alto*, 9 Cir., 109 F. 369, 54 A.L.R. 711, *Otis Elev. Co. v. First Nat. Bank*, 163 Cal. 31, 124 P. 704, 41 L. R.A., N.S., 529, and *National Bank of San Mateo v. Whitney*, 181 Cal. 202, 183 P. 789, 8 A.L.R. 298. See, also, *Blair v. Guarantee Title Co., Inc.*, 103 Cal.App. 260, 284 P. 719; *Ross v. Prudential Guar. Bldg., etc., Ass'n*, 140 Cal.App. 148, 35 P.2d 176; *Mitchell Street State Bank v. Schaefer*, 169 Wis. 543, 173 N.W. 330, and *National City Bank v. Carter*, 6 Cir., 14 F.2d 940."

[10] And in *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, at pages 696, 697, 227 P. 723, at page 731, the court said:

"While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.

"Accordingly, it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 P. 986; *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal.App. 162, 184 P. 964; *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673."

The next contention of defendant is that the finding that Underwriters was the alter ego of defendant is not supported by the evidence. The finding of the trial court was as follows:

"That it is true that the instrument [stock re-purchase agreement] * * * was executed by the Plaintiffs, whose names it bears, but it is also true that said instrument was a part of a design on behalf of the Defendant, its officers and agents, to mislead the Plaintiffs and obtain from them their Mercantile Building and Loan Association Investment Certificates; that said instrument is signed by the Postal Underwriters, Inc., the alter-ego of the Postal Union Life Insurance Company; that said Postal Underwriters, Inc., never legally came into existence, and no steps were

taken toward its incorporation, other than the filing of its Articles of Incorporation; no stock was ever issued, no organization meeting was held, it was a corporation in name only; its Vice-President, T. J. Olsen, was in the employ of and paid by the Postal Union Life Insurance Company; an employee of the Postal Union Life Insurance Company received the mail of the Postal Underwriters, Inc.; it was organized by B. D. Malone, the General Manager of the Postal Union Life Insurance Company, with a name so similar as to mislead the public; its Secretary and bookkeeper was the private secretary to B. D. Malone, and the Plaintiffs did not know until the year 1936 that the Postal Union Life Insurance Company and the Postal Underwriters, Inc., were not one and the same corporation; that all acts of the Postal Underwriters, Inc., were in truth and in fact the acts of the Postal Union Life Insurance Company; * * *

In addition to the evidentiary facts stated in the finding just quoted, there is the fact hereinbefore referred to that Underwriters was organized, controlled, used, managed and manipulated to aid in carrying on the business of defendant. No other conclusion can be arrived at from a reading of the entire record in this case. On March 14, 1933, Green, as agent of defendant, took from plaintiffs their building and loan certificates endorsed in blank and gave to plaintiffs the binding receipts. Then on April 14, 1935, after plaintiffs had sent a telegram to defendant stating that they had not received their policies, Green came to plaintiffs and handed them the stock certificate for 976 shares and the contract to repurchase said stock, already executed by Underwriters, and plaintiffs, not understanding that the contract was signed by Postal Underwriters instead of defendant Postal Union, and relying upon Green's assurance that everything was all right, signed same. It is clear from the record that practically all of the business of Underwriters was in connection with the business of defendant and it is very significant that on December 18, 1935, just 19 days after Malone ceased to be general manager of defendant, the minutes of defendant cor-

poration show that all of the obligations of Underwriters to defendant were released in consideration of the transfer to defendant by Underwriters of various properties on which defendant held encumbrances, from which transaction taken along with evidence throughout the entire record, it may fairly be inferred that defendant no longer desired to make use of Underwriters and took back its remaining assets into defendant corporation.

[11-13] Plaintiffs suggest that we may find additional support for the finding that Underwriters was the alter ego of defendant in the case of *Marr v. Postal Union Life Ins. Co.* (defendant and appellant here), 40 Cal.App.2d 673, 105 P.2d 649, in which case the plaintiff was successful in establishing the liability of the defendant upon a promissory note executed by this same Postal Underwriters, Inc., in which the District Court of Appeal in upholding the finding of the trial court that Postal Underwriters, Inc., was the alter ego of defendant Postal Union Life Insurance Co., said 40 Cal.App.2d at page 685, 105 P.2d at page 656: "The foregoing recital of the evidence convinces us that there were here present all the necessary elements to constitute an alter ego relationship between the two corporations, namely, (1) control of one by the other; (2) that one was but the mere conduit of the business of the other; (3) that recognition of the separate existence of the Underwriters would sanction a fraud and permit oppression and injustice. We entertain no doubt that the evidence clearly shows that the Underwriters had no real genuine interest in the Royal Palms property; that all it possessed was the naked legal title, held by it for the insurance company. *Shea v. Leonis*, 14 Cal.2d 666, 96 P.2d 332; *Clark v. Millsap*, supra [197 Cal. 765, 242 P. 918]; *Higgins v. California Petroleum, etc., Co.*, supra, 122 Cal. [373] 376, 55 P. 155; *Lost Burros Gold Mining Co. v. Inyo County Bank*, 83 Cal.App. 679, 257 P. 209. The jury was the judge of the value and effect of evidence challenging the verity of the testimony here narrated." A hearing was denied by the Supreme Court. However, in the *Marr*

case, there were different parties plaintiff and a different record, and the finding therein that Underwriters was the alter ego of defendant cannot be considered as res judicata in this case. However, the rules of law enunciated by that court in that case are sound. 40 Cal.App.2d at pages 681, 682, 105 P.2d at page 654 it is stated: "Before the courts will disregard the corporate entity of one corporation and treat it as the alter ego of another, even though the latter may own all the stock of the former, it must further appear that there is such a unity of interest and ownership that the individuality of the one corporation and the owner or owners of its stock has ceased, and further, that the observance of the fiction of separate existence would under the circumstances sanction a fraud or promote injustice. In other words, bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence. *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service*, 217 Cal. 124, 17 P.2d 709; *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641; *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 P. 780; *Sunset Farms, Inc., v. Superior Court*, 9 Cal.App.2d 389, 50 P.2d 106."

[14] Taking all of the evidence in the instant case, and all of the inferences that may reasonably be drawn therefrom, we do not believe that the finding of the trial court in this regard lacks substantial support in the record.

[15] Defendant contends also that the findings that defendant defrauded plaintiffs are without support in the record. But, as defendant points out, the findings make it quite clear that judgment was awarded to plaintiffs on contracts which are the "binding receipts." It is unnecessary, therefore, to discuss this contention, as the arguments made in its support are a repetition of arguments previously made by defendant, which are covered by what we have hereinbefore said. In the same category is the contention of defendant that fraud on the part of defendant was not pleaded and all findings relative thereto are im-

proper. It is clear that the action was based upon the contracts which were the binding receipts and despite the fact that defendant and its agents were guilty of fraudulent acts in connection with the contracts, the action was still based upon contract. The findings as to fraud merely explained the manner in which the transaction upon which the action was based was carried out.

[16] Defendant complains also that the finding that plaintiffs had little education is without support in the record. However, we believe that a trial judge who has an opportunity of observing and hearing a witness upon the stand for as many hours as plaintiffs were upon the witness stand in this case, is fully qualified to make such a finding.

[17, 18] Defendant also contends that the trial court committed material error in refusing to permit defendant to cross-examine Green regarding his conversations with plaintiffs. The extent of the cross-examination of a witness is a matter largely within the sound discretion of the trial judge. In this case Green was a witness called by plaintiffs, but, in view of all the circumstances and of Green's former connection with defendant, plaintiffs were fully justified in limiting their direct examination to the instructions given Green by Malone and Bouer. Plaintiffs did not question Green as to his conversations with plaintiffs upon the direct examination of said witness and we perceive no error on the part of the trial court in refusing defendant to go into said conversations upon cross-examination. Furthermore there was nothing to prevent defendant from calling Green as its own witness and asking him as to such conversations, but it evidently chose not to do so.

[19] Defendant also contends: "The finding that Green, Bouer and Malone were convicted on fifteen charges of grand theft in fifteen transactions identical in form (with the transaction with plaintiffs) is not supported by the evidence." However, we do not see how defendant can complain of this finding, as we find that the language of the court's finding is exactly the same as

the language set forth in the affirmative defense in defendant's answer, the defendant having there alleged: "That the said H. B. Green, F. J. Bouer and B. D. Malone, were indicted, tried and convicted of fifteen charges of Grand Theft and Embezzlement in fifteen transaction[s] identical in form, involving the purchase of pass-books, in Monterey County, and the said Green, F. J. Bouer and B. D. Malone were thereupon sentenced to serve terms in the State Penitentiary at San Quentin as prescribed by the law for said offenses."

We shall not discuss a number of other contentions urged by defendant because they are related to the contentions already discussed and are covered by what we have heretofore said.

The one remaining contention of defendant necessary to discuss is that the finding that defendant is not entitled to credit for the value of 976 shares of stock received by plaintiffs is erroneous.

[20] Defendant argues that whether Green was acting for Malone and Bouer as individuals or was acting for defendant, plaintiffs should account for everything of value that they received in the transaction and that the amount recovered by them should in any event be diminished by the value of said 976 shares of stock. The evidence and findings on this issue are totally unsatisfactory. Obviously, if plaintiffs received anything of value from defendant or its agents, or if plaintiffs are legally chargeable with the loss of the stock, they should not be permitted to recover double damages. The same law that permits plaintiffs to recover from defendant for the value of their building and loan certificates should enable defendant to receive credit for the value of said stock. As pointed out, however, there is no satisfactory evidence in the record to show what the market value of said 976 shares of stock was on April 14, 1935, the date upon which plaintiffs received it, and this will require a reversal of the judgment to that extent. In all other respects, however, the judgment should be affirmed.

Defendant in concluding its opening brief asserts that if this judgment is permitted to

stand, the procedures now in use for soliciting applications for insurance must be entirely revised for the protection of insurance companies and expresses grave concern as to the effect of such a decision upon insurance companies generally. Defendant states that it is difficult to see how insurance companies can devise better methods to protect themselves and the persons with whom their agents deal than the printed forms which warn as to the limits of the agent's authority. We do not believe that the affirmance in its general aspects of the judgment will interfere with the proper and legitimate conduct of the business of any company. The limitations upon the power of an agent are well understood and nothing that we have said herein is intended to change those limitations. The difficulty with defendant's position is that it refuses to accept the fact that the record here justifies the decision and findings of the learned trial judge that Malone dominated and controlled the affairs of defendant corporation and was in fact the corporation during the time of the transaction in question, and that the agent, Green, was acting under his instructions. There is here no question of an agent acting without authority or contrary to the instructions of the principal. Under the facts of this case, as shown by the record, the law would indeed be impotent if plaintiffs should be denied relief.

[21] In view of the foregoing the judgment is reversed with directions to the trial court to take evidence and to ascertain the true facts in reference to the 976 shares of stock, and if it should find that plaintiffs are legally chargeable with the value of the stock, then to ascertain the value of the 976 shares of stock on April 14, 1935, and deduct with interest said amount from the value of the plaintiffs' building and loan certificates as found by the court. In all other respects the judgment is affirmed, the parties to bear their own costs on appeal. The order denying defendant's motion for a new trial, being non-appealable, is hereby dismissed.

PETERS, P. J., and WARD, J., concur.

ENGLE v. FARRELL et al.

Civ. 15237.

District Court of Appeal, Second District,
Division 1, California.

Aug. 1, 1946.

Rehearing Denied Aug. 19, 1946.

Hearing Denied Sept. 19, 1946.

1. Fraud ⇨30

Principal and agent ⇨158

One who persuades his representative to commit a fraud, or who connives at a fraud, and knowingly takes the fruits thereof, is no less guilty than is his representative, and an agent who knowingly participates in a fraudulent transaction is equally responsible with his principle, and one who is not present at the time of making of false representations, but who profits by the fruits of the fraud, having sufficient knowledge of the facts to put a prudent person on inquiry, cannot evade responsibility.

2. Husband and wife ⇨270(9)

In purchaser's action to recover the purchase price paid for oil land base on rescission for fraud, whether vendor's wife who executed deed and who became interested in the proceeds which were presumably community property, and who at trial did not take witness stand or deny that her husband was acting with her knowledge and consent, or who did not request instruction to jury as to her liability was liable, was for jury. Civ.Code, § 161a; § 1689, subd. 1.

3. Husband and wife ⇨21, 24, 25(1, 6)

A husband or wife may act as agent for the other, and the agency may be proved by circumstantial as well as by direct evidence.

4. Husband and wife ⇨24, 25(6)

In establishing fact of an agency between husband and wife, less evidence is required to establish the agency than in other cases and it may be established by proof of ratification of act already performed without previous authority.

5. Appeal and error ⇨996, 1008(1)

Matters addressed to the weight of the evidence and to the inferences which should be drawn therefrom are reposed in

the trier of facts and an appellate court does not pass upon such conclusion even though it might not agree with the result reached.

6. Appeal and error ⇨1008(1)

The finding of trial court upon issues of fact is conclusive on appeal, unless, reading the evidence in the light and with the inferences most favorable to the conclusion reached below, the appellate court can say that conclusion is without substantial support in the record.

7. Husband and wife ⇨232(3)

In purchaser's action to recover the purchase price paid for oil land based on rescission for fraud, evidence supported jury's inferential finding that both husband and wife had participated in the alleged fraud and enjoyed the fruits of the transaction together and that the wife was liable with her husband.

8. Mines and minerals ⇨54(4)

Contract for sale of alleged oil land for vendors' fraud in the inducement, which had been concealed until after the deed had been delivered, could be rescinded by the purchaser, notwithstanding contract had been fully performed and executed, where the status quo could be fully restored. Civ.Code, § 1689, subd. 1.

9. Fraud ⇨31

When a party has been induced by fraud to enter into a contract, he may elect either to rescind the contract or he may affirm the contract, retaining whatever advantage he may have acquired and still have his action for damages for deceit, subject to limitations applicable whether the contract to which the charge of fraud is addressed is an executed or executory contract.

10. Fraud ⇨35

When a party enters, after discovery of a fraud, into new arrangements, he is deemed to have waived any claim for damages on account of the fraud.

11. Action ⇨35

In purchaser's action for money had and received and to recover purchase price paid for oil lands based on rescission for fraud, modification of money judgment for

plaintiff, and denial of new trial if plaintiff delivered deed to the property to clerk for the defendant vendor when defendant paid the judgment, did not transform the action into one on the equity to enforce a rescission and restore the parties to status quo.

12. New trial ⇨161(1)

Trial courts may impose terms and conditions on granting or denying motion for new trial, in actions tried to a jury as well as those tried to a court.

13. Appeal and error ⇨1072

In action to recover purchase price of oil land based on rescission for fraud, even if denial of defendant's motion for a new trial after money judgment for plaintiff on condition that plaintiff would deliver deed to the property to clerk for defendant when defendant paid the judgment had effect of transforming the action to one on equity side to enforce a rescission and restore the parties to status quo, denial was not prejudicial to defendant.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Cora A. Engle against Edward C. Farrell, Margaret Farrell, and others to recover full purchase price paid defendant for certain alleged oil lands. From adverse judgment, defendants appeal.

Judgment affirmed.

A. L. Abrahams, Wallace L. Ware, and Kenneth K. Wright, all of Los Angeles, for appellants.

Haight, Trippet & Syvertson, of Los Angeles, for respondent.

DORAN, Justice.

The respondent instituted the present action for money had and received, to recover the full purchase price paid to the appellants for certain alleged oil lands located in Kings County, California, said action being based upon rescission for fraud. After trial before a jury a general verdict was returned against Edward C. Farrell and Margaret Farrell, husband and wife, in the sum of \$36,797.04, and judgment entered thereon. Thereafter the trial court denied the defendants' motion

for a new trial upon the condition that plaintiff deposit with the County Clerk a deed to the lands in question with instructions to deliver such deed to the defendants upon full payment of the judgment, and that plaintiff file a stipulation consenting that the judgment be modified accordingly. Such stipulation, consent and deed were accordingly filed by the plaintiff.

The complaint charged the defendants Edward C. Farrell and Margaret Farrell with false representations to the effect that Edward C. Farrell was the owner of the land in question; that the property was good oil land which plaintiff would be able to quickly resell at a greatly increased price; that the defendants misrepresented the location of the premises, the geological structure thereof, and other facts connected therewith. The complaint further alleges that Edward C. Farrell was represented to be "a large scale oil operator" having superior knowledge; that plaintiff, a woman 65 years of age and without business experience was induced to rely on such superior knowledge and to buy three separate parcels of alleged oil land. The first tract of 80 acres was purchased about June 20, 1938; a second 80 acre parcel being purchased shortly thereafter upon representations that the second purchase was necessary to secure ingress to and the sale of the first parcel. Thereafter plaintiff was induced to purchase an additional 160 acres of alleged "good oil land". Plaintiff alleges that the fraud was not discovered until in January, 1943, and that notice of rescission was served on or about May 21, 1943.

The record contains evidence to the effect that the property sold was not located in the Middle Dome of Kettleman Hills as represented but was in Kettleman Plains Sycline; that Edward C. Farrell was not previously the owner of the property sold to plaintiff at \$110-131 per acre, but that after negotiating with plaintiff Farrell bought the land for \$21-25 per acre, which fact was not communicated to the plaintiff. The deeds delivered to plaintiff were executed by Edward C. Farrell and wife Margaret Farrell, were recorded by Edward C. Farrell, and bore

revenue stamps cancelled by Farrell. In the case of the two 80 acre parcels covered by one deed, these revenue stamps reflected a consideration of but \$4000, whereas plaintiff actually paid \$19,230.21. As to the 160 acre parcel for which plaintiff paid \$17,566.83, the cancelled revenue stamps indicated a consideration of only \$9000. Plaintiff was not furnished with policies of title insurance, and it appeared that all of the property was subject to a grazing lease about which plaintiff was not informed. Plaintiff testified that Farrell said "I would make a great deal of money. On one occasion I remember, he said I would need a suitcase to carry it in; and another instance I remember he said I would need a shovel * * * to shovel the money." In reference to appellants' assertion that representations to the effect that the land was "good oil property" were statements of opinion based on geologists' reports and hence not actionable, the record contains evidence from which a jury might conclude that Farrell did not honestly entertain such belief, and that such reports contained nothing which would justify an experienced oil man such as Farrell professed to be (20 years in the oil business in Southern California), in entertaining and expressing such a belief.

[1-4] One of appellants' chief points of contention is that "The motion of the defendant Margaret C. Farrell for a nonsuit, for a directed verdict and for a new trial, should have been granted." The basis for this argument, as stated in appellants' brief, is that "Nowhere in the record does it appear that the property purchased by the plaintiff, Mrs. Engle, from Mr. Farrell, was Mrs. Farrell's separate property, nor does it appear * * * that she received any of the consideration paid * * *. Nowhere in the record does it appear that she had any knowledge of any of Edward C. Farrell's negotiations or transactions with the plaintiff." Upon these facts, appellants argue that "To hold one liable for fraud, it must be shown in legal contemplation that he *is in some way connected with it*," citing 12 Cal.Jur. page 775. This language, it may be noted, is used in reference to actions for fraud and

deceit, and not to rescission of contracts induced by fraud. However, in the same citation occurs the following language: "One who persuades his representative to commit a fraud, or who connives at a fraud, and knowingly takes the fruits thereof, is no less guilty * * * than is his representative. And an agent who knowingly participates in a fraudulent transaction is equally responsible with his principal. Similarly, one who is not present at the time of the making of false representations but who profits by the fruits of the fraud, having sufficient knowledge of the facts to put a prudent person on inquiry, cannot evade responsibility." 12 Cal.Jur. p. 774. While it is apparently true, as appellants assert that respondent neither personally met nor had any direct business dealings with Margaret Farrell, it is clear that such facts do not necessarily constitute a defense to the present action. In arriving at the verdict against both Edward and Margaret Farrell the jury had before it evidence that these parties were husband and wife; that Margaret Farrell executed the deeds to respondent; that the land, and the purchase price received from respondent therefor, were acquired during the marriage of appellants and hence were presumably community property in which, under Civil Code, Section 161a, the wife possessed a "present, existing and equal" interest. Moreover, as pointed out by respondent, "Margaret Farrell, despite her presence at the trial and her knowledge that plaintiff was seeking judgment against her, did not take the witness stand, or in any manner endeavor to deny that her husband was acting on her behalf and with her knowledge and consent in his dealings with plaintiff. Nor did she request that any instructions be given the jury setting forth the rules applicable to the question of her liability (Rep.Tr. 538-561)." In *Stegman v. Vandeverter*, 57 Cal.App.2d 753, 758, 135 P.2d 186, 189, a wife was held responsible although not a direct party to the husband's fraud, and the court said: "In the absence of all evidence to the contrary we must assume that all of the property of defendants * * * was community in which Mrs. Vandeverter had a vested interest. She signed the deed to the ten

acres near Wasco which was exchanged for the Fresno County property. She signed the deed conveying that property to plaintiff. That deed bore \$3.00 in revenue stamps which, under the federal law, was a representation of a selling price of \$3,000. She accepted the deed conveying the Bakersfield property to her as one of the joint tenants and still retains that interest in the property. She has the benefit of the declaration of homestead which her husband placed on it. Thus she not only performed acts which were necessary to a consummation of the fraud but still retains much of the benefits growing out of it. It is well established in California that a husband or wife may act as agent for the other; that the agency may be proved by circumstantial as well as by direct evidence (citing various cases); * * * that it requires less evidence to establish agency in a case of this kind than in other cases * * *; that such an agency may be established by proof of ratification of acts already performed without previous authority." In *Conlin v. Coyne*, 19 Cal.App. 2d 78, 89, 64 P.2d 1123, 1129, a judgment against a husband and wife for damages resulting from the caving of plaintiff's land into an excavation made on defendants' land, was affirmed although the wife had not personally participated in the excavation work, and the reviewing court commented upon the fact that "It does not appear from the record that the latter (the wife) disclaimed knowledge of the improvement of the land."

[5-7] The appellant naturally contends that since the factual situation in the above cases does not parallel that existing in the present controversy, such decisions cannot here be deemed controlling authority. It is to be understood, however, that such cases are not here asserted to be conclusive in respect to the instant litigation; nor is any individual act on the part of Margaret Farrell hereinbefore recited, to be deemed decisive as to the wife's liability. Such facts were nevertheless before the jury, and as said in respondent's brief, "Mrs. Farrell's argument is really one addressed to the weight of the evidence and to the inferences which should be drawn therefrom. Such matters are reposed in

the trier of the fact and both the jury and the trial judge passed upon them (the trial judge on three occasions, namely, motions for nonsuit, directed verdict, and new trial). An appellate court does not review such conclusions even though it might not agree with the result reached." 2 Cal.Jur. 918, 920. Variouslly stated, the well known rule is set forth in *Hassell v. Bunge*, 167 Cal. 365, 367, 139 P. 800, 801, as follows: "The finding upon this, as upon other issues of fact, is conclusive on appeal, unless, reading the evidence in the light and with the inferences most favorable to the conclusion reached below, the appellate court can say that that conclusion is without substantial support in the record." The question of Mrs. Farrell's liability was squarely before the jury, and from the facts in evidence it cannot be said that there was not substantial support for the jury's inference that both the husband and the wife had participated in the fraud and enjoyed the fruits of the transaction.

[8-10] The appellants also complain that the motion of both defendants for judgment on the pleadings should have been granted because it appeared on the face of the complaint that the contract for the sale of the alleged oil land had been fully performed and executed, the plaintiff having paid the full purchase price and the defendants having deeded the property purchased; that "under these circumstances an action for rescission or to enforce a rescission does not lie." This contention, however, finds no support in the provisions of the Civil Code governing rescission, Section 1689 merely providing that "A party to a contract may rescind the same in the following cases only: 1. If the consent of the party rescinding * * * was given by mistake, or obtained through duress, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party". In 6 California Jurisprudence at page 389 occurs the following statement: "In some jurisdictions rescission is not allowed for fraud, and in others a distinction is made between executed and executory contracts. In California the statute

designates the grounds for rescission." As above noted the California statute makes no distinction between executed and executory contracts. In the instant case it must be borne in mind that the plaintiff had no opportunity to rescind the transaction prior to delivery of the deeds and payment of the consideration for the simple and unanswerable reason that prior to that time plaintiff had no knowledge that any fraud had been practiced. To deny the right of rescission merely because the perpetrator of the fraud had been able to conceal the misrepresentations until after the deed had been delivered would not only be absurd but would in effect add to Section 1689 of the Civil Code, a provision which the legislators did not enact.

No case had been cited by either party which is exactly in point with the present controversy. For example, *City of Oakland v. California Const. Co.*, 15 Cal.2d 573, 577, 104 P.2d 39, 32, cited by appellant, was an action by the city to recover the proceeds of a street improvement contract and involved the contractor's failure to faithfully perform a paving contract. As pointed out by the respondent, the status quo could not be restored and the court rightly held that "Under such circumstances, if the contract had been completely executed, as in the present case, the injured party's remedy is an action for damages." The case bears no resemblance to the present factual situation. A similar statement occurs in *Bedell Engineering Co. v. Rouse*, 57 Cal.App.2d 734, 736, 135 P.2d 404, an action for damages involving misrepresentations made by auctioneers respecting the price at which plaintiff's property could be sold, and its subsequent sale to an innocent purchaser. Again, as respondent observes, it was impossible to place the parties in status quo. Moreover, no question of rescission was involved in the *Bedell* case. In the present case it may be noted that no difficulty is presented in respect to restoring the status quo, such restoration being effectually accomplished by a repayment of plaintiff's money, and a re-conveyance of the defendants' land. Likewise, cases holding that there can be no rescission where no binding contract ever existed between the parties, are not helpful. On the other hand, several

California cases are at least persuasive if not determinative, that rescission should be permitted in a case such as the present. In *Burne v. Lee*, 156 Cal. 221, 226, 104 P. 438, 440, the court said: "Now, it is well settled that when a party has been induced by fraud to enter into a contract, he may elect either to rescind the contract * * * or he may affirm the contract retaining whatever advantage he may have acquired, and still have his action for damages for deceit * * *. This rule is, however, subject to limitations which apply whether the contract, to which the charge of fraud is addressed, is an executed or executory contract. One of these limitations is that when a party * * * enters, after discovery of the fraud, into new arrangements * * * he is deemed to have waived any claim for damages on account of the fraud." In the present case, there were, of course, no such "new arrangements." *Meinecke v. Frasier*, 69 Cal.App. 688, 702, 232 P. 499, 505, was an action in equity for rescission of an automobile purchase on the ground of fraud, title having passed and the full purchase price having been paid. The court said: "It is argued that, in cases where the contract has been fully performed, rescission will be decreed only in extreme cases; 'that nothing short of actual fraud or mistake will justify the court in granting the rescission of an executed contract.' * * * From the pleadings, proof, and findings it seems to us that this case is based upon actual fraud, and comes squarely within the provisions of the law applicable thereto. See sections 1689, 3406, 1572, Civ.Code." In other cases, such as *Bennett v. Lane Mortgage Co.*, 19 Cal.App.2d 515, 65 P.2d 953, and *Clauser v. Taylor*, 44 Cal.App.2d 453, 112 P.2d 661, rescission has been decreed on the ground of fraud notwithstanding the fact that the contract had been completely executed, without mentioning any distinction between executed and executory contracts. In the instant case, the notice of rescission appears to have been timely, and there is no valid reason why plaintiff should be denied the relief granted by the Code.

[11-13] Appellant further contends that the court erred in attempting to modi-

fy the verdict and judgment at the hearing of defendants' motion for a new trial by ordering "that if the plaintiff within ten days * * * executes and deposits with the County Clerk a deed conveying * * * the property in question to the defendants * * * with instructions to the clerk to deliver said property to these two defendants when the judgment is paid in full; and if the plaintiff files a written stipulation that the judgment may be so modified, the Court orders that the judgment be modified accordingly and the motion for a new trial will then be denied". As hereinbefore stated, plaintiff accordingly filed the required deed and consent to such modification. Appellants' assertion that such order "had the effect of transforming this action into an action on the equity side to enforce a rescission and restore the parties to status quo," is without merit. While no cases directly in point have been cited in which this particular order was involved, it appears to be standard practice in California for trial courts to "impose terms and conditions on granting or denying motions for new trial," in actions tried to a jury as well as in those tried to a court. 20 Cal.Jur. p. 207. In *Secreto v. Carlander*, 35 Cal.App.2d 361, 364, 95 P.2d 476, 477, as a condition to the denial of a new trial, the defendant was required to consent that plaintiff's judgment be increased from \$150 to \$1200, and the court stated that "the law is established in this state" that the trial court had such power in order "to bring the amount of the verdict in conformity with the evidence. *Adamson v. County of Los Angeles*, 52 Cal.App. 125, 131, 132, 198 P. 52." In this connection it may be noted that appellants' brief first complains because the original judgment did not contain a provision requiring respondent to reconvey the property as a condition to the relief awarded; appellants thereafter complain because the court modified the judgment in this very particular. In the instant case, the order did no violence to appellants' legal rights, but on the contrary mitigated the force of the judgment by requiring plaintiff to restore the property to appellants upon payment of the judgment. Even had error been committed in the making of such order, it was

beneficial, not prejudicial so far as appellants were concerned.

No error appearing in the record and there being substantial evidence to support the judgment against both appellants, the judgment is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



75 Cal.App.2d 677

**INDUSTRIAL AUTOMOBILE & CASUALTY
INS. CO. et al. v. INDUSTRIAL AC-
CIDENT COMMISSION et al.**
Civ. 13083.

District Court of Appeal, First District,
Division 2, California.
Aug. 5, 1946.

1. Workmen's compensation ☞618

Where the injury resulting from a fall is contributed to by some factor peculiar to the employment, it "arises out of the employment" within the meaning of the Workmen's Compensation Act even though the fall has its origin solely in some idiopathy of the employee.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of the Employment".

2. Workmen's compensation ☞610

In considering whether an injury arose "out of" and was "proximately caused by" employment, questions of workmen's compensation are not controlled by common-law rules as to "proximate cause" in tort cases, and reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee.

3. Workmen's compensation ☞1592

Evidence sustained compensation award on ground that sawhorses at end of bench at which employee was working, and against which employee fell, constituted a "special risk of the employment", and that traumatic injuries caused when employee fell against sawhorse while suffering an

epileptic seizure were to be attributed to the presence of sawhorse at employee's place of work.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Risk of the Employment".

Proceeding by National Automobile & Casualty Insurance Company and Neon Maintenance Corporation for a review of an award by the Industrial Accident Commission of the State of California to William H. Honerlah.

Award affirmed.

Henry G. Sanford, of San Francisco, for petitioners.

R. C. McKellins and Edward A. Sarkisian, both of San Francisco, for respondent Industrial Accident Commission.

DOOLING, Justice.

Petitioners seek to annul an award of the Industrial Accident Commission based on a finding of the commission that "William H. Honerlah, applicant, while employed as an electrician * * * by Neon Maintenance Corporation, sustained injury arising out of and occurring in the course of the employment as follows: Said applicant fell and sustained an injury to his head."

It is undisputed that the applicant while at work suffered an epileptic seizure, not induced in any way by his employment, which caused him to fall and strike his head as a result of which he sustained a fracture of the skull and cerebral concussion.

Counsel argue the matter as if the record showed and the commission had found that the applicant's head injuries had been caused by his head striking the concrete floor of the shop without the interposition of any other agency connected with his employment. The commission made no such finding and the applicant, who was the only witness, testified as follows:

"Well, I lost consciousness and fell to the floor and hit a sawhorse and injured my head and knocked me out. * * *

"I was working at the end of the bench, and there were no close quarters; the only thing these horses were at the end of the bench which holds signs up, which we

mount lights on and I evidently lost consciousness and hit the sawhorse. * * *

"Q. What part of your body struck the concrete? A. My head evidently did."

The testimony of applicant that in falling he struck the sawhorse is important because the development of the law applicable to workmen's compensation in the instances where the workman receives traumatic injuries as the result of a fall induced by an idiopathic seizure.

Our Supreme Court in the early history of workmen's compensation in this state adopted the extreme view that a workman suffering a purely idiopathic attack which caused him to fall, even from a height where his employment took him, did not incur an injury arising out of his employment although in the fall from the height he incurred a traumatic injury. *Brooker v. Industrial Accident Commission*, 176 Cal. 275, 168 P. 126, L.R.A.1918F, 878, where the workman had an epileptic fit and fell from a scaffold thirty-nine feet above the ground, the fall causing injuries which resulted in his death.

Counsel for petitioners concedes that the harsh rule of the *Brooker* case is no longer in effect in this state. See *Eastman Co. v. Industrial Accident Comm.*, 186 Cal. 587, 200 P. 17; *California Notion & Toy Co. v. Industrial Acc. Comm.*, 59 Cal.App. 225, 229, 210 P. 524; *Pacific Telephone and Telegraph Co. v. Industrial Accident Comm.*, Cal., 19 I.A.C. 106; *Associated Indemnity Corporation v. Industrial Accident Comm.*, 1 Calif.Comp.Cases 12; *Petley v. Industrial Accident Comm.*, 9 Calif.Comp. Cases 44.

In the later decisions of the Industrial Accident Commission above cited writs were denied by the courts without opinion and in *Pacific Telephone & Telegraph Co. v. Industrial Accident Comm.*, supra, it is said:

"This case would definitely seem to overrule *Brooker v. Industrial Accident Commission*, supra, and it was so urged in the briefs."

The courts in other jurisdictions seem about evenly divided on the question whether a traumatic injury suffered by his body striking the floor or ground is compensable

where the fall was induced by the employee's idiopathic condition. Holding such an injury compensable are *Savage v. St. Aeden's Church*, 122 Conn. 343, 189 A. 599; *Protectu Awning Shutter Co. v. Cline*, Fla., 16 So.2d 342; *Barlau v. Minneapolis-Moline Power Implement Co.*, 214 Minn. 564, 9 N.W.2d 6; *A. C. Lawrence Leather Co. v. Barnhill*, 249 Ky. 437, 61 S.W.2d 1. Denying compensation for such an injury are *Andrews v. L. & S. Amusement Corporation*, 253 N.Y. 97, 170 N.E. 506; *Cimino's Case*, 251 Mass. 158, 146 N.E. 245, 37 A.L.R. 769; *Daub v. Industrial Commission*, Ohio App., 57 N.E.2d 301; *Bibb Mfg. Co. v. Alford*, 51 Ga.App. 237, 179 S.E. 912.

[1] We do not find it necessary to make a choice between these conflicting cases because the authorities are overwhelming that where the injury is contributed to by some factor peculiar to the employment it arises out of the employment even though the fall has its origin solely in some idiopathy of the employee. *Wicks v. Dowell*, L. R. [1905] 2 K.B. 225; *Connelly v. Samaritan Hospital*, 259 N.Y. 137, 181 N.E. 76; *Cusick's Case*, 260 Mass. 421, 157 N.E. 596; *Varao's Case*, 316 Mass. 363, 55 N.E.2d 451; *Industrial Commission of Ohio v. Nelson*, 127 Ohio St. 41, 186 N.E. 735; *Stenberg v. Raymond Co-operative Creamery Co.*, 209 Minn. 366, 296 N.W. 498; *Tavcy v. Industrial Commission of Utah*, 106 Utah 489, 150 P.2d 379; *Milwaukee Electric Ry. & Light Co. v. Industrial Comm. of Wisconsin*, 212 Wis. 227, 247 N.W. 841; *Christensen v. Dysart*, 42 N.M. 107, 76 P.2d 1; *Board of Commissioners v. Shertzer*, 127 N.E. 843; *Peoria Ry. Terminal Co. v. Industrial Board*, 279 Ill. 352, 116 N.E. 651; *Carroll v. What Cheer Stables Co.*, 38 R.I. 421, 96 A. 208, L.R.A.1916D, 154, Ann.Cas. 1918B, 346; *Gonier v. Chase Companies*, 97 Conn. 46, 115 A. 677, 19 A.L.R. 83; *Ervin v. Industrial Commission*, 364 Ill. 56, 4 N.E. 2d 22; *Reynolds v. Passaic Valley Sewerage Com'rs*, 24 A.2d 531, 20 N.J.Misc. 74, certiorari dismissed 130 N.J.Law 437, 33 A.2d 595, affirmed 131 N.J.Law 327, 36 A. 2d 429; *Baltimore Towage & Lighterage Company v. Shenton*, 175 Md. 30, 199 A. 806; *Miller v. Beil*, 75 Ind.App. 13, 129 N.E. 493; *President and Directors of Georgetown College v. Stone*, 61 App.D.C.

200, 59 F.2d 875; *Rockford Hotel Co. v. Industrial Commission*, 300 Ill. 87, 132 N.E. 759, 19 A.L.R. 80.

In *Varao's Case*, *supra*, the employee was seized with dizziness caused by a hypertensive heart. He fell against an iron motor box and fractured his skull. In affirming an award for his consequent death the Supreme Judicial Court of Massachusetts said, 55 N.E.2d at page 452:

"The motor box was attached to a machine which was located by the side of a passageway along which one performing the duties of a foreman would travel, and the location of the motor box could be found to be a special danger to one seized with a heart attack while passing along the passageway."

In *Connelly v. Samaritan Hospital*, *supra*, the employee fell against a table in a laundry. In holding the resulting injury compensable the Court of Appeals of New York reasoned, 181 N.E. at page 79:

"The hazard that in a fall she might incur injury, by striking against the table near which she was working at the time of the fall, attached to the place of employment. To that potential danger only those in that place were subject, and thus her employment called her into a zone of special danger. The potential danger of injury from a fall at some other place might have been no less. It was not the same. Though there is danger of injury, from some combination of conditions, at all times and at all

places, the potential danger that any particular combination will arise and cause injury is limited both in time and space, and within those limits there is a zone of special danger from that source. Whenever conditions attached to the place of employment or otherwise incident to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment."

[2] Our Supreme Court, speaking through Mr. Justice Schauer, pointed out in a recent decision that: "In considering whether an injury arose 'out of' and was 'proximately caused by the employment' it has been repeatedly recognized and emphasized that questions of workmen's compensation are not controlled by common law rules as to 'proximate cause' in tort cases and that reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." *Truck Ins. Exchange v. Ind. Acc. Comm.*, 27 Cal.2d 813, 167 P.2d 705, 706.

[3] The respondent commission, under the evidence quoted, was justified in concluding that the sawhorse against which the applicant fell constituted a special risk of the employment and that his traumatic injuries were to be attributed to its presence at his place of work.

The award is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

28 Cal.2d 675

PEOPLE v. SANTA FE FEDERAL SAVINGS & LOAN ASS'N.

Sac. 5691.

Supreme Court of California, in Bank.
Aug. 9, 1946.

1. Taxation ⇨585

The word "delinquent", as used in statutes relating to taxation, means nothing more than overdue and unpaid.

See Words and Phrases, Permanent Edition, for all other definitions of "Delinquent".

2. Constitutional law ⇨284(2)
Taxation ⇨319(1)

While a taxpayer, if he demands it, is entitled to a hearing at some stage of the proceedings for the collection of a tax, an administrative hearing is not a prerequisite unless made so by statute, and constitutional requirements are met if taxpayer is given an opportunity for a hearing in subsequent proceedings for collection of tax or in an action for a refund where it is provided by statute that he may pay tax under protest and sue for its recovery.

3. Taxation ⇨586

Taxpayer, sued for delinquent bank and corporation franchise tax on ground of fraud in sale of assets showing a purported loss, was not entitled to an administrative hearing before action was brought to collect the tax, since the statute provides for hearing in the proceeding for collection of tax or in action for refund pursuant to statute authorizing payment of tax under protest and suit for recovery. Code Civ.Proc. § 338, subds. 1, 4; § 340, subd. 2; § 343; Gen.Laws 1937, Act 8488, §§ 25, 28, 30, 31.

4. Action ⇨35

A "cumulative remedy" is one created by statute in addition to one which still remains in force.

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative Remedy".

5. Constitutional law ⇨284(2)
Taxation ⇨37

The statute authorizing action for collection of delinquent bank and corporation

franchise taxes without affording taxpayer an opportunity to administrative hearing is not unconstitutional as depriving taxpayer loan association of opportunity to be heard on issue of fraud in a sham sale of assets as fully as if it had been granted an administrative hearing. Gen.Laws 1937, Act 8488, § 31.

6. Statutes ⇨147

Ordinarily, any substantial amendment of a statute indicates a legislative intention to change the meaning of the enactment rather than to interpret it.

7. Taxation ⇨319(1)

In amending Bank and Corporation Franchise Tax Act so as to give taxpayer an opportunity for an adverse hearing in the event of a fraudulent assessment, the Legislature presumably acted to carry into effect the purpose of the proposed amendment as stated by the Franchise Tax Commissioner when the Senate was considering the proposed amendment. Gen.Laws 1937, Act 8488, § 28.

8. Taxation ⇨310

The 1945 amendment to Bank and Corporation Franchise Tax Act, giving taxpayer an opportunity for an adverse hearing in the event of a fraudulent assessment, broadened the act to give additional rights to those which taxpayer had under the original act, and hence the amendment was not applicable to litigation arising prior to the amendment. Gen.Laws 1937, Act 8488, § 28.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the People of the State of California against the Santa Fe Federal Savings & Loan Association, a corporation, to recover an amount alleged to be due for additional franchise tax. From a judgment for the defendant, the plaintiff appeals.

Reversed.

Prior opinion 164 P.2d 326.

Robert W. Kenny, Atty. Gen., and John L. Nourse and Daniel N. Stevens, Deputy Attys. Gen., for appellant.

Surr & Hellyer, of San Bernardino, for respondent.

PER CURIAM.

Following the decision adverse to the respondent by the District Court of Appeal, the taxpayer's petition for a hearing by this court was granted for the principal purpose of considering the direction to the superior court to enter judgment for the state. Subsequently, the attorney general rested his case upon the sole issue as to whether under the Bank and Corporation Franchise Tax Act, as it read in 1939, a taxpayer was entitled to file a protest with and have a hearing before the Franchise Tax Commissioner as a condition precedent to the levy of an assessment levied upon the ground of fraud. As the district court of appeal correctly construed the sections of the statute applicable to the one question now presented for decision, that part of its opinion is adopted as the opinion of this court. It reads as follows:

"The State of California, through the Franchise Tax Commissioner, instituted this action to recover from defendant and respondent the sum of \$21,212.76, together with interest thereon at the rate of 6 per cent per annum from March 15, 1935. The complaint alleged that defendant was a corporation engaged in lending money on security of real estate and was subject to the provisions of the Bank and Corporation Franchise Tax Act (Stats.1929, p. 19; Deering's Gen.Laws 1937, Act 8488); that on March 1, 1935, defendant filed its franchise tax return for 1935 and therein deducted from income of \$176,773 a purported loss arising from a sale to one John C. Ralphs, and by reason of such deduction reduced its franchise tax liability from \$14,466.85 to \$325; that the sale was a sham and was fraudulent and was made to establish a fictitious loss and with intent to evade the tax; that about May 1, 1939, the Franchise Tax Commissioner discovered that the sale was fraudulent and made with intent to evade franchise taxes, and that the state was defrauded of \$14,141.84; that on July 19, 1939, he issued and mailed to defendant an assessment against it of said amount; and that on July 3, 1940, the commissioner, having determined that the

deficiency of \$14,141.84 was due to fraud and was the result of intent of defendant to evade the tax, assessed a penalty of 50 per cent of the deficiency, pursuant to section 24(b) of the act, and thereupon mailed defendant a notice thereof.

"There was no demurrer to the complaint. A demurrer would have tested the legal questions now before this court. However, respondent chose to answer, and insofar as it is material to a determination of this appeal, its answer denied the fraud and set up several separate defenses, namely: That no notice of proposed additional tax was ever mailed or given as required by section 25 of the act; that the assessment was arbitrarily made without notice and without allowing defendant any opportunity to protest or be heard and therefore was made without authority of law and is wholly void; that within 60 days after the Franchise Tax Commissioner mailed notice of the additional assessment, defendant served the commissioner with a written protest under oath against the levy of the additional tax, in which protest it requested an oral hearing, and that the commissioner never acted upon such protest and request; that the additional assessment had not become final because of the failure of the commissioner to grant the requested oral hearing, and that such hearing was a necessary prerequisite to the institution of the action. It also invoked the provisions of subdivisions 1 and 4 of section 338, subdivision 2 of section 340, and section 343, of the Code of Civil Procedure.

"Upon the trial of the action evidence was introduced by both parties, and at the conclusion the trial court filed a written opinion in which it stated: 'It seems to the Court that there can be no question but that the purpose of the purported sale to Ralphs was merely an attempt to avoid payment of the tax to the State. * * * As a matter of fact, it has been frankly admitted that one of the reasons for the conveyance was to avoid payment of the franchise tax * * * and the so-called sale was in fact no sale at all, but a pretended sale and a sham'; and in that opinion the evidence supporting its conclusion that fraud had been intentionally committed by defendant was reviewed. However, judgment was

rendered for defendant on procedural grounds, the court concluding that the provisions of section 25 of the act were applicable, that defendant was entitled to notice of the proposed additional assessment and to a hearing thereon before the commissioner as a prerequisite to the filing of the action, and that no such hearing having been granted, defendant was entitled to judgment.

"The paramount question on this appeal is whether defendant was entitled to such administrative hearing before action brought.

"Section 25 of the act, during the period involved in this action, provided that upon the filing of an original return the commissioner should examine it and if he determined that the tax disclosed was less than that disclosed by his examination, he should mail notice to the taxpayer of the additional tax proposed to be assessed, said notice to set forth the details of the proposed additional assessment; that within 60 days after mailing of said notice the taxpayer might file a written protest under oath against the levy of the additional tax, specifying the grounds of protest; that if no protest was so filed the amount of the tax should be final upon the expiration of 60 days, but if protest were filed it should be the duty of the commissioner to reconsider the computation and levy, and if so requested, grant to the taxpayer an oral hearing; that the commissioner's action after such hearing should be final after 30 days from date of mailing notice thereof to the taxpayer unless appeal was taken to the Board of Equalization; that upon such appeal the board should hear and determine same, its determination to be final upon the expiration of 60 days. Said section also provided that *except in the case of a fraudulent return*, every notice of additional tax proposed to be assessed should be mailed to the taxpayer within three years after filing of the return, and, if not so mailed, no deficiency should be assessed or collected with respect to the year for which said return was filed. Section 28 of said act then provided:

"In the event that fraud or evasion on the part of a taxpayer is discovered by the

commissioner, he shall have the power and it shall be his duty to determine the extent to which the state has been defrauded and to compute and charge against the taxpayer a tax in that amount which shall be immediately due and payable.'

"The state contends that since fraud was discovered the commissioner had the power, under section 28, to make the additional assessment without giving defendant a hearing and that the provisions of section 25 did not apply. Defendant argues that the commissioner must, in all cases, follow the procedure outlined in section 25, and that the act is unconstitutional if no right to an administrative hearing is given.

"The trial court's findings and its opinion indicate that its judgment was based upon a conclusion that under the statute respondent was entitled to an administrative hearing under section 25 in all such cases. The reasoning of the court seems to be based upon the language of section 31 of the act as it read before its amendment in 1939, as it said, in substance, that a taxpayer could not be said to be 'delinquent' when he had no notice that he was charged with the payment of the tax imposed by the commissioner; and that authority to bring an action such as this was dependent upon the delinquency of the taxpayer.

"Section 31, as it read before the 1939 amendment provided:

"At any time within three years after *the delinquency of any tax*, penalties, and interest, or any installment thereof, the commissioner may bring an action in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California to collect the amount delinquent, together with penalties, and interest * * *. In such action a writ of attachment may be issued, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the commissioner showing the delinquency shall be prima facie evidence of the levy of the tax, penalties, and interest, of the delinquency and of compliance by the commissioner and the State Board of Equalization with all the provisions of this act in relation to the computation and levy of the tax.' (Italics added.)

[1] "But said section refers to the delinquency of the tax and not of the taxpayer; and the word 'delinquent,' as used in statutes relating to taxation, means nothing more than 'overdue' and 'unpaid.' *Jenswold v. Minnesota Canal Co.*, 93 Minn. 382, 101 N.W. 603, 604; *Casareto v. Johnson*, 63 S.D. 460, 260 N.W. 705, 707; *Ryan v. Roach Drug Co.*, 113 Okl. 130, 239 P. 912, 918; *Tallman v. Board of Commissioners*, etc., Dist., 185 Ark. 851, 49 S.W.2d 1039, 1040. And as under section 28 the tax became 'immediately due and payable' when the commissioner, after discovery of the fraud, had computed and charged it against the taxpayer, the tax was delinquent from and after that date. The provision of section 28, that where the state has been defrauded the tax shall become '*immediately due and payable*,' indicates that the Legislature intended that the commissioner should act in a more summary manner in cases of fraud. If it had intended that the provisions of section 25 should apply where fraud was discovered, it would not have provided that the tax should become immediately due, since, where proceedings are had under section 25, the tax does not become immediately due, but only after the expiration of the time allowed for protest, and not then if protest be filed, for it provides that 'When a deficiency has been determined and the tax has become final *under the provisions of this section*, the commissioner shall mail notice and demand to the taxpayer for the payment thereof, and such tax shall be *due and payable at the expiration of ten days* from the date of such notice and demand.' (Italics ours.) Also the provision that *expect in the case of a fraudulent return* every notice of additional tax proposed to be assessed should be mailed to the taxpayer within three years after the return was filed and no deficiency should be assessed or collected unless such notice was mailed within such period, indicates an intention that a different course was to be pursued in case of fraud. It is entirely reasonable that the Legislature should have provided a different procedure in such cases, since summary action against those who have resorted to fraud in order to deprive the state of taxes justly due, may well be necessary to protect the

state and to enable it to take immediate steps to protect its revenues by suit and attachment or by seizure and sale. For it is not unfair to assume that a taxpayer who has resorted to fraud in the making of its return might resort to delaying tactics in order to dispose of or encumber its assets to defeat collection.

[2, 3] "As for respondent's argument that the act is unconstitutional if no right to an administrative hearing is provided, while it is doubtless true that a taxpayer, if he demands it, is entitled to a hearing at some stage of the proceedings for the collection of a tax, an administrative hearing is not such a prerequisite unless made so by statute. Constitutional requirements are met if a taxpayer is given an opportunity for a hearing in subsequent proceedings for collection of the tax or in an action for a refund where it is provided by the statute that he may pay the tax under protest and sue for its recovery. Both proceedings are provided for in the act under consideration. Section 30 provides for the latter course, and section 31 for the former, which was pursued here.

"In *Winona & St. Peter Land Co. v. State of Minnesota*, 159 U.S. 526, 16 S.Ct. 83, 40 L.Ed. 247, the court held that the Constitution of the United States was satisfied if an opportunity was given to question the validity of a tax either before the amount was determined or in subsequent proceedings for its collection. That case is cited in *Weyerhaeuser v. State of Minnesota*, 176 U.S. 550, 20 S.Ct. 485, 44 L.Ed. 583. Also, see *McMillen v. Anderson*, 95 U.S. 37, 24 L.Ed 335; *People v. Skinner*, 18 Cal.2d 349, 115 P.2d 488, 149 A.L.R. 299, and cases therein cited; *State Tax Commission v. Board of Supervisors*, 43 Ariz. 156, 29 P.2d 733, 739; *Powell v. Gleason*, 50 Ariz. 542, 74 P.2d 47, 51, 52, 114 A.L.R. 838.

"*Central of Georgia Ry. Co. v. Wright*, 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed 134, 12 Ann.Cas. 463, is relied upon by respondent. There actions were begun by the railroad company to enjoin the enforcement of executions issued for taxes assessed on shares of the stock of a railway company owned by plaintiff. Respondent reads that case as holding that an administrative hearing

was essential; but such was not the decision, for there the decision of the controller as to valuation was, by the statute, made conclusive unless it could be shown that he had acted in bad faith. There was no provision for relief in the courts upon proceedings brought to collect the taxes, or by bill to enjoin their collection. The opinion states, 207 U.S. at page 141, 28 S.Ct. at page 52, 52 L.Ed at page 143:

“‘As we have seen, the system provided in Georgia by the statutes of the state as construed by its highest court requires of the taxpayer that he return all his property, whether its liability is fairly contestable or not, upon pain of an *ex parte* valuation, against which there is no relief in the tax proceedings *or in the courts*, except in those cases where fraud or corruption can be shown in the action of the assessing officer.’ (Italics added.)

“In that very case the court cited Security Trust & Safety Vault Co. v. City of Lexington, 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204, stating that it had been there held that, before an assessment of taxes could be made upon omitted property, notice to the taxpayer, with an opportunity to be heard, **was** essential; that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace; but it further held that where the procedure in a state court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax, in a proceeding to enjoin its collection, the requirement of due process of law was satisfied.

“Furthermore, since 1933 section 31 has provided that the remedies therein set forth shall be cumulative. It states:

“‘It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the commissioner shall be or be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.’

[4] “It is said in Bouvier’s Law Dictionary, Rawle’s, 3rd Rev. 737, that ‘A cumulative remedy is one created by statute in addition to one which still remains in force.’ Also in 3 Cooley, Taxation, 4th ed., p. 2633, section 1332, it is stated: ‘If two or more statutory remedies are provided for, one of them being a personal action to collect the tax, it is generally held that the remedies are cumulative.’ In Shriver v. Woodbine Savings Bank, 285 U.S. 467, 479, 52 S.Ct. 430, 434, 76 L.Ed 884, 892, the court said: ‘Administrative remedies for the collection of taxes, if not made exclusive by statute, do not preclude the recovery of the tax by a common-law action of debt.’ Also, see, Commissioner of Banks v. Highland Trust Co., 283 Mass. 71, 186 N.E. 229, 231. In United States v. Chamberlin, 219 U.S. 250, 262, 263, 31 S.Ct. 155, 159, 55 L. Ed 204, 210, the rule is thus stated: ‘A tax may or may not be a “debt” under a particular statute, according to the sense in which the word is found to be used. But whether the government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive.’

“The foregoing rule was adopted by our Supreme Court in Scripps Memorial Hospital v. California Employment Commission, 24 Cal.2d 669, 673, 151 P.2d 109, 112, 155 A.L.R. 360. That case involved the question of whether the plaintiff, which had paid a tax and was suing for its recovery, was compelled to pursue a course before the commission before it was entitled to institute an action at law. In deciding the matter the court said:

“‘Section 45.5, which was added to the act in 1939, provides that an employer against whom an assessment has been made may ask for a reassessment but it is not provided that this must be done before any other relief will be available. On the other hand, section 45.10, which was added to the act in the same year, expressly provides that any employer may pay any contribution sought to be collected under protest and may then bring an action to recover the amount thus paid. * * *

"If it may be said that there was here an administrative remedy provided by this statute and by the rules of the commission which was available to the respondent it cannot be said that that remedy was exclusive or that its exercise was a necessary precedent to the use of the other remedy expressly given by the statute. None of the cases cited in support of the usual rule go to the extent of holding that that rule applies as against another remedy expressly provided in the same statute, which creates the administrative remedy. It would be somewhat illogical to require one who claims an exemption from such an assessment to follow a procedure in which he must ask for a pretended reassessment before he may follow the direct remedy applicable to his case which is also provided in the same statute and expressly made available to him. While the Legislature could have so provided we cannot believe that it intended to do so here. The right to pay under protest and bring such an action is directly given in this statute without qualification, and it is not for the courts to add conditions to the exercise of that right which are not imposed by the statute. Assuming that an administrative remedy existed the most that can be said is that alternative remedies were available to the respondent, and the court correctly refused to grant the motions to dismiss."

[5] "Respondent seems to take the position that because it was not granted a hearing pursuant to the provisions of section 25 of the act, it has not been granted a hearing at all. But such is not the case. It has not paid the tax, and in the action filed by the state for its collection it has been afforded and has taken full advantage of an opportunity to be heard. The issue of fraud was raised in plaintiff's complaint, and in its answer respondent not only denied the fraud but set up six separate defenses; and both parties produced evidence on the issues tendered. Therefore it cannot be said that the act is unconstitutional as depriving respondent of an opportunity to be heard on the issue of fraud as fully as if it had been granted an administrative hearing."

The respondent now strongly relies upon the action of the Legislature of 1945 in

amending the taxing statute. By that enactment, which became effective after the briefs were filed in the District Court of Appeal, section 28 was amended to read as follows:

"(a) If any taxpayer files a false or fraudulent return, or fails or neglects to file a return, with intent to evade tax, the commissioner, at any time, may require a return, or a supplementary return, under oath, or may make an estimate of the net income from any available information, and may propose to assess the amount of tax, interest and penalties due under this act. All the provisions of this act relative to delinquent taxes shall be applicable to the tax, interest and penalties computed hereunder.

"(b) When any assessment is proposed under the preceding paragraph, the taxpayer shall have the right to protest the same and to have an oral hearing thereon if requested; also to appeal to the board from the commissioner's action on the protest; the taxpayer must proceed under this paragraph in the manner and within the time prescribed by Section 25." Stats.1945, ch. 946; 3 Deering's Gen.Laws, 1945 Supp., Act 8488, p. 103.

The respondent argues that this amendment is a clarification of the statute as originally enacted. But the new provision is quite different from the section as it stood at the time the Franchise Tax Commissioner levied his assessment. The 1945 enactment not only gives the taxpayer the right to a hearing in accordance with the procedure specified by section 25, but substitutes for the previous authorization of a "charge" which became "immediately due and payable," a provision for particular steps to be followed by the commissioner which are consistent with the new requirement.

[6-8] Ordinarily, any substantial amendment of a statute indicates a legislative intention to change the meaning of the enactment rather than to interpret it. *Whitley v. Superior Court*, 18 Cal.2d 75, 113 P.2d 449; *Young v. Three for One Oil Royalties*, 1 Cal.2d 639, 36 P.2d 1065. The very fact of amendment evidences a desire to change the existing law. *Loew's Inc. v. Byram*, 11 Cal.2d 746, 82 P.2d 1. But in-

sofar as the legislation now in controversy is concerned, the conclusion as to legislative intent need not rest solely upon these fundamental principles of statutory construction. When the bill to amend section 28 was being considered by the senate, the purpose of the proposed measure was stated by the Franchise Tax Commissioner as follows: "Amendment proposes to treat fraudulent assessment in the same manner as a deficiency assessment. Under the present act, taxpayer must pay immediately upon receiving the assessment without right of protest, etc. Amendment changes present law." (Senate Daily Journal, 56th Session, May 22, 1945, pp. 3017, 3020.) Presumably the Legislature acted to carry that purpose into effect.

Under these circumstances it appears beyond question that the Legislature of 1945 broadened the taxing statute to give rights additional to those which the taxpayer had at the time the assessment was levied against the respondent. This is a change of policy which does not affect the present litigation.

The judgment is reversed.



28 Cal.2d 692

**PEOPLE v. ONE 1941 BUICK SPORT
COUPE et al.
L. A. 19709.**

Supreme Court of California, in Bank.
Aug. 13, 1946.

1. Appeal and error ☞907(3)

On appeal on judgment roll, trial court's fact findings are deemed supported by evidence.

2. Forfeitures ☞3

The government may not confiscate an automobile for unlawful use thereof by one using it without owner's consent, but where owner consents to its use by another, who uses it unlawfully, forfeiture is allowed,

regardless of owner's lack of knowledge of, or consent to, unlawful use.

3. Forfeitures ☞3

To justify forfeiture of automobile for its unlawful use by another than owner thereof, there must be some connection between owner and person committing crime, either by agency, owner's consent to such person's operation, or control of vehicle, knowledge thereof, negligence, or connivance.

4. Forfeitures ☞3

Where automobile was in possession and under control of registered owner thereof when seized by state and he had no knowledge of unlawful possession of marihuana cigarettes by another occupant thereof at such time, judgment forfeiting automobile on ground of its unlawful use to transport marihuana was unauthorized. Health and Safety Code, § 11610.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by the People to forfeit one 1941 Buick sport coupe, owned by the Kelley Kar Company and registered in the name of Ignacio N. Marquez, on the ground of its unlawful use in transporting marihuana cigarettes. From a judgment forfeiting the automobile, the legal and registered owners appeal.

Reversed, with directions.

Prior opinion 166 P.2d 69.

Sprague & Sparks and Philip S. Schutz, all of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The state obtained a judgment forfeiting an automobile in which an occupant of it, without the knowledge of the registered owner who then had possession and control of the vehicle, was carrying some marihuana cigarettes. The propriety of that judgment depends upon the construction of the forfeiture provisions of the Health and Safety Code.

In the "Notice of Seizure and Intended Forfeiture Proceedings" the attorney general asserted that the automobile "was used to unlawfully conceal, convey, carry or transport marihuana, and marihuana was in the possession of an occupant thereof." By its answer, Kelley Kar Company, a corporation, the legal owner, set up the defense of reasonable investigation of the moral responsibility, character and reputation of Ignacio N. Marquez, the registered owner. The corporation also denied having any knowledge that the automobile was to be used for the transportation of narcotics, and alleged, upon information and belief, that narcotics were not unlawfully possessed by any occupant of the vehicle and that it was not used to unlawfully conceal or transport marihuana or any other narcotics. The defense of Marquez was that he had no knowledge of the possession of marihuana by any occupant of the automobile and that it "was not being used for any unlawful purposes."

[1] As the appeal is upon the judgment roll, the findings of fact made by the trial court are deemed to be supported by the evidence. Ownership of the automobile was found to be as alleged by the state. The court also determined that at the time it was seized, the vehicle was in the possession and under the immediate control of Marquez. James Taylor, an acquaintance of Marquez, was an occupant of the car; he, Marquez and another person were en route to a theater. Taylor, without the knowledge of Marquez, had some marihuana cigarettes in his possession. Upon the issue of ownership, the finding was that Kelley Kar Company had a bona fide interest in the automobile in accordance with the terms of a contract of conditional sale, but that the vendor had made no investigation in regard to the moral responsibility, character and reputation of Marquez before the agreement was executed and the vehicle delivered to him.

From these findings the court concluded that "the vehicle * * * was not used with the knowledge of either the registered or legal owner to unlawfully conceal, convey, carry or transport marihuana, or that marihuana was in possession of an occupant

thereof, contrary to the force and effect of section 11610 of the Health and Safety Code * * * [and it] * * * should be released to the registered and legal owners thereof * * *." Judgment was rendered accordingly. Thereafter, the attorney general's motion for a new trial was granted, the previous judgment vacated and set aside, and a judgment entered forfeiting the vehicle to the state. The appeal of Marquez and Kelley Kar Company is from that judgment.

Section 11610 of the Health and Safety Code provides: "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State." The principal contention of the appellants is that this statute does not authorize the forfeiture of an automobile under the circumstances related in the findings of fact upon which the judgment here challenged was rendered. An automobile may not be used for a purpose unknown to the person operating it, they assert. The code section should be strictly construed, the argument continues, and if it authorizes a forfeiture in the event that an occupant, without the knowledge of the owner then in possession and control of the vehicle, has a narcotic upon his person, the legislation unconstitutionally deprives one of his property without due process of law. Also, it is said, in failing to require that the owner be "particeps criminis," the statute is unreasonable, arbitrary and capricious and does not bear a reasonable relationship to the legislative purpose of preventing the unlawful transportation of narcotics.

The attorney general takes the position that under the plain terms of the statute, to justify the forfeiture of an automobile the state need only prove that an occupant of the vehicle had a narcotic in his possession. He argues that it is not necessary to show that the owner had knowledge of the illegal possession of the narcotic by the occupant, or that the owner was an aider or abettor in the crime of unlawful possession. And strict construction of a statute is not permissible in this state, he contends, because

each of our principal codes requires that its provisions "are to be liberally construed with a view to effect its objects and to promote justice." Civ.Code, § 4; Code Civ. Proc. § 4; Pen.Code, § 4; Pol.Code, § 4.

It has been held that "there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use." *People v. One 1941 Ford 8 Stake Truck*, 26 Cal.2d 503, 507, 159 P.2d 641, 642; see, also, *People v. One 1933 Plymouth Auto*, 13 Cal.2d 565, 568, 90 P.2d 799; *Van Oster v. State of Kansas*, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044; *United States v. One Lincoln Touring Car, D.C.*, 11 F.2d 551. Justification for the confiscation under such circumstances has been placed upon the ground that "certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril." *Van Oster v. State of Kansas*, supra, 272 U.S. at page 467, 47 S.Ct. at page 134, 71 L.Ed. 354, 47 A.L.R. 1044. But property taken from the owner without his consent stands in a different category, and the Health and Safety Code has been construed as not authorizing the confiscation of a stolen automobile. "The reasoning leading to this conclusion is that a contrary determination would amount to an unconstitutional deprivation of property without due process of law (*People v. One 1937 Plymouth 6*, 37 Cal. App.2d 65, 98 P.2d 750), and where a statute is susceptible of two interpretations, one of which would satisfy constitutional guarantees, if possible the courts will uphold the legislation." *People v. One 1941 Ford 8 Stake Truck*, supra, 26 Cal.2d at page 506, 159 P.2d at page 642; see, also, *United States v. One Buick Roadster, D.C.*, 280 F. 517; *United States v. One Ford Coupe Automobile, D.C.*, 21 F.2d 639.

[2, 3] The line of demarcation established by these decisions is that if the owner

has not consented to the use of his property, the government may not confiscate it. But if consent has been given, forfeiture is allowed regardless of the owner's lack of knowledge of or consent to the unlawful use. *People v. One 1937 Plymouth 6*, 37 Cal. App.2d 65, 70, 98 P.2d 750. "An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the owner's consent to do so in any manner or at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner." *People v. One 1941 Ford 8 Stake Truck*, supra, 26 Cal.2d at page 507, 159 P.2d at page 642. These distinctions rest upon the fundamental principle that, to justify the forfeiture of property, there must be some connection, either by agency, consent to operate or control the vehicle, knowledge, negligence, or connivance, between the owner of the seized vehicle and the person committing the crime. *People v. One 1941 Cadillac Club Coupe*, 63 Cal. App.2d 418, 422, 147 P.2d 49; *Peisch v. Ware*, 4 Cranch 347, 8 U.S. 347, 2 L.Ed. 643; *United States v. One Haynes Automobile, D.C.*, 290 F. 399; *The Cargo Ex Lady Essex, D.C.*, 39 F. 765, 767.

[4] As the findings of fact in the present case declare that, at the time the state seized the automobile it was in the possession of Marquez and under his control and that he had no knowledge of the unlawful conduct of Taylor, there is no basis for the judgment of forfeiture. The judgment is, therefore, reversed with directions to the trial court to enter judgment denying forfeiture and releasing the automobile in controversy to the appellants.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

28 Cal.2d 696

WILLIAMS v. FIELD TRANSP. CO. et al.
L. A. 19741.

Supreme Court of California, in Bank.

Aug. 13, 1946.

1. Appeal and error ◊979(2)

An order granting new trial for insufficiency of evidence to sustain judgment will not be disturbed upon appeal in absence of abuse of discretion.

2. Appeal and error ◊1015(3)**New trial** ◊71

Even if the evidence is uncontradicted, the trial judge may draw inferences therefrom contrary to the inferences made by the jury, and must resolve such conflicts in determining whether the issues should be retried, and only when as a matter of law there is no substantial evidence to support a contrary judgment may an appellate court reverse an order granting a new trial.

3. New trial ◊70

In employee's action against employer and truck driver for injuries allegedly sustained during the loading of a truck, order granting employee a new trial after verdict for employer and driver was not abuse of discretion, where evidence relating to driver's negligence in loading the truck and employee's exercise of due care during the loading operation was clearly sufficient to support a verdict for employee.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Willie Williams against Field Transportation Company and another for personal injuries allegedly sustained by plaintiff while unloading pipes from a truck. From an order granting plaintiff a new trial after verdict and judgment for the defendants, the defendants appeal.

Order affirmed.

Prior opinion, see 166 P.2d 884.

Kenneth J. Murphy, of Los Angeles, for appellants.

Herlihy & Herlihy, of Los Angeles, for respondent.

EDMONDS, Justice.

Willie Williams sued Field Transportation Company and J. M. Brown, its employee, for damages on account of personal injuries assertedly sustained during the loading of one of its trucks. Following verdict and judgment in favor of the corporation and Brown, a new trial was granted "upon the sole ground of the insufficiency of the evidence to sustain the verdict as to all of the issues." The appeal is from that order.

Brown, a truck driver employed by Field, was sent to the premises of Industrial Engineering Company to pick up a number of pieces of 16-inch pipe 40 feet long, each of which weighed 1,800 pounds. Upon arrival he presented his trucking order to W. E. Trimmel, the yard superintendent, and there was some conversation as to the method to be used in loading and stacking the pipe. Trimmel said that to place it in a pyramid would provide maximum safety but Brown, after a telephone conversation with his company's dispatcher, determined to use the strip or tier method, which allowed a larger load on the truck.

Trimmel pointed out to Brown that his truck was not adequately equipped to carry the pipe in tiers because it had no stringers. Brown then went to a dunnage pile, procured some timbers and placed his truck in position for loading.

A crane stood parallel to the truck and between the truck and the pipe rack. In placing the pipe on the truck, its 30-foot boom operated in a horizontal arc. From this boom hung a cable at the end of which was a spreader bar holding load lines and lifting hooks. By means of these hooks, inserted into the ends of a pipe, it was hoisted from the pile, swung over to the truck and lowered into position. The hooks were then removed and the crane's boom returned to the rack for another pipe.

Tag-lines or leader ropes extending from these hooks were used to guide the pipe and keep it from swinging. Williams was assigned to handle one of the tag-lines. Brown stood on the truck during the loading operations, just behind the cab. When a pipe reached the truck, Williams turned

his line over to Brown who directed the pipe to rest. After it was in position for carrying, Brown pulled out the hook and handed it back to Williams. The man operating the tag-line at the other end of the pipe then released the hook under his direction, and he and Williams followed the boom as it returned to the pipe rack.

After five joints of pipe were laid in a row, Brown placed the stringers and blocking to keep them in place. Five sections were then placed in a second tier, each of which was directly on top of one of the first five. After being placed, these were also blocked and stringers laid across them. Under normal operations, the two rows would then be bound together by a chain cinched around them, but there is a conflict in the evidence as to whether this was done by Brown.

When the eleventh pipe was brought over, Williams handed his end of the line to Brown who directed the lowering of it, removed the hook and handed the hook and line back to Williams. Martin, the other tag-line man, removed the hook at his end of the pipe and both he and Williams started back to the pipe rack. Williams was then walking from the front to the rear of the truck between it and the crane. He had gone about 10 feet when the eleventh pipe rolled onto him. According to Brown's testimony, he had told Williams that walking between the truck and the crane was dangerous.

As grounds for the reversal of the order, the appellants assert that Williams failed to establish a prima facie case of negligence and that the evidence did not justify the court's instruction to the jury concerning the doctrine of *res ipsa loquitur*. Also, they contend, the evidence establishes, as a matter of law, that Williams was guilty of contributory negligence and voluntarily assumed the risk of injury. In support of the trial judge's ruling, Williams insists that the doctrine of *res ipsa loquitur* is applicable and that the evidence does not support an inference either of contributory negligence or of assumption of risk. Moreover, it is argued, as there is a conflict in the evidence, the order granting a new trial may not be set aside upon appeal.

[1,2] An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. "All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party." *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 170 P.2d 465, 467. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 163 P.2d 689; *Mazzotta v. Los Angeles Ry. Corp.*, *supra*.

[3] In the present case, the evidence clearly is sufficient to support a verdict in favor of the plaintiff. It was a question of fact as to whether Brown used due care in the loading of the truck and certain testimony tends to prove that he was guilty of negligence. The method of loading selected by him, the size of the pieces of lumber used as stringers between the rows of pipe laid on the truck, and the directions given Williams as to the handling of the tag-line and his return from the truck to the pipe rack after each section of pipe was loaded, were some of the factors proper to be considered in determining the issues of negligence and contributory negligence. Under these circumstances, there was ample ground for the exercise of judicial discretion in favor of a new trial.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

28 Cal.2d 748

In re BROOKS' ESTATE.**BROOKS v. BROOKS.****L. A. 19376.**

Supreme Court of California, in Bank.

Aug. 20, 1946.

1. Executors and administrators ⇨194(5)

Mere proof that applicant for a family allowance is decedent's widow is not conclusive of right to allowance, since allowance may be waived by an agreement to that effect or be lost by improper conduct. Probate Code, § 680.

2. Divorce ⇨234**Executors and administrators** ⇨188

A wife who obtains an interlocutory decree of divorce making no provisions for her support is not entitled to support, nor, on husband's death, to either a family allowance or a probate homestead. Probate Code, §§ 660 et seq., 661, 680.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of James Robert Brooks, deceased, by Bessie M. Brooks for family allowance and probate homestead, which was opposed by Emma Brooks. From a judgment for petitioner, Emma Brooks appeals.

Reversed.

Prior opinion 164 P.2d 537.

Newby, Holder & Newby, of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, for respondent.

TRAYNOR, Justice.

Petitioner and decedent were married in September, 1936, and separated in June, 1940. Following their separation decedent brought two actions against his wife, one for divorce, in which she filed a cross-complaint asking that a divorce be granted her, and the other for the recovery of money allegedly paid her under the terms of a void antenuptial contract. In the divorce action decedent prevailed in the trial court, but petitioner secured a reversal of that part of the judgment granting decedent

an interlocutory decree. *Brooks v. Brooks*, 53 Cal.App.2d 95, 127 P.2d 296. Petitioner allowed the judgment to become final without appeal, however, insofar as it denied her the divorce prayed for in her cross-complaint. In the other action petitioner prevailed after two appeals had been taken. *Brooks v. Brooks*, 48 Cal.App.2d 347, 119 P.2d 970; *Brooks v. Brooks*, 63 Cal.App.2d 671, 147 P.2d 417. In July, 1942, while both actions were still pending, petitioner made a written offer of reconciliation, which her husband did not answer. A year later, after the judgment in the divorce action had become final, petitioner in turn brought an action for divorce. As a result of negotiations between the parties, decedent agreed not to contest the action, waived his motion for a change of venue and paid his wife \$165 for attorney's fees and costs, and she agreed to make no other demands upon him in the action and joined him in the abandonment of the homestead that she had selected in 1939 from his separate property. Accordingly she was awarded an interlocutory decree of divorce on October 11, 1943, that made no provision for her support. Her husband died on June 4, 1944, and she thereafter applied to the probate court for a family allowance and a probate homestead upon the property that she had previously abandoned as a homestead. Decedent's sister appeals, as executrix of his estate, from the order granting petitioner such allowance and homestead.

Section 680 of the Probate Code provides that a widow is entitled to an allowance for her maintenance during the settlement of the estate, while section 661 of that code gives the surviving spouse the right to a probate homestead. Both sections are part of chapter 11 of division 3 of the Probate Code in which the Legislature has outlined the policy of this state regarding the "Support of the Family" pending the administration of an estate. With regard to the rights of a surviving wife, the two sections are parallel and cases construing one are cited authoritatively in cases construing the other. Our determination as to petitioner's right to a family allowance will therefore be decisive as to her right to a probate homestead.

[1] Although section 680 requires no more of an applicant for a family allowance than that she be the decedent's widow, it is settled that it does not give an absolute statutory right to such an allowance to every applicant who establishes that she is the decedent's widow. An applicant may have waived her right to an allowance by an agreement to that effect (*Estate of Yoell*, 164 Cal. 540, 129 P. 999; *Estate of McCoy*, 51 Cal.App.2d 483, 125 P.2d 71; see 11A Cal.Jur., *Executors and Administrators*, § 379), or may have lost that right by her conduct. *Estate of Miller*, 158 Cal. 420, 111 P. 255; *Estate of Bose*, 158 Cal. 428, 111 P. 258; *Estate of Fulton*, 15 Cal. App.2d 202, 59 P.2d 508. The executrix contends that the cases denying an allowance to a widow because of her conduct do so on the ground that by that conduct she lost her right to be supported by her husband during his life, and that correspondingly petitioner should be denied an allowance since she lost her right to support approximately eight months before her husband's death. The precise question as to the effect of an interlocutory decree of divorce granted the wife without any provision for her support upon her right to a family allowance has never been expressly passed upon in this state. It must be recognized, however, that two decisions of this court and two decisions of the District Court of Appeal strongly imply that such a decree will not prevent her from obtaining a family allowance. *Estate of Gould*, 181 Cal. 11, 183 P. 146; *Estate of Bidigare*, 215 Cal. 28, 8 P.2d 122, 123; *Estate of Breitter*, 69 Cal.App. 424, 231 P. 351; *Estate of Malouf*, 67 Cal.App.2d 589, 155 P.2d 121. Since there are several cases decided both by this court and by the District Court of Appeal holding that a wife is not entitled to an allowance unless she was entitled to support before her husband's death, the development of the California law on the subject must be reexamined.

In the first case, decided under a statute different from the one now in effect in that it provided for an allowance for the maintenance of the family of the decedent rather than for the maintenance of the widow and minor children, the court denied an allowance to a wife who had contracted a second

marriage under the erroneous belief that her marriage to the decedent had been terminated by a divorce. *Estate of Byrne*, Myr. Prob. 1. Although the second marriage was void, it nevertheless released decedent from any liability for her support. Since she could not demand before his death that he support her, she was not a member of his family within the meaning of the statute and was therefore not entitled to an allowance. In *In re Noah's Estate*, 73 Cal. 583, 15 P. 287, 288, 2 Am. St.Rep. 829, as in all subsequent cases, the statute involved was substantially similar to section 680 of the Probate Code. Although the wife in that case had waived "all her marital claims" under the terms of a separation agreement, the court denied her an allowance, but not on the ground that her waiver was broad enough to cover such an allowance. Relying instead upon *Estate of Byrne*, supra, it pointed out that the wife had lost nothing by her husband's death that she previously possessed and denied her an allowance on the ground that since she was not entitled to demand that he support her before his death she was not "the immediate family of the deceased, to whom was to be continued during the settlement of the estate the 'reasonable support' which the husband in ordinary cases is presumed to furnish his wife." 73 Cal. 583, 589, 15 P. 287, 290, 2 Am.St.Rep. 829. In *Wickersham v. Comerford*, 96 Cal. 433, 31 P. 358, the wife had also entered into a separation agreement which, under the decisions that were to follow, could have been construed as a waiver. In denying her a probate homestead, however, this court relied, not upon such waiver, but upon the same grounds that it had used in *In re Noah's Estate*, supra. *Estate of Miller*, supra, 158 Cal. 420, 111 P. 255, and *Estate of Bose*, supra, 158 Cal. 428, 111 P. 258, in which the wife had abandoned her husband before his death, were likewise decided upon those grounds. They were also relied upon in *Estate of Yoell*, supra, 164 Cal. 540, 129 P. 999, although only as an alternative basis for the decision. Thus, it became "well settled that a surviving widow who had separated from her husband and had ceased to be a member of his family, or to be entitled to his support at the time of his

death, is not entitled to an allowance * * *." *Estate of McSwain*, 176 Cal. 280, 284, 168 P. 117, 119.

In *Estate of Gould*, supra, 181 Cal. 11, 183 P. 146, however, this court for the first time approached the problem differently. The husband died within a year of the granting to his wife of an interlocutory decree of divorce that assigned to him certain property "free and clear of all [her] claim." In granting her a family allowance out of that property the court stated that the statutory provision for such allowance was "not conditioned upon her having lived in a family relation with her husband at the time of his death." 181 Cal. 11, 13, 183 P. 146, 147. No California cases were cited in support of that proposition, but the court relied upon a case from Georgia (*Farris v. Battle*, 80 Ga. 187, 7 S.E. 262) and a case from Missouri (*King v. King's Ex'r*, 64 Mo.App. 301). Although they both support the proposition for which they were cited, it should be noted that *King v. King's Ex'r*, supra, is squarely opposed to *Estate of Miller*, supra, and *Estate of Bose*, supra, for it gives an allowance to a wife who deserted her husband, and that in *Farris v. Battle*, supra, the granting of a family allowance is regarded as part of the intestate distribution of the estate, a view that is not followed in the California cases. See *Estate of Kennedy*, 157 Cal. 517, 527, 108 P. 280, 29 L.R. A., N.S., 428; *Estate of Simonton*, 183 Cal. 53, 59, 190 P. 442; *Estate of Woodburn*, 212 Cal. 683, 687, 300 P. 22; 11A Cal. Jur., *Executors and Administrators*, § 369. Nor did the court consider in *Estate of Gould*, supra, whether the fact that the interlocutory decree apparently made no provision for the wife's support affected her right to an allowance. It passed upon the effect of the decree only to determine whether the clause that gave the husband certain property "free and clear of all claim" of his wife covered her claim to a family allowance. On the authority of *Estate of Whitney*, 171 Cal. 750, 154 P. 855, the court held that it did not. In *Estate of Whitney*, supra, the spouses had entered into an agreement primarily intended to give the husband the right to dispose of the entire community property by will. The court

held that the wife had not waived her right to an allowance, stating that "the right should not be held to have been surrendered by an agreement between the spouses 'except by clear and explicit language.'" 171 Cal. 750, 756, 154 P. 855, 857. Since the spouses had lived together until the husband's death under conditions that made him liable for her support until that time, no issue was raised in that case as to whether the widow's right to an allowance was dependent upon her having been entitled to support as a wife. In applying the "clear and explicit language" test to the language of the decree in *Estate of Gould*, supra, the court overlooked the fact, however, that in that case, unlike *Estate of Whitney*, supra, the husband was not liable for his wife's support at the time of his death. Since the divorce was granted to the wife, it was presumably because of her husband's fault that she was not a member of his family at the time of his death. The court would have been justified therefore in holding that under such circumstances her right to an allowance could not be made to depend upon the existence of the family relation, a qualification that it had already recognized in *In re Noah*, supra. There was apparently no justification, however, for unqualifiedly holding that the existence of the family relation was immaterial, or for failing to determine whether the right to an allowance depended upon the right to support during the husband's life. The court may have regarded the "family relation" test and the "right to support" test as being the same. It is clear, however, that under certain circumstances, such as those of *Estate of Gould*, supra, or of the present case, the two tests do not overlap.

In *Estate of Parkinson*, 193 Cal. 354, 224 P. 453, and *Estate of Henningsen*, 199 Cal. 103, 247 P. 1082, this court reaffirmed the proposition that the existence of the family relation was not an essential prerequisite to the granting of an allowance or a probate homestead. In the former case, however, the wife was receiving support at the time of her husband's death; in the latter the family relation had not in fact been dissolved. In the next case (*Estate of Boeson*, 201 Cal. 36, 255 P. 800, disapproved

on other grounds in *Leupe v. Leupe*, 21 Cal. 2d 145, 149, 130 P.2d 697) the court seemingly returned to the position that it had held before deciding *Estate of Gould*, supra, for it stated in a dictum, citing *In re Noah*, supra, *Estate of Miller*, supra, *Estate of Bose*, supra, and *Estate of Yoell*, supra, that before an allowance can be denied, the wife must not only have ceased to be a member of the family, but must also have lost her right to support.

In the last case on the subject decided by this court (*Estate of Bidigare*, supra, 215 Cal. 28, 8 P.2d 122) the wife had not only secured an interlocutory decree of divorce without provision for her support, but had also entered into a separation agreement whereby she expressly waived her right to support during her husband's life. The court did not consider, however, whether the agreement or the decree had cut off the wife's right to any family allowance by making her husband no longer liable for her support. It stated the only issue to be whether the agreement contained a waiver of the allowance and held that it did not, construing the agreement strictly in favor of the wife on the authority of *Estate of Whitney*, supra, and *Estate of Gould*, supra.

In *Estate of Breitter*, supra, 69 Cal.App. 424, 231 P. 351, the wife had also secured an interlocutory decree of divorce that made no provision for her support. After recognizing that the code provisions were enacted for the protection of those entitled to support at the time of the husband's death, the court reversed an order denying the wife a family allowance, without apparently noticing that she was not entitled to the support that had just been declared to be a prerequisite to the granting of such allowance. In *Estate of Fulton*, supra, 15 Cal.App.2d 202, 59 P.2d 508, the wife was denied a probate homestead on the ground that she had abandoned her husband under conditions rendering him no longer liable for her support. In *Estate of Ruiz*, 53 Cal.App.2d 363, 127 P.2d 945 (hearing denied), and *Estate of Egeline*, 53 Cal. App.2d 368, 127 P.2d 948, the court denied an allowance to the wife on the ground that an interlocutory decree of divorce granted to the husband had previously

freed him from all obligation to support her. In *Estate of Malouf*, supra, 67 Cal. App.2d 589, 155 P.2d 121, however, the wife prevailed, although the interlocutory decree that she had secured was silent about support. Again the court did not consider the fact that she was not entitled to support before her husband's death.

[2] This court must therefore choose between two lines of decisions that cannot be reconciled. One of them makes the granting of an allowance dependent upon the wife's right to support at the time of her husband's death; the other does not. Our choice must be governed primarily by a consideration of what the Legislature intended when it enacted the provisions for the "Support of the Family" involved in all those cases. Some of those cases have nothing to say about the nature and purpose of a family allowance. Those that do discuss the matter, however, all seem to agree that a family allowance was intended by the Legislature to continue, during the settlement of the estate, the support that the wife was previously receiving or was at least entitled to receive. See *Estate of Byrne*, supra, Myr. Prob. 1; *In re Noah's Estate*, supra, 73 Cal. 583, 15 P. 287, 2 Am. St.Rep. 829; *Estate of Miller*, supra, 158 Cal. 420, 111 P. 255; *Estate of Yoell*, supra, 164 Cal. 540, 129 P. 999; *Estate of Fulton*, supra, 15 Cal.App.2d 202, 59 P.2d 508; *Estate of Ruiz*, supra, 53 Cal.App. 2d 363, 127 P.2d 945; *Estate of Egeline*, supra, 53 Cal.App.2d 368, 127 P.2d 948. The cases that do not insist upon the condition that the wife be entitled to support seem to lose sight of the purposes for which an allowance is granted. They give her an allowance intended to continue a support that she neither received previously nor was entitled to receive. No doubt the Legislature intended also to protect the family by restricting the decedent's absolute testamentary freedom and by continuing to the family as against creditors the exemptions to which the decedent was entitled during his life. See 1 *Woerner, Administration* (3d ed.) § 77; *Atkinson, Wills*, 101. That protection is accorded them, however, only as a part of the broader protection that is derived from the decedent's duty to support them. Our choice of the

first line of cases finds additional justification in the fact that the second is based upon *Estate of Gould*, *supra*, a case decided without regard for previous California authority.

It is settled in this state that a wife who obtains an interlocutory decree of divorce making no provision for her support is not entitled to support. *London G. & A. Co. v. Industrial Acc. Com.*, 181 Cal. 460, 465, 466, 184 P. 864.

The order appealed from is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.



75 Cal.App.2d 739

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. WIRTA.

Civ. 7195; Sac. 5738.

District Court of Appeal, Third District,
California.

Aug. 10, 1946.

1. Taxation Ⓒ59

Evidence that "tie-makers" would buy designated trees or trees on designated area upon a stumpage basis, would fell trees and make from them shakes, ties, posts, or stakes according to their judgment, that they worked no regular hours, that they furnished their own tools, and that seller could not discharge them, sustained finding that they were "independent contractors" and not seller's "employees" within unemployment insurance act. Gen. Laws, Act 8780d, §§ 37, 38, 44.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Appeal and error Ⓒ1011(1)

The trial court's determination upon conflicting evidence is conclusive.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by the California Employment Stabilization Commission, successor to California Employment Reserves Commission, against Into Wirta, as administrator of the estate of Emil Wirta, deceased, to collect unemployment contributions, interest, and penalties. From a judgment for defendant, plaintiff appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Hill & Hill, of Eureka, for respondent.

ADAMS, Presiding Justice.

This action was instituted under the provisions of Sections 37, 38 and 44 of the California Unemployment Insurance Act, Gen.Laws, Act 8780d, against defendant as administrator of the estate of Emil Wirta, for the collection of unemployment contributions, interest and penalties, for the period beginning July 1, 1939, and ending December 30, 1943. The decedent, during said period, operated what is known as a "tie camp" in Humboldt County. He employed certain employees including truck drivers, caterpillar and bulldozer operators and general utility men. Liability for failure to pay contribution upon these employees was admitted at the trial. However, it was contended by plaintiff that certain other persons referred to as split products operators or "tie-makers" were also employees of decedent and that Wirta should have made contributions as to them. The trial court found to the contrary, and it is from its judgment in this behalf that this appeal was taken.

The evidence shows that decedent Wirta was engaged in the business of manufacturing and selling split products consisting of ties of various sizes, stakes, posts and shakes. He owned some timber and leased some from others. The "tie-makers" whose status is in question here, were skilled men, long experienced in their particular line of work. They operated as follows: Wirta would show them a "lay-out" consisting of

a designated area, or a designated number of trees. They then bought the designated trees, or the trees on the designated area, upon a stumpage basis, felled the trees and made from them either shakes, ties, posts or stakes, according to their judgment as to which product or products could be made from them most advantageously. They were not told by Wirta or anyone in his employ what to make, they worked no regular hours, going and coming as they wished, sometimes "laying off" for periods of days. They furnished their own tools consisting of cross-cut saws, drag-saws, axes and wedges, and their own fuel to operate the drag-saws. They could, and sometimes did, take partners in to help in their work, and sometimes assisted one another in the felling of trees. Also they sometimes employed helpers whom they themselves paid. Their products were sold mainly to Wirta who purchased and paid for them on the basis of so much per 1000 board feet. The products purchased by Wirta were counted, graded and culled by him and he hauled them from the woods. He did not inspect the work while it was being done. The operators could and sometimes did sell their products to others, and did not receive pay from Wirta for such products as he did not consider satisfactory. The products made by the operators remained their property until paid for by Wirta, and risk of loss was theirs. Wirta kept no records of the

trees these men worked, they considered themselves their own "bosses," and they could quit work whenever they wished. Wirta could not discharge them, though he could refuse to sell any more trees to a man whose products were unsatisfactory. Wirta furnished meals and lodging to the operators if they desired to avail themselves of same, but they were charged for such facilities when they elected to use them. A form of agreement was introduced in evidence* but not all of the operators executed such contracts, and the evidence shows that the methods of operation, before and after the execution of the agreements was the same.

[1] In view of the recent decision of the Supreme Court in *Empire Star Mines Co., Ltd., v. California Employment Comm.*, 28 Cal.2d 33, 168 P.2d 686, we think that the evidence fully sustains the finding of the trial court that the "tie-makers" in question were not employees of Wirta, but that they were independent operators. In the *Empire Star Mines* case, 28 Cal.2d at page 43, 168 P.2d at page 692, the court said:

"The relationship contemplated by the legislation as the basis of the requirement for contributions is that of employer and employee; a principal for whom services are rendered by an independent contractor does not come within the scope of its pro-

* "Agreement, executed this _____ day of _____, 1941, between E. Wirta, herein called the Seller, and _____, herein called the Buyer.

"Seller agrees to sell, and Buyer agrees to buy certain specified redwood trees located upon the North half of the Northwest quarter of Section 16, Township 4 South, Range 3 East, Humboldt Base and Meridian, in Humboldt County, California, designated as trees Numbered _____, at the rate of _____ per thousand board feet stumpage, to be manufactured into split products by the Buyer and resold.

"The Seller agrees to purchase from the Buyer split products to be manufactured by the Buyer from said trees which meet specifications prescribed by the Seller, at the rate of _____ per thousand board feet. It is understood that the Buyer may sell said split products to whomever he desires by paying a toll of

\$1.00 per m. board feet for use of roads constructed and maintained by Seller.

"It is understood and agreed that no title to the real property upon which said trees are located passes to the Buyer. Should the Buyer fail to manufacture said trees, and logs and timber therefrom into split products within a reasonable time, to-wit, within 30 days after notice from the Seller, title thereto shall revert to the Seller. Risk of loss is on the Buyer.

"It is further understood that the Buyer is in no sense the employee of the Seller; that said Buyer operates entirely upon his own responsibility, at his own time and using his own tools and equipment. Buyer may, but shall not be obliged to, engage assistance or contract said work. In such event Buyer agrees to save Seller harmless from labor claims, liens, public liability and property damage done or suffered by the Buyer or anyone employed by him."

visions. *Garrison v. State of California*, 64 Cal.App.2d 820, 824, 149 P.2d 711; see *California Emp. Comm. v. Bates*, 24 Cal.2d 432, 150 P.2d 192; *California Emp. Comm. v. Los Angeles, etc., News Corp.*, supra [24 Cal.2d 421, 150 P.2d 186]. In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. *California Emp. Comm. v. Bates*, supra; *California Emp. Comm. v. Los Angeles, etc., News Corp.*, supra. Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee."

The court then pointed out that the leasers, who in that case were held to be independent contractors and not employees, determined for themselves what work they would do and how it would be done; they fixed their own working time; they were never requested to discharge anyone; the lessors' foremen and shift bosses never visited the leasers' work; the leasers sometimes hired men to assist them, and paid their wages; they carried on their

work at their own risk in their own way, for their own profit.

The same may be said of the tie-makers in the case before us, and in addition thereto, the tie-makers bought the trees from which their products were made, and sold the products to Wirta if he wanted to buy them, or to others if he did not; their work was never inspected while it was in progress, and it is apparent that they were at all times considered as independent operators who knew their own business and were skilled therein, who could be depended upon to make the most of the timber sold to them, without any supervision, direction or control by Wirta of the method, manner or details of their operations.

Much less evidence from which a right of contract might be inferred is shown in the instant case than was shown in the case of the leasers in the *Empire Star Mines* case; and no right to discharge at will appears here. Appellant argues that a right to control appears because Wirta told the men what products to make. But the testimony shows, not that Wirta told them what to make, but that he told them what products he wanted or would like to have. They used their own judgment as to what they would make out of any particular tree. Appellant also argues that Wirta had the right to discharge tie-makers because he could refuse to give a new "lay-out" to an unsatisfactory operator. But that same right could have been exercised as to the leasers in the *Empire Star Mines* case, and cannot be said to constitute evidence of a right to control or evidence of an employer-employee relationship. It also argues that the tie-makers' products were sold only to Wirta. But there was testimony that "lots of times somebody sold them to somebody else".

[2] Any conflicts in the evidence have been resolved against appellant by the trial court and its determination under such circumstances is conclusive here.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

75 Cal.App.2d 828

UNITED STATES FIDELITY & GUARANTY CO. v. KECK.

No. 13125.

District Court of Appeal, First District,

Division 1, California.

Aug. 26, 1946.

1. Executors and administrators ⚡227(3)

Where claim against estate showed that plaintiff's judgment against decedent was for designated sum with interest from certain date, accompanying affidavit stating that such sum with interest from such date was "justly due" and that there were no offsets was not deficient for failure to state that no payments had been made thereon which were not credited. Probate Code, § 705.

2. Action ⚡66

Modern jurisprudence regards the substance as more important than mere form and will not permit a mere technicality to defeat substantial justice.

3. Executors and administrators ⚡227(3)

The statutory requirements as to contents of affidavit supporting a claim against estate of decedent are not intended to make it easier to avoid payment of just claim, but are intended to make a claimant set forth his claim with such particularity that executor or administrator in passing upon it would be fully advised as to just what was claimed, and all that is required is substantial compliance with statute. Probate Code § 705.

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by the United States Fidelity & Guaranty Company against John A. Keck, administrator of the estate of Lizzie B. Keck, deceased, upon a claim presented against the estate of deceased which had been rejected by defendant. From a judgment for plaintiff, defendant appeals.

Affirmed.

Waldo F. Postel, of San Francisco, for appellant.

Bernard B. Stimmel, of San Francisco, and Norman S. Stimmel, of Antioch, for respondent.

SCHOTTKY, Justice pro tem.

Respondent commenced an action against appellant administrator upon a claim presented against the Estate of Lizzie B. Keck, deceased, which claim had been rejected by appellant. The only defense set up by appellant administrator was that the affidavit supporting the claim was not in the form required by section 705 of the Probate Code. The trial court found the claim sufficient, adequate and proper as to form and rendered judgment in favor of respondent. This appeal is from said judgment.

The claim sued upon set forth as the item of indebtedness the following:

"1942

"May 28, Judgment entered in the Superior Court of the State of California in and for the County of Alameda in that certain action entitled 'United States Fidelity and Guaranty Company, a corporation, plaintiff vs. Lizzie B. Keck, defendant'—Proceeding No. 166384 and bearing date of the 28th day of May, 1942, and by reference made a part hereof; that no part of said judgment has been paid or satisfied and the whole thereof is due, owing and unpaid in the sum of Eight Thousand Seven Hundred Fifty-nine and 84/100 Dollars \$8,759.84 With interest thereon at the rate of 7% per annum from and after the 28th day of May, 1942."

The affidavit in support of the claim reads as follows:

"State of California
City and County of San Francisco. } ss.

"Horace W. B. Smith, being first duly sworn, deposes and says:

"That the United States Fidelity and Guaranty Company, whose foregoing claim is herewith presented to the administrator of said deceased, is a corporation; that affiant is an officer of said corporation, to wit: Resident Secretary, and that he has knowledge of and is familiar with the matters as stated in said claim; and for that reason he

makes this affidavit on behalf of said United States Fidelity and Guaranty Company, a corporation; that the amount of said claim is, to wit: The sum of Eight Thousand Seven Hundred Fifty Nine and 84/100 Dollars (\$8,759.84) with interest thereon at the rate of 7% per annum on and after the 28th day of May, 1942, which is wholly unpaid and unsatisfied, and the same and the whole thereof is now justly due, owing and unpaid, and that there are no offsets to the same to the knowledge of said affiant.

"(Sgd.) Horace W. B. Smith".

The applicable portion of section 705 of the Probate Code reads as follows: "Every claim which is due, when filed or presented must be supported by the affidavit of the claimant or someone in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant."

Appellant contends that the affidavit of claimant does not comply with the above section and that the judgment in favor of respondent should therefore be reversed. This is the sole question involved upon this appeal. There was no denial in appellant's pleadings as to the recovery of the judgment upon which the claim was based, nor as to its amount, nor was there any allegation or evidence that any payments were made which were not credited. Appellant asserts: "The affidavit in question does not state 'that no payments have been made thereon which are not credited.' The affidavit does not use any word which would indicate an attempted compliance with the section. None of the following words are used: 'payment,' 'payments' or 'credited.' The Code distinguishes between the 'payments' and 'offsets.' In the case now before the Court, the second requirement of the section is entirely ignored." Appellant argues that "the affidavit failing to state that no payments have been made thereon which have not been credited" is insufficient to support the claim.

In our opinion the contention of appellant is entirely devoid of merit, and, were it not for the apparent sincerity of counsel for appellant in his briefs and upon the oral

argument, we would be disposed to characterize the appeal as frivolous.

[1,2] We are unable to understand how it can be contended seriously that the affidavit here in question omits any requirement of the section. Appellant argues that it does not use the words "that no payments have been made thereon which are not credited," and that, therefore, the second requirement of the section is lacking. However, the claim shows that the judgment was for the sum of \$8,759.84 with interest from May 28, 1942, at 7%. The affidavit states that said sum of \$8,759.84 with interest at 7% from May 28, 1942, was justly due and that there were no offsets to same. Certainly, if the amount of the judgment was \$8,759.84 with interest from May 28, 1942, and the affidavit states that said amount and interests are justly due, it follows that there have been no payments, and it would add nothing to the substance of the affidavit to go further and state "that no payments have been made thereon which are not credited," because it already appears that no payments have been made. Appellant's argument is in effect an argument that there must be a strict, literal compliance with the language of the section. While such an argument might find some support in decisions of an earlier day when mere technicalities were deemed important, it is out of harmony with modern enlightened jurisprudence which regards the substance as more important than mere form and will not permit a mere technicality to defeat substantial justice.

[3] The requirements as to the contents of the affidavit supporting a claim against the estate of decedent are not intended to make it easier to avoid payment of a just claim, but were intended to make a claimant set forth his claim with such particularity that the executor or administrator in passing upon it would be fully advised as to just what was claimed. All that is required is a substantial compliance with the requirements of the section. As was said in the case of *Doolittle v. McConnell*, 178 Cal. 697, at page 712, 174 P. 305, 310: "The purpose of a claim against an estate is to give the executor or administrator such

information as will enable him 'to act upon it advisedly.'" And in *Valente v. Sica*, 1 Cal.App.2d 478, at page 480, 36 P.2d 1086, at page 1087, the court said: "We believe the verification substantially complies with section 705 of the Probate Code. Our courts have in the past refused to be technical in ruling upon matters of this sort. *Estate of Swain*, 67 Cal. 637, 8 P. 497; *Guerian v. Joyce*, 133 Cal. 405, 65 P. 972; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 P. 496."

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



75 Cal.App.2d 934

GREAT AMERICAN INSURANCE COMPANY, a Corporation, Plaintiff and Appellant, v. **CAPITAL NATIONAL BANK OF SACRAMENTO**, a National Banking Association, Defendant and Respondent.

Civ. 7247.

District Court of Appeal, Third District,
California.
Aug. 17, 1946.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Elliott, Atkinson & Sitton, of Sacramento, for appellant.

Treadwell & Laughlin, of San Francisco, for respondent.

THOMPSON, Justice.

This is a companion case with *American Alliance Insurance Company v. Capital National Bank of Sacramento*, 171 P.2d 449. The issues in both cases are precisely the same. From a summary judgment which was rendered against the plaintiff in this case it has appealed.

In every essential respect the pleadings in these companion cases are the same. No

separate briefs were filed in this case. The parties rely on the briefs which they filed in the last mentioned case.

Upon the authorities cited and for the reason stated in the *American Alliance Insurance* case, the summary judgment which was rendered in this case is affirmed.

ADAMS, P. J., and PEEK, J., concur.



75 Cal.App.2d 723

LINE v. LINE.

Civ. 15328.

District Court of Appeal, Second District,

Division 3, California.

Aug. 8, 1946.

Rehearing Denied Sept. 5, 1946.

1. Divorce ⚡160

Where defendant in divorce proceedings was duly served with summons and complaint and was fully advised thereby that the plaintiff sought an order that the defendant pay plaintiff's counsel \$2,500 for services rendered in connection with the action and defendant's default was regularly entered, defendant waived any objection to the complaint except as to its legal sufficiency and the jurisdiction of the court, and fact that defendant had previously stipulated in writing that the amount he should be ordered to pay plaintiff as attorney's fees should be determined by the court at the time of the trial, gave defendant no additional rights. Code Civ.Proc. § 434.

2. Divorce ⚡221

That property settlement provided that court in wife's contemplated action for divorce might fix, at the trial or default hearing, amount of attorney's fees to be paid by defendant, did not deprive court of jurisdiction to determine such fees. Civ. Code, §§ 137, 137.5.

3. Divorce ⇨221, 223

The matter of compelling the husband to pay the wife any money necessary to prosecute or defend the cause rests solely with the court's discretion, and any agreement purporting to otherwise settle such matter is subject to examination by the court. Civ. Code, §§ 137, 137.5.

4. Divorce ⇨221

In divorce proceedings allowance of attorney's fees may not be made for past services in absence of defendant's consent but when consent is given such allowance may be made. Civ. Code, §§ 137, 137.5.

5. Divorce ⇨221

The stipulation or agreement of defendant in divorce proceeding consenting to deferment of the fixation of attorney fees to the time of trial waived any objection to allowance of fees for past services, and the court could properly consider all legal services rendered to wife by her attorney in determining a reasonable fee. Civ. Code, §§ 137, 137.5

6. Divorce ⇨221

A consent of defendant in divorce proceeding to deferment of fixation of attorney fees to time of trial may be manifested by an oral stipulation made in open court to continue the matter of the payment by the defendant of the wife's attorney fees to the time of trial, or by a writing whereby the defendant stipulates that this may be done. Civ. Code, §§ 137, 137.5.

7. Divorce ⇨160

The sufficiency of the evidence to support an allowance of \$2,500 to wife's attorney in divorce proceeding was not open to defendant whose default had been taken. Civ. Code, §§ 137, 137.5.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Alice C. Line against F. Warren Line for divorce, wherein an interlocutory judgment of divorce for plaintiff was entered. From so much of the judgment as allows plaintiff an attorney's fee of \$2,500 and the sum of \$11.50 on account of court costs, the defendant appeals.

Affirmed.

Martin S. Ryan, of Los Angeles, for appellant.

Paul R. Hutchinson, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

Appeal is taken herein by the defendant from that portion of the interlocutory judgment of divorce reading as follows: "The parties having stipulated in said property settlement agreement that the application of the wife for attorney's fees and court costs be continued, and the same having been continued by them until the time of trial, and the same having been heard at this time, the Court now finds that plaintiff is entitled to her attorney's fees and court costs herein incurred and defendant is ordered to pay direct to Paul R. Hutchinson, attorney for plaintiff, the sum of \$2500.00, on account of said attorney's fees, and the sum of \$11.50 on account of court costs, which sums are ordered paid forthwith."

Plaintiff and defendant are husband and wife. The evidence discloses that at the time of their separation on March 15, 1945 substantial grounds existed whereby plaintiff was entitled to a divorce against defendant, that she had a proper claim upon certain community property then owned by the parties and for support and suit money in event of suit. Negotiations were carried on by the parties, each being adequately represented by counsel, culminating in a duly executed written property settlement agreement. Such agreement provided for a division of the community property of the parties and the amount of support moneys was fixed to the satisfaction of each party thereto. As to the subject of attorney's fees and court costs to which the plaintiff might be entitled in any subsequent action for divorce, such agreement provided as follows: "It is agreed that both wife and husband have each had the independent legal advice of an attorney of their own choosing, and that Paul R. Hutchinson is the attorney for the wife. It is further understood that in any action for divorce such as the wife is about to file and maintain, she would be entitled to demand and receive attorney's fees and court costs to be paid by the husband with which to prosecute said action, but that if the same were

done it would be necessary to make a preliminary application for the same prior to the trial or default hearing on the merits of said action which would be an unnecessary delay and inconvenience to the parties. It is therefore stipulated and agreed by the husband that no such preliminary application need be made and that the application for attorney's fees and court costs by the wife may be continued to the time of trial or default hearing, and no objection or exception shall be taken at that time to the request for attorney's fees and court costs by virtue of the fact that no such preliminary application was made, and it is further agreed that if, in the meantime, the parties have not agreed and settled upon the amount of attorney's fees, the Court shall at that time determine and fix the amount of attorney's fees to be paid by the husband, the same as if application had been made for the same in the beginning of the action, and order the husband to pay the same, and he agrees to pay the amount so ordered by the Court. In fixing said fees, the Court shall not view the value of the services to be rendered after the hearing or in connection with the hearing, but shall fix the same for the services rendered by him to the wife in the consultation, settlement, presentation, and trial of said divorce action."

Thereafter, on August 7, 1945, the plaintiff filed her complaint against the defendant for a divorce, alleging grounds of extreme cruelty, that she was unable to pay her attorney's fees herself and that the defendant was able to do so, that prior to the filing of the action the parties had entered into a written property settlement agreement providing for a disposition of the community property between the parties and for support moneys, that the amount of attorney's fees and court costs to be allowed plaintiff be continued to and heard at the time of the trial, and that the sum of \$2500 was and is a reasonable sum for her attorney's fees in connection with this action. In the prayer of the complaint plaintiff asked, in addition to a divorce, for approval by the court of such property settlement agreement and that defendant be ordered to pay, as and for plaintiff's attorney's fees, the sum of \$2500.

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Appellant was duly served with such complaint and summons and having failed to enter any appearance his default was regularly entered and the case was set down for hearing as a default divorce. At such default trial hearing the attorney for defendant appeared, although neither defendant nor any witness in his behalf was present. Defendant's attorney took no part in the proceedings, nor raised any objections to any portion thereof excepting his oral protest to the allowance of any sum as attorney's fees for plaintiff's counsel in excess of \$500. He made no proffer of any evidence, asked for no continuance, nor for any permission to intervene or reopen the case, or to take any proceeding directed toward the setting aside of the defendant's default for surprise or upon any other ground. Evidence was adduced relative to the income of the defendant, the amount of property involved in the action, and as to the extent of the legal services which were rendered by plaintiff's counsel. The court permitted the defendant's attorney to state his objections to the amount to be allowed as such attorney's fee, as a friend of the court, and following the conclusion of such hearing allowed the sum of \$2500 as attorney's fees for plaintiff's counsel.

[1] Defendant now complains that the trial court erred in refusing to allow him to present evidence at the default hearing as to his financial ability to pay any attorney's fees for the services rendered by his wife's attorney, and her financial necessity therefor. The record fails to disclose any request by defendant, through his counsel or otherwise, for permission of the court to present any evidence whatsoever. In any event the defendant had previously been served with summons and complaint and was fully advised thereby that the plaintiff sought an order by the court for defendant to pay plaintiff's counsel fees in the sum of \$2500 in such action. Defendant took no objection to such complaint, either by demurrer or answer, and his default was regularly entered thereto. He therefore must be deemed to have waived any objection to the contents of the complaint, excepting only as to its legal sufficiency and to the jurisdiction of the court. Code Civ.Proc. sec.

434. The mere fact that defendant had previously stipulated in writing that the amount which he should be ordered to pay plaintiff as attorney's fees should be continued to and be determined by the court at the time of trial, gave defendant no additional rights of objection.

[2,3] Defendant questions the jurisdiction of the trial court to make any order whatsoever for attorney fees for plaintiff's counsel because of the fact that, as a part of the property settlement agreement, the parties agreed that the court might fix and determine at the trial, or default hearing, the amount of such fees to be paid by the husband. Defendant cites in support of this theory, *McCahan v. McCahan*, 1920, 47 Cal. App. 173, 190 P. 458, and other cases holding that an agreement in advance and in anticipation of a divorce being brought, to pay certain counsel fees and costs, may operate to facilitate a dissolution of the marriage tie and, such being its effect, is void as contra bonos mores. Not only does the instant case factually differ, in that no amount was stipulated in the agreement which might attempt to limit defendant's liability for future fees and costs, but as is pointed out in the *McCahan* case, an agreement to allow the court to determine the amount of attorney's fees to be paid by a husband for legal services rendered to a wife in a divorce action brought against him by her, only stipulates to the legal rights already possessed by the wife under the provisions of the Civil Code, secs. 137, 137.5. The matter of compelling the husband to pay the wife any money necessary to prosecute or defend the cause is a matter solely within the court's discretion and any agreement purporting to otherwise settle such matter is subject to an examination by the court. See *Steinmetz v. Steinmetz*, 1924, 67 Cal.App.195, 227 P. 715.

[4-6] The defendant contends that, irrespective of the validity of the agreement concerning such attorney's fees, in the absence of an order to show cause being served upon the defendant and a stipulation entered in the minutes of the court to continue the matter of the fixation of all attorney fees and costs to the time of trial, no allowance may be made for the past services which were included by the court

in its fee award. It is true that, in the absence of the defendant's consent, an allowance of attorney fees may not be made for past services (*Kyne v. Kyne*, 1945, 70 Cal. App.2d 80, 96, 160 P.2d 910, 919; *Dixon v. Dixon*, 1932, 216 Cal. 440, 443, 14 P.2d 497; *Brockmiller v. Brockmiller*, 1943, 57 Cal. App.2d 623, 626, 135 P.2d 184), but when consent is given such allowance may be made. The stipulation or agreement of the defendant consenting to the deferment of the fixation of attorney fees to the time of trial waives this objection and the trial court may properly consider all legal services, both past and present, rendered to the wife by her attorney in ascertaining and allowing a reasonable fee therefor. Such consent may be manifested by an oral stipulation made in open court to continue the matter of the payment by the defendant of the wife's attorney fees to the time of trial (*Kyne v. Kyne*, supra, 70 Cal.App.2d at page 96, 160 P.2d at page 919; *Brockmiller v. Brockmiller*, supra, 57 Cal.App.2d at page 626, 135 P.2d 184; *Meyer v. Meyer*, 1921, 184 Cal. 687, 690, 195 P. 387; *Farrar v. Farrar*, 1919, 41 Cal.App. 452, 456, 182 P. 989), or by a writing whereby the defendant stipulates that this might be done. *Newlands v. Superior Court*, 1916, 171 Cal. 741, 154 P. 829. As was said in this latter case (171 Cal. at page 745, 154 P. at page 831): "The objection that an allowance of such attorneys' fees cannot be made after the services have actually been rendered, which objection is based upon the declarations in *Mudd v. Mudd*, 98 Cal. [320], 322, 33 P. 114, *Loveren v. Loveren*, 100 Cal. 493, 35 P. 87, and *Lacey v. Lacey*, 108 Cal. 45, 40 P. 1056, is entirely obviated by force of the circumstance that in this case the husband did not object, but stipulated in writing his consent that this might be done. As the husband is the only person whose rights could be injuriously affected by such an order, his consent thereto removes any possible difficulty in the way of its legality and enforcement." The defendant herein, having specifically agreed in writing that the court's order might cover both past and present legal services, is in no position to now enter such a belated objection.

[7] Defendant asks us to review the sufficiency of the evidence to support the

allowance of a fee of \$2500. This ground of appeal is not available to an appealing defendant whose default has been taken. Such a defaulting appellant must confine his attack to the consideration of jurisdiction or of the sufficiency of the pleadings. *Reed Orchard Co. v. Superior Court*, 1912, 19 Cal.App. 648, 662, 128 P. 9, 18; *Crackel v. Crackel*, 1911, 17 Cal.App. 600, 121 P. 295; *San Gabriel Valley Bank v. Lake View Town Co.*, 1906, 4 Cal.App. 630, 633, 89 P. 360; *Lester v. Beer*, 1946, 74 Cal. App.2d Supp. 984, 168 P.2d 998. The amount of such fees allowed by the trial court was within the scope of the complaint and the jurisdictional powers of the court were not exceeded.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.



75 Cal.App.2d 697

PEOPLE v. RUBIO.
Cr. 4008.

District Court of Appeal, Second District,
Division 1, California.

Aug. 7, 1946.

Modified on Denial of Rehearing

Aug. 16, 1946.

Hearing Denied Sept. 5, 1946.

1. Criminal law $\S$ 1159(2), 1160

To justify appellate court in interfering with determination of the jury in the first instance and of the trial judge on the hearing of a motion for new trial, court must be able to say that the evidence obviously does not warrant the inference of guilt.

2. Criminal law $\S$ 1144(13)

On appeal the appellate court must assume in favor of the verdict the existence of every fact which the jury could have possibly deduced from the evidence and then determine whether such facts are legally sufficient to support the verdict.

171 P.2d—47

3. Criminal law $\S$ 260(11)

An appellate court may set aside the findings of the trial court only where there is no substantial or credible evidence in the record to support them, or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict or decision as to convince the appellate court that its rendition was the result of passion or prejudice upon the part of the triers of fact.

4. Homicide $\S$ 253(1)

Evidence sustained conviction of murder in the first degree.

5. Homicide $\S$ 332(2)

Where conviction of murder in the first degree was sustained by substantial evidence, verdict was conclusive on appellate court.

6. Criminal law $\S$ 822(16)

Instructions considered as a whole which clearly told jury that, before they could convict defendant of murder, they must be convinced beyond a reasonable doubt by direct evidence, circumstantial evidence, or both, that defendant had willfully, etc., murdered deceased, that while law made no distinction between direct and circumstantial evidence in degree of proof required, circumstances relied upon to establish guilt must be consistent with that hypothesis and inconsistent with any other rational conclusion, and that jury could not convict defendant upon mere suspicion however strong, nor simply because there was some evidence against him, etc., were not erroneous.

7. Criminal law $\S$ 782(9)

Where trial judge fully and fairly advised the jury as to the kind, quality, and degree of proof necessary before defendant charged with murder could be convicted, that was all that the law required.

8. Criminal law $\S$ 1137(3)

Appellant cannot complain of instruction which was given at his own request.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Frank Rubio was convicted of murder in the first degree, and from such conviction and an order denying his motion for a new trial, he appeals.

Affirmed.

Leola Buck Kellogg, of Los Angeles, (Montgomery G. Rice, of counsel), for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with the murder of one Henrietta Valdez. Following trial before a jury he was convicted of murder in the first degree, with the penalty fixed at imprisonment in the state prison for life. A motion for a new trial was denied. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

The record discloses that about five o'clock on the morning of August 24, 1945, the dead body of Henrietta Valdez was found by deputy sheriffs of Los Angeles County lying in the roadway of Brooklyn Avenue, a main thoroughfare running easterly through and out of the City of Los Angeles. The body was facing north, with the feet south, approximately eight feet south of the center line of the highway. There was blood on the road around the body and skid marks of an auto tire. However it does not appear that the vehicle which made these marks had passed over the body. The skull had been severely crushed, and the body was brush-burned or abraided as if it had been dragged or pushed over a rough surface. An examination of the body revealed that two bullets had passed completely through the abdomen and thorax, entering low on the left side and existing at a higher point on the right side. The chief autopsy surgeon of the Los Angeles County Coroner's office testified that an autopsy performed by him revealed the victim to be a woman approximately thirty years of age; that the contusions and brush-burns extended over the right side of the front of the body,

the upper areas of the back, and the right side back of the pelvis and lower spine, as well as extensively over the right side of the face and forehead; that there was a multiple fracture of the ribs, the liver was ruptured, and the skull fractured. The immediate cause of death was internal hemorrhage due to gunshot wounds of the abdomen.

In answer to the question, "Was there anything that you found in this examination which would indicate to you from your examination any of these matters that these two bullet wounds might have been inflicted while the deceased was sitting in the right-hand seat of the automobile involved by a person who was sitting to her left, or the left-hand seat of the automobile?" the chief autopsy surgeon testified, "The position of the course of the wounds in the body does not necessarily indicate the position of the body at the time of receiving those wounds or the position of the gun in delivering those wounds. I could not make a positive statement as to that." Replying to the question, "It could have been inflicted in that way?" the witness stated, "It could have been inflicted in that way * * * the wound through the body did not indicate any definite position of the body." The autopsy surgeon also testified that "there was no evidence of powder marks on the wounds, but that might be due to the presence of clothing. Whether there were powder marks on the clothing I don't know." An examination of the blood in the body of the deceased indicated the presence of "0.18 percent of alcohol. The generally accepted figure for intoxication is .15."

The defendant, a man 65 years of age, first met the deceased in a Los Angeles cafe about 1940, and approximately a year later they commenced living together, which they continued to do for over three years. Some six or seven months prior to the homicide, according to the defendant's testimony, they separated, because of her excessive drinking. Following such separation, however, defendant rented an apartment in an auto court, which, the proprietor testified, both occupied until August 2, when he requested them to vacate because they made too much noise. The defendant, however

testified that while the deceased was living in the auto court he "didn't stay many times with her because she was a sick woman"; that he did call upon her and bring her something to eat. He further testified that during this period he slept in his poolroom for a couple of months and thereafter stayed at the home of a Mr. and Mrs. Paiz, the latter of whom was a sister of defendant and both of whom corroborated him in regard to his staying at their residence. It is conceded that on the date prior to the homicide defendant was living at the Paiz residence.

We deem it a fair statement to state that notwithstanding defendant's objection to the deceased's over-indulgence in alcohol during the latter months of her life, the two were apparently on friendly terms. They often had breakfast together, sometimes at the Garcia house, and other times at a cafe. They had supper usually at the Garcia home, to which place defendant would bring food for preparation and consumption. After supper defendant would go down to his poolroom and deceased would visit with the people in the Garcia home until eight or nine P. M., when defendant would call for her. There was also testimony that for some fifteen months prior to her death deceased, accompanied by defendant, would call every Sunday at the home of the former's sister, who was rearing the fifteen-year-old daughter of deceased, and would take the girl to the theater. There was no direct or positive evidence that defendant had ever been unfriendly with the deceased or that he had threatened or mistreated her. There was no evidence that defendant would profit, financially or otherwise, through her death.

We come now to a consideration of the whereabouts and conduct of defendant and deceased during the 24 hours immediately preceding her demise. Defendant operated a poolroom at 3404 Ford Avenue, Los Angeles. It was his custom to open his place of business between ten and twelve o'clock in the morning and to close it between ten o'clock P. M. and midnight. He drove and constantly used a 1938 Chevrolet coupe, which was registered to his son, Frank Rubio, Jr. Deceased also had a key to the automobile. On the morning of Au-

gust 23 defendant walked from the home of his sister, Mrs. Paiz, to his poolroom, a distance of some four blocks, arriving there between nine-thirty and ten o'clock. He did not, however, unlock the door to his poolroom, having met the deceased at the front thereof. After greeting each other, they repaired to a Mrs. Santoya's house, where the deceased was to have breakfast. Finding no food in the house, defendant walked to his apartment, obtained his automobile, and about eleven o'clock returned to the Santoya house with groceries. At that time defendant and deceased agreed to have supper together, whereupon defendant drove to his poolroom, opening it around one o'clock. About five o'clock that afternoon defendant drove back to the Santoya house in search of the deceased, but was informed by Mrs. Santoya that deceased was not there. Defendant thereupon went back to his poolroom, returning to the Santoya home between eight-thirty and ten P. M., when he was again informed that the deceased was not there. Going back to his pool hall, he remained there until about eleven P. M., when he closed his place of business, went across the street for a soft drink, and returned to his parked automobile, where he encountered deceased in what he described as an intoxicated condition. According to defendant's testimony, the following ensued:

"Q. What conversation did you have with her there? A. She wanted me to take her over to have some supper, and I turned around and looked at her, and I said, 'You are pretty drunk. I don't want to bother with you when you are drunk.' And I got in the car and drove away and left her standing on the curb.

"Q. When was the next time you saw her? A. I never seen her any more.

"Q. Never saw her after that? A. No, sir, that was the 23rd, at night.

"Q. When you drove away what was she doing? A. Well, I drove away, and at that time I had some clothes I wanted to take home, I had a suit of clothes in there, and I turned around the block, and when I was ready to get off the car I heard some voice say, 'Here comes that woman

again,' and I didn't know who it was, and I turned around, and I don't know if I seen her or not. Anyhow, I got in the car and went home."

Defendant further testified that he arrived at his sister's home where he was living at 11:45 P. M.; that after greeting the family, he immediately retired, and arose about 7:30 o'clock the following morning, had breakfast, and drove to his poolroom, where he arrived about ten A. M. As to his arrival home and retiring, defendant was corroborated by the testimony of Mary Paiz, who was sitting up with a sick child, and who testified that she admitted defendant to the house. Isabel Paiz, whom defendant requested to iron some shirts for him on the following morning, also testified as to the time of his arrival home and retiring. Mrs. Leon, a neighbor, testified she saw defendant arrive at the Paiz home shortly before midnight.

The foregoing constitutes all of the direct evidence bearing upon the whereabouts of the defendant on the night preceding and the early morning of the homicide. The mortician to whose establishment the body of the deceased was removed, testified that death occurred "at least two or three hours" prior to the time of the examination by him at eight A. M. to determine how long she had been dead.

In statements made to deputy sheriffs on August 25, the day after the homicide, defendant said that on the night of August 23, when he encountered deceased leaning against his automobile, she "cussed" him when he refused to take her to supper; that all he was trying to do was get away from her because "it did not please me to see her drunk"; that he "blew up"; that it "burned me plenty"; that it "made me so mad when I seen her." In a stenographic statement taken from the defendant by deputy sheriffs on August 25 and introduced in evidence, we find the following:

"Q. Has Henrietta Valdez ever threatened you in any manner? A. I don't know the word.

"Q. I mean threatened—A. I don't know the meaning of the word.

"Q. By 'threatening' I mean has she ever told you that she will expose you for

any particular reason to the law? A. She told me a long time ago because when we separated she wanted to come back to me and she told me that she was going to report me and do me all the harm in the world.

"Q. What did Henrietta say she was going to report you for? A. Well, everything—that I killed a man in Arizona, and that I had run a gambling house, doing this and doing that.

"Q. About how long ago was it that Henrietta threatened to expose you for killing a man in Arizona? A. Couple of months, three months ago.

"Q. And was there any one present besides you and Henrietta at that time? A. I don't remember. I don't think there was.

"Q. Where did that conversation take place? A. Right in front of the pool hall. She always would come to the pool hall hollering and bothering me; hollering in there, 'I am going to put you in jail. I am going to do all the harm I can for you.' That is when she told me—I said, 'Why you going to report me for? Have I done anything wrong for you? I always did the best for you I could. I lost my house and lost my furniture and everything, and then you try to get me in trouble.' Then the answer she gave me that time—there was a woman in front there, both got together—and she told me, she says she was going to try to do all the harm she could to get me out of the neighborhood, because they were afraid of me.

"Q. What was that woman's name that Henrietta said that to? A. Well, the woman wasn't there at the time. She was along. She was right in front. I could just look through the window and look at the two persons together there.

"Q. I think you said that was a place where there was considerable colored people? A. Yes.

"Q. Well, Henrietta was bothering you considerably over the last period of—the last couple of months, was she not? A. I guess she wasn't bothering me when sober.

"Q. Was she drunk this last Thursday morning at 10:00 o'clock when she came over and asked you to take her over to

Angelina's house? A. Well, not very badly, but I could see she had a few drinks in her."

While testifying as a witness in his own behalf, defendant stated that during the six or seven months prior to the homicide he had seen the deceased intoxicated almost every night; that he told her to "cut down the drinking," which she refused to do; that after they had separated deceased "kept looking for me and talking to me"; sometimes intoxicated and sometimes sober; that she was "always" asking him for money, which he would give her when she was sober, but refused when she was intoxicated; that when he refused to give her money while she was under the influence of liquor "she would cuss and tell me all kinds of words."

The record reflects that on the night preceding her death deceased was observed by Amelia Santiago between eight and nine P.M., sitting in defendant's automobile in front of his pool hall; that her nose was bleeding and she was holding a handkerchief to her nose. Because deceased was intoxicated, Mrs. Santiago merely greeted her and went away.

Another witness, Mrs. Ramirez, testified that on the same night, some time after eleven-thirty o'clock, she was waiting for a bus at Brooklyn Avenue and Ford Street, when deceased ran across the street with a man running after her "who wanted to teach her to smoke marihuana"; that she finally separated deceased from this man, and let a bus go by, whereupon she and deceased went to the cafe of a Mrs. Lopez for some Mexican food, arriving there about 1:30 P.M. Mrs. Ramirez had previously noticed that deceased's lip was swollen and "somewhat on her nose." Mrs. Lopez, the cafe proprietor, noticed blood on the deceased's face or sweater and stated that neither deceased nor her companion was intoxicated, and that they departed from her place about 1:50 A.M. on the morning of August 24. After leaving the cafe, deceased and Mrs. Ramirez returned to the corner of Brooklyn Avenue and Ford Boulevard, where deceased sat on the curb. They remained there until about two A.M., when Mr. Arias, an acquaint-

ance of Mrs. Ramirez, arrived, stopped his automobile and all three had a drink of whiskey from a bottle produced by Mrs. Ramirez. Mr. Arias thereupon took Mrs. Ramirez home, the deceased refusing to go because she was waiting for the defendant. After taking Mrs. Ramirez home, Mr. Arias returned to where he had left the deceased and observed her sitting on the curb near the pool hall. While his testimony is somewhat confused, he does positively state that the deceased said she was waiting for the defendant. This witness also testified that at this time the deceased was very drunk.

The defendant owned a pearl-handled, 38-caliber revolver, which he had a permit to carry, and which he constantly carried with him in a holster to and from his pool hall. He had this revolver loaded, with him on the night of the 23rd of August when he claims he last saw deceased, and he had it in his possession on the morning of the 24th of August, when he took it to his pool hall. The revolver was found at the pool hall about ten o'clock on the morning of the 25th of August, loaded with five shells. Defendant stated that he had last fired this weapon on the 22nd of August in the hills, at which time he fired it three times; that he had cleaned the gun prior to this firing, but did not clean it afterward. Expert testimony was introduced by the People that the last time the weapon had been fired it had been fired in his opinion two times only; but the witness did admit that the weapon could have been fired more than twice. He also testified that the weapon had been cleaned since it had been last fired. Another expert witness for the People testified that the bullet wounds on the body of deceased were made by 38-caliber bullets fired at very close range, probably not more than two inches from the body, the lower entrance wound scorching the skin, but not the upper one, it having gone through the left-hand side of a sweater and brassiere, whereas the lower bullet was "probably fired without having gone through any cloth." A defense expert witness testified that there was no way of positively identifying the caliber of the bullets which caused the wounds.

An examination of defendant's car disclosed a finger print of the deceased on the rear view mirror; that there was a dent on the inside of the right-hand door that was made by an object the size of a 38-caliber bullet; that this dent had three times as much lead in it as the surrounding area, and that there were striations in the area which indicated the bullet was traveling upward. There was also testimony that the seat cover had been washed and had upon it human blood, which was type "O," this being the classification into which the blood of deceased fell. There was also testimony that there were human bloodstains on the apron of the car. The defense produced an expert witness who testified that from his examination there was no reason to believe that the dent was made by a 38-caliber bullet. After his arrest defendant, in talking to a deputy sheriff, stated "If you find any blood on that car I am guilty." He explained this at the trial by saying that he was sure there was no blood on the car.

On this appeal a reversal is urged by appellant on three grounds: (1) That the evidence is legally insufficient to sustain the conviction; (2) that one of the instructions given was prejudicially erroneous, and (3) that there was no evidence of sufficient substantiality to establish that the homicide constituted murder.

[1-3] It is conceded that the deceased met her death through criminal means. While contending that the evidence is legally inadequate to prove that the crime charged was murder, appellant does concede that the death of the deceased was occasioned by criminal homicide, in that her life was unlawfully taken by another through criminal violence. Appellant challenges the sufficiency of the evidence to legally establish the fact that the crime was perpetrated by him. We are therefore confronted, first, with the question of whether, upon any hypothesis whatever, there is sufficient substantial evidence to support the conclusion reached in the court below. It is not a question of whether the circumstances relied upon to justify the verdict of the jury might in the opinion

of the reviewing court be reasonably reconciled with the innocence of the defendant; but to justify interference by us with the determination of the jury in the first instance and the trial judge on hearing of the motion for new trial, we must be able to say that the evidence obviously does not warrant the inference of guilt. *People v. Newland*, 15 Cal.2d 678, 681, 682, 104 P.2d 778. We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether such facts are legally sufficient to support the verdict. An appellate court may set aside the findings of the trial court only when there is no substantial or credible evidence in the record to support them, or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict or decision as to convince the appellate court that its rendition was the result of passion or prejudice upon the part of the duly constituted triers of fact. When a case presents any of these features, this court deals with it as a matter of law. Experience teaches that such a situation can be presented only in exceptional cases.

In the case with which we are here concerned the prosecution relied solely upon circumstantial evidence, except for a statement made by the defendant to deputy sheriffs and to which we have alluded. The circumstantial evidence was sharply contradicted by direct evidence introduced by the defendant. The law makes no distinction between direct and circumstantial evidence in the degree of proof required for conviction, but requires only that proof of guilt be established beyond a reasonable doubt by evidence of the one character or the other, or both. Therefore, if the circumstances relied upon by the prosecution reasonably justify an inference of guilt, but an inference of innocence might also reasonably have been drawn, it was for the jury, as between these two inferences, to choose, and unless it is obvious that the evidence does not warrant the inference of guilt adopted by the Jury, this

court is powerless to interfere. And where the inference of guilt is negated by positive and direct evidence in contradiction thereof, that too presents a question for the triers of fact, who may, if they conscientiously choose to do so, reject the direct and positive testimony opposed to that from which the inference of guilt may reasonably be drawn. In such a situation we may not substitute our own judgment of the value and effect of such evidence and the credibility of witnesses for that of the jury unless we can say that the evidence is of such a character as to amount to no evidence at all.

In the instant case we are confronted with a situation wherein the external manifestations of the defendant do not indicate a feeling of hostility toward the deceased, but nevertheless there was evidence that from the time of the disagreement between defendant and the deceased in February, 1945, the latter was constantly harassing and annoying the former; that the deceased, over the protests of defendant, frequently became intoxicated and on these occasions demanded money from him, and when he refused such demands she would curse him, sometimes in the presence of others. According to the defendant himself, the deceased threatened him and was going to "report" him for killing a man in Arizona, and that he "had run a gambling house * * *"; that "she always would come to the pool hall hollering and bothering me, hollering in there, 'I am going to put you in jail. I am going to do all the harm I can for you.'" The defendant said to the deceased, "Why are you going to report me for? Have I done anything wrong for you? I always did the best for you I could. I lost my house and lost my furniture and everything, and then you try to get me in trouble." While he continued to see the deceased and provide for her, the defendant was anxious to get away from her, and the situation in which he found himself with her, according to his testimony, made him angry. We refer to this evidence because of appellant's argument that there is an entire absence of any evidence showing any motive on his part which

would prompt him to take the life of the decedent. While on innumerable occasions the Supreme Court and district courts of appeal of this state have held that proof of motive in the commission of the crime of murder is not essential to sustain a judgment of conviction, nevertheless there are cases holding that this rule is applicable only where the perpetration of the act charged is brought home to the defendant by sufficient evidence, and that where the identity of the defendant as the person who committed the crime is a fact in dispute evidence of a motive of the defendant to commit the crime, while not essential, does assume materiality. Also, where the evidence relied upon to connect the defendant with the commission of the crime is entirely circumstantial, proof of motive may assume some importance.

In addition to the foregoing, the record reflects that late in the evening of the day preceding her demise the deceased was observed by the defendant leaning against the automobile, waiting for him in front of his pool hall. At that time he was armed with his .38-caliber revolver; she was intoxicated and demanded money. He refused to talk with her, take her to supper, or give her any money. She swore at him in the presence of other people and according to the defendant, all he desired was to get away from her. He was angry; he drove away, and later returned to the same vicinity, but believing the deceased was intent upon seeing him, he drove off again. True, the defendant and some of his relatives and neighbors testified that he went home, retired to bed and remained there all night, but this, as heretofore noted, created a conflict with contrary inferences deducible from other facts and circumstances established in evidence. The evidence also discloses that deceased during the early morning hours of August 24 remained in the vicinity of appellant's poolroom, talked with several people, and resisted their urgings to leave the vicinity because she was waiting for appellant. There was testimony that the fatal bullets were fired at close range. Upon appellant's automobile human bloodstains of the

same type as decedent's were found. This fact, it is true, was explainable because before midnight the deceased was observed sitting in the vehicle with her nose bleeding, but an incriminating circumstance was the fact that the automobile was washed in an effort to remove the bloodstains therefrom. There was a dent in the right-hand inside portion of the door, which it was testified was made by an object the size of a .38-caliber bullet. An expert witness for the prosecution testified that defendant's revolver had been cleaned since it was last fired and that upon the occasion when it was last fired it was fired but twice. Both the .38-caliber revolver and the automobile were at all times in the possession and under the control of the defendant, although the deceased had keys to the automobile. During the time he was questioned by deputy sheriffs, appellant stated that if blood were found on the automobile he was guilty. In view of the fact that the seat of the vehicle had been washed, this statement assumes some significance.

[4, 5] In the light of the foregoing circumstances, we are not warranted in saying that there is no substantial evidence to support the verdict; or that the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible, or that it so clearly and unquestionably preponderates against the verdict as to convince this court that its return was the result of passion or prejudice on the part of the jury. The instant case shows the usual and ordinary situation where the evidence, circumstantial on the side of the prosecution and direct on the side of the defense, was conflicting as to the vital question in the case—and the jury's finding against the defendant, being supported by material evidence, is conclusive upon this court.

[6] Appellant challenges the correctness of one of three instructions given as to the proof required in cases where the evidence is circumstantial. We do not deem it necessary to here set forth the three instructions given. When considered in their entirety and in conjunction with

each other and all other instructions, the three on circumstantial evidence clearly and understandingly admonished the jury that before they could convict the defendant of murder they must be convinced beyond a reasonable doubt by direct evidence, circumstantial evidence, or both, that the defendant wilfully, unlawfully, feloniously and with malice aforethought murdered Henrietta Valdez. The jury was instructed that while the law makes no distinction between direct and circumstantial evidence in the degree of proof required, "nevertheless the circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion." The jury was also instructed that "under the law no jury should, nor has it the right to, convict a defendant of a crime upon mere suspicion, however strong, nor simply because there may be some evidence in the case against him; nor merely because there is or may be strong reason to suspect that he is guilty, but before a jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt."

[7, 8] From a reading of all the instructions given, we are impressed that the trial judge fully and fairly advised the jury as to the kind, quality and degree of proof necessary before appellant could be convicted. That is all the law requires. *People v. Curtis*, 36 Cal.App.2d 306, 322, 98 P.2d 228. Furthermore, the challenged instruction was given at the request of the defendant himself, and the law is well settled that an appellant cannot complain of instructions given at his own request. *People v. Curtis*, supra, 36 Cal.App.2d at page 321, 98 P.2d 228. Were it otherwise, a defendant could purposely mislead the court and thereafter take advantage of his own deception.

Finally, appellant urges that the evidence is insufficient to support a conviction of murder. Under the facts hereinbefore narrated, it must be held that if the jury was warranted in finding that the deceased was killed by the defendant, the killing was

accompanied with that deliberation and malicious intent which characterizes the crime of murder.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.



75 Cal.App.2d 751

PEARSON v. WHITWORTH et al.
Civ. 15207.

District Court of Appeal, Second District,
Division 1, California.
Aug. 12, 1946.

1. Automobiles ⇨244(22, 32)

Evidence authorized inference that automobile which struck plaintiff in pedestrian crosswalk was that of corporate defendant and supported implied finding that individual defendant was operating automobile at the time with permission of corporate defendant so as to authorize recovery against both defendants.

2. Automobiles ⇨245(72)

Where evidence disclosed that pedestrian, after alighting from streetcar, walked within streetcar loading zone to marked pedestrian crosswalk and waited there for defendants' automobile to pass, and that defendants' automobile suddenly swerved and struck pedestrian, whether pedestrian was guilty of contributory negligence was properly left to jury.

3. Appeal and error ⇨996, 1001(1)

The implied finding of trier of fact may not be disturbed on appeal if there is any evidence, or reasonable inference to be drawn therefrom, in support of verdict.

4. Appeal and error ⇨1004(1)
Damages ⇨208(1)

The assessment of damages is primarily the province of jury and secondarily

the province of trial court when passing upon a motion for new trial, and an appellate court will not disturb verdict unless it is so grossly excessive as to immediately suggest that it was the result of passion, prejudice, or corruption on part of jury.

5. Damages ⇨132(1)

\$10,755.30 for personal injuries requiring extended medical treatment, for pain and for loss of wages, was not excessive, particularly in view of fact that jury on prior trial had returned a verdict almost equally as large.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Atheline Pearson against L. E. Whitworth, Good Earth Company, and others to recover for injuries allegedly sustained by plaintiff when she was struck by an automobile driven by individual defendant and owned by corporate defendant. From a judgment for plaintiff, named defendants appeal.

Affirmed.

Harold E. Thomas and Hiram T. Kellogg, both of Los Angeles, for appellants.

Mervin Glass and Robert A. Cushman, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an action to recover damages for injuries alleged to have been sustained by the plaintiff when she was struck down by an automobile being driven by defendant Whitworth and owned by defendant corporation.

From a judgment on the verdict in favor of the plaintiff for the sum of \$10,755.30 and costs of suit, defendants prosecute this appeal urging the following as grounds for a reversal:

(1) That plaintiff failed to prove by a fair preponderance of the evidence that the automobile which struck her was owned by the Good Earth Company, or was being driven with its knowledge and consent;

(2) That plaintiff was contributively negligent as a matter of law;

(3) That the award of damages is excessive and not justified by the evidence.

The respondent Atheline Pearson testified that she alighted from the front end of a westbound "P" car on Pico Boulevard at Valencia Street in the city of Los Angeles around 4:45 p. m. on October 26, 1942, and stepped into a marked safety zone located in the northerly half of Pico Boulevard; that several other persons also alighted from the street car at the same intersection; that because some westbound automobiles had stopped behind the street car, respondent waited in the safety or loading zone to permit the street car and said automobiles to pass; that she then walked to the crosswalk adjoining the west end of the loading zone, it being her intention to cross Pico to the southeast corner of the intersection and thence across Valencia to Von's Market located on the southwest corner thereof. When she reached the said crosswalk she looked to see if the way across Pico Boulevard was clear, and observed an automobile approaching from the east traveling in the middle of the street between the westbound and eastbound tracks. She thought it was coming too fast, so she waited, standing near and approximately on the north rail of the westbound tracks. When she stopped the auto was 60 or 70 feet from the spot where she was standing and was approaching at a speed of from 40 to 45 miles per hour. As this automobile approached, respondent observed an elderly lady, who started south in the crosswalk ahead of respondent, running toward the south, whereupon the automobile "all of a sudden * * * swerved to the right and I couldn't do anything but take what was coming, it was too quick." When hit she was standing still within the lines of the crosswalk, and was knocked westerly therefrom an unknown distance, the automobile stopping in front of Von's Market on the southwest corner of the intersection. From where respondent was lying on the pavement, she saw appellant Whitworth get out of the automobile and walk back to the point where she was lying in the street; said appellant then picked her up in his arms and placed her in his automobile, which respondent testified was a "coupe"; that he

then turned his car around and driving east on Pico, took her to the Georgia Street Receiving Hospital, where he waited while she was being treated, and then drove her to her home.

Phillip Schwindt, a passenger in the same westbound "P" streetcar, also alighted at Valencia Street and observed respondent as she stood in the loading zone waiting for the automobiles to pass. This witness testified he saw the automobile which subsequently struck respondent as it approached the intersection, at a speed which he estimated to be 30 to 40 miles per hour, straddling the south rail of the westbound car tracks; that it "swung out of the tracks and hit Mrs. Pearson," who was then standing "approximately at the west end of the loading zone where it joins the pedestrian crosswalk." That the right front bumper hit respondent and she was knocked or thrown a distance of 42½ feet; that the automobile traveled 50 feet plus its length from the point of impact and stopped facing westerly with its left wheels close to and just north of the north rail of the westbound streetcar tracks. This witness, an automobile mechanic, further testified that the car which struck respondent was a 1935 or 1936 Ford coupe, sort of a dull grey and needed a paint job; that he saw the driver of the car get out and identified appellant Whitworth as such driver; that said Whitworth picked up respondent, put her in the right-hand side of the car, made a "U" turn on Pico Boulevard, and drove easterly.

It was stipulated that the Good Earth Company was the owner of a Ford cabriolet and a Ford station wagon on the date of the accident.

Marvin L. Brechel, a Los Angeles City police officer, testified that on the afternoon of October 26, 1942, he took a traffic accident report from appellant Whitworth at the Georgia Street Receiving Hospital; that said appellant told him that he was driving a Ford coupe, 1936 model, at the time of the accident; that Whitworth "told me he was driving his car on westbound on the westbound street car tracks of Pico and that as it passed by a safety zone at about De Long Street he heard a thump

on the right hand side of his car; that he brought his car to a stop and saw a woman was lying on the street, and that he put the woman in his car and brought her to the Georgia Street Hospital." On cross-examination, this witness stated that Mr. Whitworth told him he believed that someone had walked into the side of his car and that he had looked back and had seen somebody lying there and he told the officer at the time that he was not sure that he struck anyone; that he was driving about 15 miles per hour. This officer also testified as a witness for the defense to the effect that he had talked to respondent at the Georgia Street Hospital on the same occasion, to-wit: on the afternoon that she was injured and that "She told me that she had alighted from a street car into the safety zone and she intended to cross Pico from the safety zone to the south side of the street and that she was struck down. She didn't know at the time how it happened, but she said she didn't see the car prior to the impact, and she could not tell me exactly where she was standing at the time of the impact. * * * She was confused as to those details where she was standing." He further testified on cross-examination that respondent was sitting in a wheelchair in the women's ward of the hospital and complained of a pain in her back; that she did not appear to be dazed but appeared to be confused; that she told him the accident occurred at Pico and Valencia and that she was intending to go to Von's.

Appellant Whitworth testifying under section 2055, Code of Civ.Proc., stated that he was a resident of San Fernando Valley, a licensed real estate salesman and father of Bob Whitworth, who was a licensed real estate broker and one of the officers of the Good Earth Company; that he was accustomed to using a Ford cabriolet belonging to said company, which also owned a Ford station wagon; and that he used the cabriolet in the course of his business as a salesman; that on the day of the accident said witness left his home driving the Ford cabriolet, that he went to the home of his son where he changed automobiles and drove the Ford station wagon to Los Angeles to buy a deep freezer for himself and

to look for some pipe for his son; that he shopped around for the pipe but did not procure any; that about 4:00 in the afternoon of October 26, 1944, he was traveling west on Pico Boulevard in the Ford station wagon on his way to keep an appointment with his doctor; that he saw respondent in a safety zone at Sentous and Pico and that he was first attracted to respondent when he saw she was the victim of an accident; that she was then standing east of the center of the loading zone at said intersection and to the rear of his automobile; that he never saw her when she was in front of him; that he slowed down almost to a stop because he "felt a bump in the back of my car and I thought someone had bumped into me"; that he turned his head around when he felt the bump and saw respondent, stopped his car and went back and took respondent to the Georgia Street Receiving Hospital and later drove her to her home. Said witness stated that he was driving the station wagon; that whether he told the officer it was a Ford cabriolet he did not know, but that he might have done so. In answer to the question: "As a matter of fact, you told the police officer, did you not, you were driving a 1936 Ford coupe?" said witness stated: "I am not absolutely sure whether he made the mistake or whether I told him it was the Ford cabriolet. I will say if I did tell him it was a Ford cabriolet that was a mistake, and in confusion." This witness was cross-examined on behalf of appellant Good Earth Company and stated that he had a conversation with his son on the morning of the accident to the effect that he was permitted to "take the station wagon to make my errand for the freezer if I would bring him back the pipe and get back by 1:30."

Robert Whitworth testified that appellant L. E. Whitworth was allowed to use the Ford cabriolet owned by the Good Earth Company on October 26, 1942, any time he asked for it, and occasionally he kept it at his house over night; that on the day in question, appellant Whitworth asked permission to drive the Ford station wagon and he drove off in that vehicle; that appellant was supposed to bring it back by one o'clock. This witness also testified that he saw the Ford cabriolet that

day after appellant left with the station wagon and that it was never out of his sight except when he went into the house to eat, and that it was parked in front of his office at 4:30 that afternoon.

[1] There was sufficient evidence from which the jury could infer that the automobile which struck respondent was the Ford cabriolet owned by the Good Earth Company. Moreover the evidence was sufficient to support the implied finding that appellant Whitworth was using and operating the automobile with the permission of such company.

The situation presented is similar to that in *Blank v. Coffin*, 20 Cal.2d 457, 462, 126 P.2d 868, 871, where it was stated by the supreme court:

"The fact that the car was owned by defendant and was being driven by one of its employees was sufficient to permit the jury to infer that the car was being driven with defendant's permission. When defendant introduced evidence contrary to such an inference in the testimony of Coffin and Stuperich, the issue of permission could be taken from the jury and a verdict directed for the defendant only if the testimony could not be rationally disbelieved. There were several grounds upon which the jury could disbelieve the testimony. Both Stuperich and Coffin, employees of the defendant, had an interest in the outcome of the case since they would naturally wish to remain in the good graces of their employer. Coffin's testimony as to how the accident occurred directly contradicted the testimony of plaintiff's witnesses, and if the jury disbelieved Coffin in this respect, it could disbelieve him in all respects."

See, also, *Flemmer v. Monckton*, 73 Cal.App.2d 271, 166 P.2d 380; and *Hicks v. Reis*, 21 Cal.2d 654, 659, 134 P.2d 788, 790, in the latter of which it was stated: "Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. (Citation of authorities.) As a general rule, therefore, the trier of the facts is free to disbelieve the evidence as to the non-existence of the fact of permission, and to find that it does exist solely on the basis of the inference."

[2, 3] There is no merit in appellants' contention that respondent was guilty of contributory negligence as a matter of law. As hereinbefore stated, respondent walked a few steps westerly in the loading zone to the marked pedestrian crosswalk. She looked to see if everything was clear for her to cross the street; that, observing appellants' automobile approaching from the east between the two sets of rails at a speed which she believed to be "a little too fast," she waited. The place where she stopped to wait was inside the pedestrian zone, approximately on the north rail of the westbound tracks, and somewhat to the north of the path in which appellants' automobile was approaching the intersection. Obviously, respondent stood in a position of safety provided appellants' automobile contained to follow the course it was then traveling. Instead of so doing, appellant Whitworth swerved to the right and struck respondent. In the words of the latter, "I couldn't do anything but take what was coming, it was too quick." Respondent was corroborated by the witness Schwindt. Under the circumstances presented by the instant litigation, it was the sole province of the jury to determine whether respondent was guilty of contributory negligence, and the implied finding of such trier of the facts may not be disturbed on appeal if there is any evidence or reasonable inference to be drawn therefrom in support of the verdict. Ample evidence was presented to support the verdict on that issue. See *Foerster v. Direito*, Cal.App., 170 P.2d 986, and authorities there cited.

Appellants finally urge that the award of damages is excessive and not justified by the evidence. In that regard, it was shown that respondent on the night of the accident was taken to the office of Clinton Roath, M. D., who treated her; that she was then very ill, unable to walk, hurt all over and had two nose bleeds; that the following day X-rays were taken at the California Hospital where she was put to bed and remained five days; thereafter she was confined to bed at her home for five weeks under the care of a nurse; that she was unable to turn over in bed and had to lie on her right side all of the time and was unable to get out of bed; that the sixth week

she was permitted to sit up each day for 20 minutes and the seventh and eighth weeks she was up part of the day. She was away from her work for a period of ten weeks. At the time of the accident, respondent was working as an operator of latches, milling machines, drills and other machines, which work required her to stand on her feet. When she returned to work it was necessary for her to have lighter tasks which permitted her to sit while working, because she could stand only on one foot. Respondent injured her left leg, left hip, back and left shoulder, received a cut back of the left temple and a cut over the left eye leaving a scar; dislocation of the left little finger; both ankles cut; abrasion of the left hip; both eyes blackened and entire left side from shoulder to foot bruised; two upper front teeth broken off and one other upper tooth broken. The X-rays taken at the time of respondent's injury revealed a fracture of the descending ramus of the left pubic bone at its junction with the ischium, a slight overlapping at the point of the fracture; also some evidence of distortion in the hip socket because of an overriding of the bone at the fracture site and a little displacement upward.

At the time of trial, more than two and a half years after the accident, respondent's back, left hip and left leg still pained her continuously, the pain being sharper in cold weather. Walking tires the left leg because the left leg "is of no use to me"; sleeping on her left side is painful and keeps her awake; the use of her arms in her work causes pain in her back and hip; the hip is stiff and it is necessary for her to climb stairs by placing one foot on a step and the other beside it. Respondent testified that upon her doctor's prescription she was wearing a back brace at all times except when in bed. Examination of respondent by Dr. Taylor showed a tendency to list to the right while standing; pain in the left low back on forward bending; moderately severe pain on backward bending; more pain in bending to the left than to the right; tenderness across the entire low back and mostly across the sacroiliac region. Dr. Taylor testified: "I still believe she may be in the very early stages of a derangement of one of the cartilages

of the low spine, but it is not far along and may never be far enough along to cause any serious trouble, but it might. * * * If it progresses and it is definitely established as a protruded disc (intervertebral) our treatment requires first attempt at conservative methods such as manipulation and rest in bed, and even the application of a cast for six weeks to three months, and then if it becomes persistent and we are unable to control it by conservative means we remove it"; that this would require surgery of the spine and is "quite a technical problem"; that respondent had been under treatment for a period of more than two years, and that it would probably take her another year or so to lose all her complaints; that the condition from which respondent was suffering at the time of the trial was, in said witness' opinion, caused by and as a result of the automobile accident of October, 1942.

[4] It is firmly established by a long line of decisions that the assessment of damages is first of all the province of the jury, and secondly, the province of the trial court when passing upon a motion for a new trial, and that an appellate court will not disturb a verdict unless it is so grossly excessive as to immediately suggest that it was the result of passion, prejudice or corruption on the part of the jury.

As stated in *Scaletta v. Silva*, 52 Cal. App.2d 730, 739, 126 P.2d 898, 902: "It has been frequently held that the amount of money which will adequately compensate one for particular injuries received as the result of an accident, together with the pain and suffering incident thereto, rests largely in the sound discretion of the jury. This discretion may not be interfered with unless it clearly appears that the award is so grossly excessive as to shock the conscience and to enforce the conclusion that it was the result of passion and prejudice on the part of the jury. *Rannard v. Harris*, 121 Cal.App. 281, 286, 8 P.2d 864; *Armstrong v. Ford*, 30 Cal.App.2d 347, 351, 86 P.2d 385; 20 Cal.Jur. 101, § 65."

[5] There is no evidence in the record indicating that the jury in the instant case was actuated by passion, prejudice or corruption. As a matter of fact, this was the

second jury to pass upon and make the award of damages attributable to appellants' negligence, and it is noteworthy that the jury in the first trial awarded the sum of \$9,710.51.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.



75 Cal.App.2d 779

MUNFREY v. CLEARY et al.
Civ. 7234; 1 Sac. 5754.

District Court of Appeal, Third District,
California.
Aug. 17, 1946.

1. Attorney and client ⇨123(1)

Dealings between an attorney and his client for benefit of the attorney are presumptively invalid, but such presumption is not conclusive.

2. Appeal and error ⇨1008(1)

In action for reconveyance of realty which plaintiff had conveyed to his attorney by deed, whether plaintiff in delivering deed was acting under undue influence of attorney presented a question of fact which should be determined by trial court under proper pleadings.

3. Appeal and error ⇨169

Generally, an issue not presented by pleadings cannot be considered upon appeal.

4. Pleading ⇨48

Where fraud or undue influence or that a party has suffered injury through abuse of confidence by another is relied upon by party, he must plead accordingly.

5. Appeal and error ⇨882(3)

A party who has tried his case wholly or in part on a certain theory, which was acted upon by trial court, cannot on appeal adopt a different theory.

6. Attorney and client ⇨123(2)

Even if allegations of complaint were sufficient and evidence showed that relationship of attorney and client existed between grantee and grantor at time deed was executed and that grantor did not have independent advice, such facts established disputable presumption that grantor was acting under undue influence of grantee, casting upon grantee the burden of overcoming it by clear and satisfactory evidence.

7. Attorney and client ⇨124

Where client executed deed to his attorney in payment for services rendered in matter involving realty conveyed, disputable presumption of undue influence arose, but deed created countervailing presumptions.

8. Attorney and client ⇨124

Evidence established that no advantage was taken of client by his attorney, and that client was fully informed when he executed a deed conveying to attorney realty in payment of services rendered in a matter involving such realty, so that client was not entitled to reconveyance of such realty.

Appeal from Superior Court; Placer County; Raymond McIntosh, Judge.

Action by H. Munfrey, also known as Captain H. Munfrey, against Leslie A. Cleary and another to require defendants to reconvey to plaintiff property which plaintiff had conveyed by a deed. From a judgment for defendants, plaintiff appeals.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Gumpert & Mazzer, of Stockton, for respondents.

ADAMS, Presiding Justice.

Appellant in his first amended complaint upon which the issues in this case were tried alleged that he was the owner of certain real property in Placer County, described as Lots 75 and 76 in Lakeside Tract; that on or about April 30, 1942, at the request of defendant Leslie A. Cleary,

who was then and there the attorney for plaintiff, and to whom plaintiff was indebted in a then unknown amount, plaintiff executed and delivered to said defendant a deed to said lots 75 and 76, a copy of which deed was annexed to and made a part of the complaint; that plaintiff did not read said deed and did not know that defendant Margie W. Cleary was a grantee therein, and relied upon the representations of defendant Leslie A. Cleary as to the nature and effect thereof; that defendant stated to plaintiff and plaintiff understood and believed that said deed was absolute in form and was intended to and did secure said defendant for the future payment by plaintiff of whatever fees for legal services were due by plaintiff to said defendant; that plaintiff was then unable to pay said fees and was willing to give such security; that at the commencement of this action plaintiff had not read or seen said deed, and did not know the contents thereof and only learned after the commencement of the action that the deed ran also to Margie W. Cleary and only reserved in plaintiff a life estate in said property; that said land at the time of the execution of the deed had and now has a reasonable market value in excess of \$10,000; that the services rendered by Leslie A. Cleary to plaintiff were rendered in the Estate of Mary Ann Munfrey, then pending in the Superior Court of Stanislaus County; that plaintiff at no time was indebted to Margie J. Cleary; that on information and belief, the reasonable value of the legal services rendered by Leslie A. Cleary was less than \$1,000; that defendants assert that the deed was not delivered as security and refuse to fix the amount of any fees and refuse to reconvey the property. Judgment was prayed that the amount of attorney's fees due from plaintiff to Leslie A. Cleary be fixed, that said deed be declared a mortgage, that plaintiff be allowed to redeem said property from said mortgage, that defendants be directed to reconvey same to plaintiff, and that plaintiff's title be quieted as against defendants.

The deed attached to the complaint is dated April 30, 1942, and recites that in

consideration of the love and affection that the party of the first part bears for the parties of the second part and for other good and valuable considerations, the party of the first part does grant, bargain and sell unto the parties of the second part, all the right, title and interest that the party of the first part has or may hereafter acquire in Lots 75 and 76 of the Lakeside Tract, etc., "reserving, however, to the party of the first part a life estate in said property, this deed being intended to convey to the parties of the second part the remainder over after the death of the party of the first part."

In answer to the amended complaint the defendants admitted the execution of the deed, that Leslie A. Cleary rendered services to plaintiff in the Estate of Mary Ann Munfrey and that said services had been completed, but denied the allegations not admitted.

A jury trial having been waived the court heard said cause, and at the conclusion of the trial made findings in favor of defendants, finding in substance, that none of the allegations of plaintiff's complaint, except those which were admitted by defendants, was true. It further found that the deed was *freely and voluntarily executed and delivered by plaintiff* to defendants for a good and valuable consideration and with full knowledge on his part of its contents and legal effect; and that it was not true that the deed was executed, given or accepted as a mortgage, or as security for any debt or obligation, but that, on the contrary, said deed was executed and delivered by plaintiff to defendants for the purpose and with the intent of conveying to defendants absolute title to the property, subject only to the life estate in favor of plaintiff.

On this appeal plaintiff states that he founds his case upon two propositions: "First. That plaintiff conveyed this property to defendants at the request of defendant Leslie A. Cleary as security for payment of attorney's fees which Cleary had earned and had still to earn in representing plaintiff in respect of certain questions arising in the estate of plaintiff's de-

ceased wife, Mary Ann Munfrey. Second. That plaintiff conveyed this property to defendants at a time when the defendant Leslie A. Cleary, was actively working as plaintiff's attorney in respect of certain questions arising in the estate of plaintiff's deceased wife, Mary Ann Munfrey, that this very property was involved in that work, that plaintiff's conveyance of the property was made under such circumstances in the relation of client and counsel that plaintiff is entitled to recover it, that the defendant Leslie A. Cleary earned fees in such work which plaintiff should pay, that such fees (not yet determined) should be fixed, and that on their payment the plaintiff should recover the property."

Regarding the first of these propositions appellant says that as the evidence is in conflict and the trial court found against him, he does not rely on same, but relies solely upon the second. Respondents answer appellant's contention by stating that this second proposition is not an issue in the case, that it is not within the pleadings, and was not the theory upon which the case was tried; and that an appellant may not be permitted to try his case upon one theory and then, on appeal, change his position and adopt a different one.

Appellant's theory apparently is that the evidence shows that at the time the deed was executed Mr. Cleary was acting as plaintiff's attorney in matters involving the property conveyed by the deed, that Mr. Cleary prepared the deed, and that he benefited thereby, and that it does not appear that plaintiff had independent advice, and that it follows therefrom that the deed must be set aside and the property reconveyed to plaintiff. He asserts that dealings between an attorney and client for the benefit of the former are presumptively invalid on the ground of constructive fraud. Citing *In re Estate of Witt*, 198 Cal. 407, 419, 245 P. 197; *Carlson v. Lantz*, 208 Cal. 134, 138, 280 P. 531. He also cites Section 2224 of the Civil Code, which provides that one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better

right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it, and Section 2235 of that code which provides that all transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence. He also states that "once an attorney has been employed by a client, he cannot enter into a valid business transaction with his client *in respect of the very subject matter which is involved in his employment* unless the client obtains and relies upon independent advice on whether or not the proposed transaction properly guards or takes care of the interests of the client." And he says that the main error committed by the trial court in disposing of this controversy was the refusal to accept and apply the rule from the cases which he cites.

Appellant does not point out any ruling of the court which presents an error of law, nor does he contend that the trial court failed to find on any issue presented by the pleadings, nor contend that the evidence does not support the findings, or the findings support the judgment. There was no motion to amend the findings, and no motion for a new trial, and there is no request that this court make findings. See Rules on Appeal, rule 23(a). Appellant says in his opening brief that we should reverse the judgment because the trial court failed to make a finding that plaintiff did not have any independent advice (though the record fails to show that the trial court was requested to make such a finding); and in his closing brief asserts that the question which he has "made the issue on this appeal should be decided here and now", and further litigation averted. It is therefore not quite clear to us what appellant thinks this court should or can do in the premises. He apparently assumes that since the evidence shows that Mr. Cleary was acting as his attorney at the time that the deed was executed and that as it does not show that appellant had independent advice, it must follow,

as matter of law, that, regardless of the form of the pleadings and the findings of the trial court, this court should hold that defendants must reconvey the property to him. We cannot agree with this conclusion.

[1,2] While it is true that dealings between an attorney and his client for the benefit of the attorney are *presumptively* invalid, such presumption is not conclusive; and whether or not appellant in this case, in executing and delivering the deed in controversy was acting under the undue influence of his attorney presents a question of fact that should be determined by a trial court under proper pleadings which present that issue and thus permit the opposing litigant to meet same and the trial court to pass upon it. The amended complaint in this action does not present any such issue. It was obviously designed to present but the one issue, that the deed was intended as a mortgage; and the case was tried upon that theory. The record shows that at the commencement of the trial appellant's counsel stated to the court:

"And the purpose of this action, then, is to establish the fact that this deed was intended simply as security, to have the Court fix the reasonable fee of Mr. Cleary for his services on behalf of Captain Munfrey in this proceeding in his wife's estate, to have the court give us leave to redeem the property and pay off Mr. Cleary and get the deed absolute from Mr. Cleary to Plaintiff Captain Munfrey for the property. There are other allegations here, but that is the whole purport of the case, if the Court please."

[3] As a general rule an issue not presented by the pleadings cannot be considered upon appeal. *Martin v. Diaz*, 124 Cal. App. 200, 205, 12 P.2d 57; *Conway v. Citrus Belt Land Co.*, 94 Cal.App. 533, 542, 271 P. 525; *Blanc v. Connor*, 167 Cal. 719, 726, 727, 141 P. 217; *Riverside Water Co. v. Gage*, 108 Cal. 240, 245, 41 P. 299; *Boomer v. Southern Cal. Edison Co.*, 91 Cal.App. 382, 386, 267 P. 181; *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 171, 135 P. 502.

[4] Also where fraud or undue influence, or that a party has suffered injury through the abuse of confidence by another

is relied upon by a party he must plead accordingly. *Donze v. Donze*, 88 Cal.App. 769, 774, 776, 264 P. 294; *In re Estate of Mallory*, 99 Cal.App. 96, 103, 104, 278 P. 488; *In re Estate of Roberts*, 49 Cal.App.2d 71, 81, 120 P.2d 933; *In re Estate of Yoell*, 164 Cal. 540, 546, 129 P. 999; *Conneally v. San Francisco Sav. & Loan Soc.*, 70 Cal. App. 180, 183, 232 P. 755; *Davies v. Symmes*, 49 Cal.App.2d 433, 446, 122 P.2d 102; *Strong v. Strong*, 22 Cal.2d 540, 545, 546, 140 P.2d 386; *Tanforan v. Tanforan*, 173 Cal. 270, 275, 276, 159 P. 709; 12 Cal. Jur. 800-802, sec. 62.

[5] Also as a general rule where a case has been tried upon one theory that theory must be adhered to on appeal, and a party who has tried his case wholly or in part on a certain theory, which theory was acted upon by the trial court, cannot, on appeal, change his position and adopt a different theory, since to do so would be unfair to the trial court and to opposing counsel. *Blanc v. Connor*, supra; *Marra v. Ætna Construction Co.*, 15 Cal.2d 375, 379, 101 P.2d 490; *Mathews v. Pac. Mutual Life Ins. Co.*, 47 Cal.App.2d 424, 428, 118 P.2d 10; *Ernst v. Searle*, 218 Cal. 233, 240, 241, 22 P.2d 715; 2 Cal.Jur. 237; 4 C.J.S., Appeal and Error, § 241, p. 471; 5 C.J.S., Appeal and Error, § 1503, p. 175.

[6,7] But even if we were to assume, as appellant contends, that the allegations of the complaint are sufficient, and that the evidence shows that the relationship of attorney and client existed at the time the deed was executed and that appellant did not have independent advice, such facts do not establish conclusively that appellant was acting under undue influence of his attorney. The presumption which arises under such circumstances, though it casts upon the attorney the burden of overcoming it by clear and satisfactory evidence, is disputable; and the fact that the client may not have had independent advice is but a circumstance. See *Brown v. Canadian Ind. Alcohol Co.*, 209 Cal. 596, 599, 289 P. 613; *Burnham v. Witt*, 217 Cal. 397, 398, 18 P.2d 949; *Macaulay v. Booth*, 53 Cal.App.2d 757, 760, 128 P.2d 386; *In re Hill*, 13 Cal.App. 2d 326, 328, 329, 57 P.2d 155; *Luiz v. Queen*

of Angels Hospital, 53 Cal.App.2d 310, 313, 127 P.2d 966; *Donze v. Donze*, supra. Also, in the case of a written instrument there are countervailing presumptions. See *Donovan v. Security-First Nat. Bank*, 67 Cal. App.2d 845, 853, 155 P.2d 856; *Dimond v. Sanderson*, 103 Cal. 97, 101, 102, 37 P. 189; *In re Estate of Roberts*, supra.

Therefore it cannot be said, as matter of law, that because it appears that Mr. Cleary was appellant's attorney, and appellant testified that he did not seek or have independent advice the conveyance must be set aside. Appellant's allegation in his complaint that he was willing to give the deed "as security" is inconsistent with his present contention that the deed was secured by undue influence upon the part of his attorney; and the trial court found that it was freely and voluntarily executed and delivered by plaintiff for a good and valuable consideration, with full knowledge on his part of its contents and legal effect, and with the intent of conveying to defendants absolute title to the property, subject only to the life estate in favor of plaintiff. It also found that it was not true that appellant relied entirely or at all upon the representations of defendant Leslie Cleary as to the nature and effect of the deed.

[8] As above stated appellant does not contend that the evidence does not sustain the findings, and there is ample evidence to support them, and to support a conclusion that no advantage was taken of plaintiff by defendants or either of them. It shows that appellant was fully informed as to all matters relating to the transaction, that he knew the contents of the deed when he executed it, and did exactly what he himself had proposed and wanted to do at the time the deed was executed, that is, provide that the property should belong to "his kids"—as he called defendants—after his death. The testimony shows that plaintiff and defendants were very warm friends, that they visited in one another's homes, both before and after the death of Mary Ann Munfrey, that plaintiff lived in defendants' home after the death of his wife, carried a key to their house, and when away wrote to both of defendants in most affectionate terms;

and that it was only after he remarried, some eight months after the execution of the deed, that he changed his mind and requested a reconveyance of the property.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



75 Cal.App.2d 869

WILLIG v. GOLD et al.

Civ. 13122.

District Court of Appeal, First District,

Division 2, California.

Aug. 22, 1946.

1. Contracts ⇨141(3)

Evidence supported determination that seller, in paying unlicensed business opportunity broker a commission on sale of business without inquiring whether broker was licensed as such, violated statute making such payment a misdemeanor and hence was in *pari delicto* with broker and could not recover back commission thus paid, though broker would be subject to much heavier penalty for acting as such without a license. Business and Professions Code, §§ 10250 et seq., 10259, 10260.

2. Brokers ⇨38(1)

Where insurer, on basis of information as to volume of business done by insured disclosed to broker in course of negotiations for sale of insured's business and imparted to insurer under contract to pay broker a percentage of recovery, filed suit for unpaid premiums which were based on volume of business, insured could not recover percentage payable to broker of amount paid by insured to compromise suit on theory that amount payable to broker was the fruits of a breach of confidential relation existing between insured and broker as principal and agent.

3. Principal and agent ⇨48

An agent is under no legal duty not to disclose principal's dishonest acts to the party prejudicially affected by them.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Interpleader by Rathbone, King & Seeley against Laurance Gold and others, wherein L. T. Willig filed a complaint in intervention for recovery of money payable by plaintiff in interpleader to named defendant and broker's commission paid named defendant by plaintiff in intervention. From a judgment denying recovery, plaintiff in intervention appeals.

Judgment affirmed.

Hubbard & Hubbard, of San Francisco, for appellant.

Charles M. Stark, of San Francisco, for respondent Gold.

Franklyn M. O'Brien, of San Francisco, respondent in pro. per.

Paul W. McComish, of San Francisco, of counsel, for respondent.

DOOLING, Justice.

The appellant, Willig, had been the owner of a business in San Francisco which he wanted to sell. Respondent Gold learned of this and negotiated with Willig to buy the business for himself. These negotiations having failed he undertook to secure a purchaser and succeeded in selling the business to a corporation for over \$100,000. Gold demanded a much larger commission but was paid by Willig for his services as broker \$3000.

During the course of their negotiations Willig had disclosed to Gold the volume of his business over a certain period. Willig was insured by Rathbone, King & Seeley with the premium payments measured by the volume of business done by Willig. Angered at Willig's refusal to pay him more than \$3000 for his services Gold, through his attorney, entered into a written agreement with Rathbone, King & Seeley, for a percentage of their re-

covery, to disclose information to Rathbone, King & Seeley that one of their assureds had misrepresented the amount of premiums due to them. Pursuant to this agreement Gold gave to Rathbone, King & Seeley the information that he had obtained from Willig. Rathbone, King & Seeley filed a suit for unpaid premiums against Willig which was compromised for \$30,000. Several parties having demanded all or part of the \$7215.49 which represented the percentage of the \$30,000 payable to Gold under their written agreement with him, Rathbone, King & Seeley interpleaded the various claimants and paid the money into court.

Willig filed a complaint in intervention asking, 1, for the recovery of the \$3000 paid to Gold as a commission on the ground that the transaction was illegal because Gold was not licensed as a business opportunity broker (Business and Professions Code, Div. 4, Pt. 1, Ch. 4); and 2, for the recovery of the entire sum of \$7215.49 on the theory that it was the fruits of a breach of the confidential relation existing between agent and principal.

The court denied Willig recovery on both grounds and Willig appeals.

The denial of recovery of the \$3000 commission was on the ground that both parties were *participes criminis* and in *pari delicto*.

[1] The evidence supports the trial court's determination that in paying the \$3000 to Gold Willig was guilty of a violation of that part of sec. 10259, Business and Professions Code, which reads:

"It is a misdemeanor, punishable by a fine of not exceeding fifty dollars (\$50) for each offense, for any person, whether obligor, escrow holder or otherwise, to pay or deliver to anyone a compensation for performing any of the acts within the scope of this chapter, who is not known to be or who does not present evidence to such payor that he is a regularly licensed business opportunity broker at the time such compensation is earned."

The following quotation from Willig's testimony makes clear that he paid the \$3000 without requiring Gold to "present

evidence to such payor that he is a regularly licensed business opportunity broker" as required by the quoted section:

"Q. Did he tell you he had a license as a business opportunity broker? A. He didn't say he had a license, he said he was a business opportunity broker.

"Q. Did he tell you he had a license? A. No, he did not.

"Q. Did you ask him if he had a license? A. No, I did not."

Appellant argues that despite his violation of the express prohibition which the law placed on him not to pay a commission without requiring Gold to present evidence that he held a license, he is entitled to recover because, he argues, he was not in *pari delicto* with Gold. In this regard he points to sec. 10260, Business and Professions Code:

"Any person acting as a business opportunity broker or business opportunity salesman without a license shall, upon conviction thereof, if a natural person, be punished by a fine of not to exceed five hundred dollars (\$500), or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment in the discretion of the court; or if a corporation, be punished by a fine of not to exceed five thousand dollars (\$5,000)."

Because of the heavier penalty imposed on the unlicensed broker by this section he asserts that the principal making a payment to an unlicensed broker in violation of sec. 10259 is not in *pari delicto* with the broker who violates sec. 10260.

Appellant cites no case holding that a person who violates a penal statute which lays an express prohibition upon him is not in *pari delicto* with the other party to the transaction merely because the law imposes a heavier penalty upon the other. He cites and relies upon *Tatterson v. Kehrlein*, 88 Cal.App. 34, at pages 49, 50, 263 P. 285, 291, which contains this statement:

"The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not in *pari delicto*,

and the buyer may have judgment for the money paid out by him under the illegal contract, and may have the contract, the stock certificates and promissory note given in payment of such stock canceled. *Reilly v. Clyne*, 27 Ariz. 432, 234 P. 35, 40 A.L.R. 1005; *Karamanou v. [H. V.] Greene Co.*, 80 N.H. 420, 124 A. 373; *Vercellini v. U. S. I. Realty Co.*, 158 Minn. 72, 196 N.W. 672; *Edward v. Ioor*, 205 Mich. 617, 172 N.W. 620, 15 A.L.R. 256; *Landwehr v. Lingenfelder*, Mo.App., 249 S.W. 723; *Reno v. American Ice Machine Co.*, supra [72 Cal.App. 409, 237 P. 784]. The foundation of the right of the plaintiff to recover in these cases, although a party to the illegal contract, is the rule of the common law declared by Lord Mansfield in *Browning v. Morris*, 2 Cowp. 790, 98 Eng.Reprint, 1364 (quoted from in the Arizona and New Hampshire cases, supra), as follows: 'The rule is, in *pari delicto potior est conditio defendantis*. (sic) * * * Where the contract is executed, and the money paid in *pari delicto*, this rule * * * certainly holds * * * and the party who has paid it cannot recover it. * * * For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are equally criminal. But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one from their situation and condition, being liable to be oppressed or imposed upon by the other; there the parties are not in *pari delicto*; and, in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.' In *Reilly v. Clyne*, supra, it is said: 'The complaining party is especially protected by the law where the agreement is not illegal *per se* but is merely prohibited. * * * The purpose of the Blue Sky Laws is to protect the public against imposition. The defendant is one of the public for whose benefit the law was enacted.' And in *Irwin v. Curie*, 171 N.Y. 409, 64 N.E. 161, 58 L.R.A. 830, the court says: 'It is safe to assume that whenever the statute imposes a penalty upon one party, and none upon the other, they are

not to be regarded as para-delictum.' And in *Edward v. Ioor*, supra, the court uses this language: 'It is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side.'"

This test for determining whether the parties to a transaction which violates a statute are in *pari delicto* is of ancient lineage, stemming from the following statement of Lord Mansfield in *Browning v. Morris*, supra, 2 Cowp. 790, 793:

"And it is very material that the statute itself, by the distinction it makes, has marked the criminal: For the penalties are all on one side."

This case is often cited and the test above quoted frequently applied. See in addition to the cases cited in the quotation from *Tatterson v. Kehrlein*, supra; *Randall v. California Land Buyers Syndicate*, 217 Cal. 594, 597, 20 P.2d 331; *McClory v. Dodge*, 117 Cal.App. 148, 152, 4 P.2d 223; *White v. Franklin Bank*, 39 Mass. 181, 22 Pick; *Tracy v. Talmage*, 14 N.Y. 162, 67 Am.Dec. 132; *Smart v. White*, 73 Me. 332, 40 Am.Rep. 356; *Lester v. Howard Bank*, 33 Md. 558, 3 Am.Rep. 211; *Bateman v. Robinson*, 12 Neb. 508, 11 N.W. 736; *Edgerly v. Hale*, 71 N.H. 138, 51 A. 679; *Mason v. McLeod*, 57 Kan. 105, 45 P. 76, 41 L.R.A. 548, 57 Am.St.Rep. 327; *Stansfield v. Kunz*, 62 Kan. 797, 64 P. 614; *United Bank & Trust Co. v. Joyner*, 40 Ariz. 229, 11 P.2d 829; *Thomas v. City of Richmond*, 79 U.S. 349, 12 Wall. 349, 20 L.Ed. 453.

In the last cited case the Supreme Court of the United States said, 79 U.S. at page 356:

"But if the parties are in *pari delicto*, as * * * if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves."

For reasons of public policy which it must be presumed to have considered adequate, the legislature has seen fit to make

guilty of a criminal act the one paying a commission under the circumstances shown here. It has singled out the payor by sec. 10259. So far as the payment of a commission is concerned the legislature has by that section placed the penalty solely upon the payor, and he is the one whom the legislature, in the language of Lord Mansfield, "has marked the criminal." In the attempt to prove his right to recover the commission Willig was compelled to disclose that in making that very payment he violated an express penal provision. In the absence of some compelling public policy (which we cannot discover here) no cause of action can be grounded upon appellant's own violation of an explicit statutory prohibition placed upon him. 6 Cal. Jur. 104, 105.

[2, 3] Appellant's second claim is somewhat startling. He argues in effect that because of the agency relation which had previously existed Gold was under a duty not to disclose to Rathbone, King & Seeley that appellant had made false returns to them and as a result paid them a smaller premium than they were entitled to receive. He cites no case, and we are sure that none can be found, that an agent is under a legal duty not to disclose his principal's dishonest acts to the party prejudicially affected by them. He does make an effort to show that there is no evidence in the record to support a finding that appellant did make false returns. The record shows that after suit brought and an audit of his books appellant paid Rathbone, King & Seeley \$30,000 in settlement of their claim. It also shows that the action was based on the allegation that Willig had made false returns as the basis of premium payments, and a former employee of Willig testified: "Mr. Bittel told Mr. Willig that the company wanted to audit the books. Mr. Willig said, when your house is not in order, you don't want any one looking in."

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

75 Cal.App.2d 883

BELL v. LOVETT et ux.

Civ. 15249.

District Court of Appeal, Second District,
Division 1, California.

Aug. 31, 1946.

Rehearing Denied Sept. 20, 1946.

Hearing Denied Oct. 28, 1946.

War ☞4

Evidence justified denial of lessee's recovery of \$50 per month in excess of the \$200 rent provided for in a lease on ground that payment was made as a consideration for waiver by the lessors of their right to sell the property and oust the lessee from possession thereof, which right was reserved to the lessors prior to the effective date of the Emergency Price Control Act. Emergency Price Control Act of 1942, §§ 1 et seq., 205(e), as amended, 50 U.S.C.A. Appendix, §§ 901 et seq., 925(e).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by R. H. Bell against C. A. Lovett and Agnes L. Lovett, husband and wife, to recover money paid by plaintiff, as lessee, to defendants, as lessors, alleged to have been in excess of the maximum monthly rental payment permitted by the Office of Price Administration. From an adverse judgment, plaintiff appeals.

Affirmed.

Louis Ballenger, of Glendale, for appellant.

H. E. Bianchi, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an action to recover money paid by plaintiff, as lessee, to defendants, as lessors, alleged to have been in excess of the maximum monthly rental payments permitted by the office of Price Administration.

Plaintiff prosecutes this appeal from an adverse judgment based upon a ruling of the trial court sustaining defendants' objection to the introduction of any further evidence "on the ground there is no cause of action on behalf of the plaintiff, that

it is clearly shown here that the moneys were paid, were not rent, but were consideration for a change in the terms of the lease."

On September 26, 1940, respondent C. A. Lovett, who with his wife, Agnes L. Lovett, owned the Glendale Motor Hotel, leased the same by written agreement to Violet C. Hossack and Maude Wells for a term of five years from October 1, 1940, for a total consideration of \$12,000, payable in monthly installments of \$200 each. The sum of \$3200 was paid in advance upon the execution of the lease and was for the first month and the last fifteen months of the term.

Under paragraph VI of the lease, the lessee had an option to lease the property for an additional five year term upon expiration of the original term; and by paragraph VII of the lease, the lessor had the right to sell the property during the term of the lease, free thereof.

On January 16, 1941, the original lessees assigned their interest in the lease to appellant, to which respondents consented in writing. On May 3, 1944, appellant and respondents executed a modification of paragraphs VI and VII of said lease by which it was agreed that lessee should relinquish his right to exercise the option provided by paragraph VI "beyond the 30th day of September, 1945"; and that the lessor and his wife "hereby relinquish their right to sell said premises free and clear of said lease prior to the expiration of the lease, being the 30th day of September, 1945."

After reciting in haec verba the lease, assignment and modification, hereinbefore referred to, the first amended complaint alleged as follows:

"V. That on the 1st day of March, 1942, the rent for the aforementioned housing accommodations was the sum of \$200 per month; that subsequent to the 1st day of March, 1943, and prior to the 1st day of October, 1943, the rent for said accommodations was increased to the sum of \$250.00 per month.

"VI. That on the first day of November, 1942, pursuant to the provisions of

the Emergency Price Control Act of January, 1942, as amended, [50 U.S.C.A. Appendix, § 901 et seq.], there became in effect in Los Angeles County, State of California, Maximum Rent Regulation Number 53, being docket number 6084, as issued by the Office of Price Administration; that by reason and operation of the provisions of said regulation, the maximum legal rent for the aforesaid housing accommodations on and after the 1st day of November, 1942, became and thereafter was the sum of \$200.00.

"VII. That the property mentioned in the lease aforesaid comes under the provisions of maximum rent regulations established by the Office of Price Administration in that the said premises contained less than 25 rented rooms, to-wit, 10 rooms.

"VIII. That on or about the 1st day of October, 1943, the defendants demanded of the plaintiff the sum of \$250.00 as rent for said housing accommodations for the rental period from October 1, 1943, to November 1, 1943; that on or about the 1st day of October, 1943, plaintiff paid the sum of \$250.00 demanded as aforesaid, and said demand and payment exceeded the legal rent for said housing accommodations for said period by the sum of \$50.00.

"IX. That by reason and virtue of the premises, plaintiff is bringing this action for \$50.00 under the provisions of section 205(e) of the Public Law 421 of the 2nd Session of the 77th Congress of the United States, known as the Emergency Price Control Act of 1942, approved January 30, 1942, as amended [50 U.S.C.A. Appendix, § 925(e)]."

Plaintiff then alleged twenty-five additional causes of action for \$50 each, or an aggregate of \$1200, and prayed for a judgment treble that amount, or \$3600.

As to the allegations of paragraphs V, VI, VII and VIII of the first amended complaint hereinabove quoted, the court found as follows:

"IV. That the allegations set forth in paragraph V are not true. The court finds that the rental rate at all times during the occupancy by the plaintiff was the same as is set forth in the original lease agreement entered into between the defendant,

C. A. Lovett, and Violet Hossack and Maude Wells.

"V. That the allegations set forth in Paragraph VI of the plaintiff's complaint are not true. The court finds that on November 1st, 1942, and thereafter the maximum rental rate for said premises involved in this action pursuant to the provisions of the Emergency Price Control Act of 1942 as amended was the rental rate provided for by said lease referred to in Paragraph I hereinabove, on the maximum rental date fixed by the Act, to-wit: March 1st, 1942.

"VI. That the allegations set forth in Paragraph VII of plaintiff's first amended complaint are true. That all of the ten (10) rooms involved in said lease with the exception of one (1) were sublet to the general public by plaintiff. That the plaintiff was not the ultimate consumer of said premises other than one (1) room. The court finds from the oral evidence offered by the plaintiff that all of the allegations set forth in Paragraph VIII page 11 of plaintiff's first amended complaint are not true. That there was no agreement between the plaintiff and the defendants or either of them for any increase in rent. That the sum of Fifty (\$50.00) Dollars paid to the defendant, C. A. Lovett, was paid solely in consideration of the defendants undertaking and agreeing not to sell said property during the period beginning October 1st, 1943, to and including November 1st, 1943, and the waiver of the defendants' right to sell said property and recover possession thereof upon return of rents prepaid by the plaintiff's assignors.

This right was reserved to defendants in the lease prior to the effective date of the Emergency Price Control Act. That the defendants did not demand or receive any rent for the use or occupancy of said premises on or after the effective date of the price regulation in excess of the maximum rent collectable thereunder, nor did said defendants or either of them offer, solicit, attempt or agree to violate any provision of said regulation."

The court also found: "That the lease agreement set forth in Paragraph II of plaintiff's first amended complaint was en-

tered into between the parties therein named as alleged. That lessees, Violet C. Hos-sack and Maude Wells, by assignment did transfer their interest to the plaintiff who did not assume performance of the terms or conditions thereof. That the plaintiff at the time of and as a condition to the acceptance of said assignment did secure from the defendants herein a waiver of the defendants' rights to sell said property described in the lease, which waiver was effective to the first day of August, 1941. That there was paid to the defendant, C. A. Lovett, as consideration for said waiver, the sum of Two Hundred Dollars (\$200.00) which payment was slightly less than Fifty Dollars(\$50.00) for each month during which the waiver was effective."

The lease and the assignment thereof were executed on September 26, 1940, and January 16, 1941, respectively, and prior to the effective date of the rental regulations as fixed by the Emergency Price Control Act, to-wit: March 1, 1942. On the date of the execution of the assignment, appellant paid \$200 to respondents for a waiver effective to August 1, 1941 of the latter's right to sell the property covered by the lease.

Appellant testified that on September 6, 1943, respondent C. A. Lovett "came to my place and asked me if I would be willing to sign a statement to vacate the property January 1, 1944, if he wouldn't sell it in the meantime. * * * I told him I would have to study the matter over. * * * He came back (on September 13) and asked me if I was going to agree to sign this statement, which I told him that I would not and he left and said 'then I am going to sell it'. * * * On or about the 17th day of September * * * 1943 * * * Mr. Lovett drove into the place accompanied by a man and a woman and he drove to the rear. The man and the woman got out of the car and came to the front and I went to the rear where Mr. Lovett was in his car. * * * I asked Mr. Lovett, having seen an advertisement in the paper of the sale of the place, * * * if we could not work out some way where I could buy the place and he stated that he wanted \$28,000.00, \$20,000.00 down and carry the \$8,000.00 himself. So I told him I couldn't make that payment. So he stated

that he didn't particularly want to sell the place now and if I would agree to pay him \$50.00 more a month rent he would let me stay in the place until the war ended with Germany and then we went to the front, went to the office, and Mr. Lovett wrote on a piece of paper \$250.00 a month until the war with Germany ended; and I asked him then inasmuch as he could not build if he wouldn't extend the time until six months after the government released building material. To which he agreed. * * * I mailed him the first check on September 22, 1943 * * * \$250.00. * * * this amount of money was paid each month thereafter * * * until May 3, 1944." The witness then testified that early in December Mr. Lovett told him he could get \$30,000 for the place and intended to sell it, whereupon the witness told Lovett that he had agreed not to sell the place until after the war with Germany if the witness paid him \$50 a month, to which Mr. Lovett replied that he did not have that agreement in writing. On April 20, 1944, appellant had another conversation with respondent Lovett at which time the latter said: "If I could scratch section six of the lease he would scratch section seven and we would initial it, in that way it would give him a chance to sell and give possession after my lease expired. * * * I told him I would have to study the matter over but in that event we would have to have a rider covering our agreement because I would not scratch anything. * * * On the 21st of April, 1944 * * * I told Mr. Lovett that I agreed to accept his proposition and that I would make arrangements with the attorney to prepare the rider * * * I told him that I would agree, I told him I would pay the entire amount, rent, \$250.00 for May and June, and \$750.00 the last fifteen months of the lease, a total of \$1,250.00. I made an appointment. * * *

"The Court: Before you proceed further, Mr. Bell, about six questions back you gave an answer—I think I heard you, but I am not sure—I understood you to say, and I want to be sure that I am right, that at the time this 3 for identification was written in that conversation that you were to pay \$50.00 additional a month in order

that Mr. Lovett would not sell the property, what was it you said in that regard. I want to get that clear. What was said on that subject?

"The Witness: I don't believe I answered that question directly that way.

"The Court: No, you didn't answer it directly, there was an implication in your answer that that was what was being discussed. Now, what was said at that time?

"The Witness: Well, I had agreed to pay him the \$50.00 extra a month rent if he did not sell the property. It wasn't to keep him from not selling it because I couldn't keep him from selling it, he had a right to sell it."

Thereafter, appellant recounted a meeting in Mr. Ballenger's law office when a document introduced in evidence as Exhibit 5 was prepared and signed by respondents. This is the document modifying the lease, dated May 3, 1944, hereinbefore mentioned. At the same time, appellant's check for \$1250 was handed to respondents. On cross-examination, said witness testified: "I was paying the money, yes, so that I might remain there. * * * That is the object of the matter that I could remain there, I didn't want to get out. * * * I was after security * * * And I had no security" until the provisions authorizing respondent to sell were removed from the lease.

Thereafter the trial court sustained respondents' objection to the introduction of further evidence and found (Finding VI) that "the defendants did not demand or receive any rent for the use or occupancy of said premises on or after the effective date of the price regulation in excess of the maximum rent collectable thereunder, nor did said defendants or either of them offer, solicit, attempt or agree to violate any provision of said regulation."

It is stated by appellant in his opening brief that:

"Without close analysis of the testimony it may be conceded that much of it warrants the inference that the raise from \$200.00 to \$250.00 in the monthly payments was in consideration and upon the understanding that the terms in the lease were altered so that the tenant was assured of

remaining in possession until the expiration of the term of the lease, which resulted from the waiver by Lovett of his right to sell and oust Bell. Yet other testimony given by the plaintiff clearly indicates that the additional \$50.00 paid each month was agreed to represent a raise in the rent. However * * * all payments by the tenant to the landlord 'in connection with' the 'use and occupancy' of 'housing accommodations' are, in the eyes of the Office of Price Administration, and by virtue of its regulations and opinions, rent payments; and it is declared in Section 2(a) of Rent Regulations for Housing,

"'Regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations * * * higher than the maximum rents provided by this regulation.'"

The modification agreement of May 3, 1944, in which appellant relinquished his right to exercise his option to rent the property for a further period beyond the termination of the lease, and respondents relinquished their right to sell the property free of the lease during the remaining term thereof, also provided that "All the other terms and conditions of the said lease shall continue to remain in full force and effect except as herein modified." In other words, the rent payable under the lease remained at \$200 per month.

It is obvious from the foregoing that the testimony of appellant is amply sufficient to support an inference that the sum of \$50.00 per month, here complained of, was paid as consideration for the waiver by respondents of their right to sell the property and oust appellant from possession thereof during the remaining term of the lease, as evidenced by the modification agreement; and which right was reserved to respondents in the lease prior to the effective date of the Emergency Price Control Act.

The judgment is affirmed.

DORAN, and WHITE, JJ., concur.

75 Cal.App.2d 798

Ex parte MARES.**No. 2415.**

District Court of Appeal, First District,
Division 2, California.

Aug. 19, 1946.

1. Constitutional law ⇨81

The law does not tolerate the prohibition of something which may be regulated in such a way as to overcome any evils which may be incidentally connected with it.

2. Constitutional law ⇨101

There is no vested right to do business upon the public streets.

3. Highways ⇨168

The highways of the state are public property and their use for purposes of gain is special and extraordinary, which generally may be prohibited or conditioned as the Legislature sees fit.

4. Constitutional law ⇨81

If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

5. Municipal corporations ⇨622

San Francisco ordinance prohibiting solicitation on any public street or sidewalk of public street and sidewalk traffic for sale of magazine subscriptions for future delivery is not unconstitutional as being an arbitrary prohibition of a lawful business which could be effectively regulated without prohibition, but is a valid exercise of the police power.

6. Commerce ⇨55

Constitutional law ⇨90

San Francisco ordinance prohibiting solicitation on any public street or sidewalk of street and sidewalk traffic for sale of magazine subscriptions for future deliv-

ery is not unconstitutional as unlawfully burdening interstate commerce or as infringing freedom of speech and press.

7. Municipal corporations ⇨111(4)

Under San Francisco ordinance prohibiting solicitation of street and sidewalk traffic for sale of magazine subscriptions for future delivery, the provision prohibiting solicitation in any area or doorway or entrance immediately abutting on any public street or sidewalk is separate from the provision regarding solicitation on any public street or sidewalk, and the alleged invalidity of the former provision does not invalidate the latter provision.

8. Commerce ⇨12

The Constitution does not forbid all burdens upon interstate commerce, but only undue or discriminatory burdens.

9. Constitutional law ⇨235

San Francisco ordinance prohibiting solicitation on any public street or sidewalk of street and sidewalk traffic for sale of magazine subscriptions for future delivery does not deny equal protection of law as discriminatory, in that it distinguishes between immediate sales and sales for future delivery, nor because members of Jehovah's Witnesses are permitted to solicit subscriptions for their publications.

10. Constitutional law ⇨84, 90

Activities which are directed to the spreading of a religious belief, or the dissemination of some social, economic, or political thought, or some other doctrine or idea believed to be of public interest or general concern, cannot be prohibited.

11. Municipal corporations ⇨622

San Francisco ordinance prohibiting solicitation of public street and sidewalk traffic for sale of magazine subscriptions for future delivery, and reciting that it was passed because of the war emergency, was not invalid when the emergency became less acute or had entirely passed, where supervisors had power to enact the ordinance whether there was an emergency or not.

12. Constitutional law ⇨1

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and protects all classes of

men, at all times and under all circumstances.

Proceeding in the matter of the application of Reo Mares for a writ of habeas corpus for petitioner's release from custody after an arrest for violation of ordinance of the city and county of San Francisco.

Petition denied and petitioner remanded to custody.

Henry C. Clausen, of San Francisco, for petitioner.

Edmund G. Brown, Dist. Atty., and Elton C. Lawless, Deputy Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

The petitioner seeks to be released from custody after his arrest for a violation of ordinance 2593 of the city and county of San Francisco which provides that, "No person shall on any public street or sidewalk * * * or in any area or doorway or entrance-way immediately abutting thereon, solicit the sale to street and sidewalk traffic of any subscription to any magazine or periodical for future delivery, or the sale of any tangible personal property to be delivered to the purchaser thereof, or to any other person, at a subsequent time." A violation is made a misdemeanor punishable by a fine of \$500, or imprisonment not to exceed six months, or both.

Petitioner worked as a solicitor on a commission basis for a partnership which acted as broker for various national magazine distributors and publishers including Liberty, Cosmopolitan, Good Housekeeping, Argonaut, Catholic Digest, Reader's Digest, Popular Mechanics, Newsweek, Saturday Evening Post, New York Times and Christian Herald. On April 13, 1946, when arrested, he admittedly was engaged on the streets and sidewalks and in the areas, doorways and entrance-ways abutting thereon, in soliciting subscriptions for some or all of those publications. It is alleged that the solicitation was conducted in a quiet manner and subscribers were accepted only if they gave a definite address.

Most of the magazines are published outside California and sent by mail to sub-

scribers in this and other states after the booking of the subscriptions. Some of them are published in California and sent by mail to subscribers either within or without the state.

Five grounds are urged against the validity of this ordinance, namely, that it (1) is an arbitrary prohibition of a lawful business; (2) interferes with interstate commerce; (3) violates the rights of freedom of speech and of the press; (4) denies petitioner the equal protection of the laws; and (5) cannot be sustained as an emergency measure.

1st: Prohibition or regulation. Petitioner concedes that such solicitation is subject to regulation, and he indeed invites it, but he complains that where there can be regulation, absolute prohibition is an arbitrary, oppressive and unreasonable exercise of power. The ordinance does not prohibit solicitation generally, which, of course, is a lawful business. It prohibits solicitation of *street and sidewalk traffic* in a populous and busy city.

[1] It is true, as was said in *Re Farb*, 178 Cal. 592, 598, 174 P. 320, 323, 3 A.L.R. 301, relied on by petitioner, that "The law does not tolerate the prohibition of something which may be regulated in such way as to overcome any evils which may be incidentally connected with it." See, also, 5 Cal.Jur. 710. But the question whether regulation could effectively solve the problem or whether outright prohibition was necessary, was a question which the supervisors had to decide. Assuming that regulation had been ordained, requiring the examination, bonding and licensing of solicitors, the basic traffic problem still would not have been solved or even touched. Pedestrians would still be accosted and intercepted, and sidewalk traffic halted, on the busy sidewalks of the city, or in somebody's near-by doorway, while sales talks were delivered and order blanks signed. The only difference would be that the solicitors would be licensed. If certain areas were defined as out of bounds for solicitation, or the hours therefor limited, that would not be true regulation but really partial prohibition. Doubtless the supervisors had these considerations in mind

when they enacted this ordinance and decided that outright prohibition was the only effective remedy. In view of the cases presently to be cited it would seem to be a question within their own province as legislators, for, according to the authorities, such a subject was open to either regulation or outright prohibition. See *People v. Sullivan*, 60 Cal.App.2d 539, 541, 141 P.2d 230.

[2,3] "The place for the conduct of a private business is upon private property; and it has been said that *there is no vested right to do business upon the public streets.*" *Pittsford v. City of Los Angeles*, 50 Cal.App.2d 25, 32, 122 P.2d 535, 538, and see text therein quoted and cases cited. "It is well established law that the highways of the state are public property; * * * and that their use for purposes of gain is *special and extraordinary*, which, generally at least, the legislature may *prohibit* or condition as it seems fit [citations]." *Stephenson v. Binford*, 287 U.S. 251, 264, 53 S.Ct. 181, 184, 77 L.Ed. 288, 294, 87 A.L.R. 721. "Use of a public street for private enterprise may under some circumstances redound to the public good; but nevertheless it is a *special privilege* peculiarly subject to regulation, and one which may be granted on reasonable terms or *entirely withheld* [citations]." *People v. Galena*, 24 Cal.App.Supp.2d 770, 775, 70 P.2d 724, 727. (Emphasis thus far is ours.) Numerous authorities support these statements.

[4] Moreover, no rigid or arbitrary distinction between regulation and prohibition is drawn by the courts *in passing on ordinances of this character*. The standard, rather, is defined as follows in *Booth v. People of State of Illinois*, 184 U.S. 425, 429, 22 S.Ct. 425, 427, 46 L.Ed. 623: "If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real

or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." See, also, *Otis v. Parker*, 187 U.S. 606, 609, 23 S.Ct. 168, 47 L.Ed. 323.

[5] None of the many cases cited by the petitioner under this head concerns the factual situation now presented, namely, the use of the *public* streets for *private* business; they deal with the prohibition or regulation of private business on one's own premises. The closest case on its facts, cited by petitioner, is *McKay Jewelers v. Bowron*, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188; upon which he strongly relies. The two cases, however, are easily distinguished for there the plaintiff shopkeepers did all their soliciting *while wholly within their own premises*, which abutted on the street, and the sales were made inside their stores. In the instant case Mares moved about on the sidewalks, and the doorways and entranceways which he admittedly used were not on his or his principals' premises. In the *McKay* case the court held (19 Cal.2d at page 601, 122 P.2d at page 546, 139 A.L.R. 1188) that "A legislative body may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable *upon the use of private property* or the pursuit of useful activities" (emphasis added) and that therefore the prohibition of the Los Angeles law had no relation to health, morals or the general public welfare and that, *as applied to plaintiffs*, it violated their constitutional rights. It is not in point.

The instant case, in our opinion, presents a situation as clearly within the exercise of the police power as that presented in the *Galena* case, *supra*. The difference between the control of taxicab stands and the control of sidewalk traffic is simply a difference in degree. In our opinion when the supervisors ordained absolute prohibition rather than mere regulation they dealt with a matter directly related to the public peace, safety, convenience, comfort and welfare.

[6,7] *2nd: Commerce clause, and, 3rd, freedom of speech and press.* A local law containing substantially the same prohibi-

tions as those found in ordinance 2593 is in effect in the city of Los Angeles. In the case of *People v. Carver et al.*,¹ defendants were convicted in the municipal court of Los Angeles of its violation. On appeal before the appellate department of the Superior Court its constitutionality was challenged on grounds 2nd and 3rd now raised. The judgment was affirmed on December 14, 1945 (Cr. A-2119), in the following opinion written by Presiding Judge Shaw, concurred in by Judges Bishop and Kincaid, which we take the liberty of adopting:

"The defendants appeal from judgments of conviction of violating Section 42.19 of the Los Angeles Municipal Code. That section provides that 'No person shall, on any public street or sidewalk in this city, or in any doorway or entranceway immediately abutting thereon, solicit the sale of any subscription to any magazine, periodical or other publication, or the sale of any tangible personal property for delivery at a subsequent time.' The charges against defendants were under that part of the section prohibiting solicitation of magazine subscriptions on the public streets and sidewalks. These cases were tried together and at the trial it was stipulated that witnesses would testify to the doing by defendants of the acts charged and that the magazines for which subscriptions were solicited were published and printed outside of the State of California, the subscription money was sent to the publishers, and the magazines were sent by mail from the place of publication outside of California to the subscribers in and out of California.

"The points made on appeal go entirely to the validity of the ordinance, the objections being, first, that it is an unlawful interference with interstate commerce, and, second, that it infringes freedom of speech and the press. Possibly the provision of the ordinance which prohibits solicitation from doorways and entranceways abutting on the streets may be invalid for the reasons held to invalidate a similar ordinance in *McKay Jewelers v. Bowron*, 1942, 19 Cal.2d 595, [122 P.2d 543, 139 A.L.R. 1188]; but that provision is not in question here, and the two provisions regarding

place of solicitation are plainly separable, so that if one is struck down it does not necessarily drag the other down with it. *Bacon Service Corp. v. Huss*, 1926, 199 Cal. 21, 32, [248 P. 235]; *People v. Lewis*, 1939, 13 Cal.2d 280, 282, [89 P.2d 388]; *In re Bell* 1942, 19 Cal.2d 488, 498, [122 P.2d 22],

"The prohibition against street solicitation is not an absolute prohibition but merely a regulation of the obtaining of magazine subscriptions. It affects interstate commerce in magazines indirectly only. It does not discriminate between intrastate and interstate commerce, but applies to both alike. It relates to a matter of local concern, with which it would be difficult for Congress to deal adequately. It appears to us to be well within the rule sanctioning local regulations which was laid down in [*State of*] *California v. Thompson*, 1941, 313 U.S. 109, [61 S.Ct. 930], 85 L.Ed. 1219, 1221, where the court said: '* * * there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints.' See also *Town of Green River v. Fuller Brush Co.*, [10 Cir., 1933], 65 F.2d 112, [88 A.L.R. 177], where similar reasons were given for upholding, as far as the matter of interstate commerce was concerned, an ordinance prohibiting solicitation of sales in certain places.

"The contention regarding freedom of speech and press is sufficiently answered by the decisions in *Pittsford v. City of Los Angeles*, 1942, 50 Cal.App.2d 25, 32, [122 P.

¹ No opinion for publication.

2d 535], and *Valentine v. Chrestensen*, 1942, 316 U.S. 52, [62 S.Ct. 920], 86 L.Ed. 1262, where the courts upheld ordinances prohibiting distribution of business advertising matter on the streets. In the latter case, the court said: 'This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.'

"This ordinance does not, like those condemned in *Schneider v. [State of New Jersey, Town of] Irvington*, 1939, 308 U.S. 147, [60 S.Ct. 146], 84 L.Ed. 155, prohibit the distribution of literature on the streets. It merely prohibits the sale of subscriptions for publications to be delivered at a future time. The decision in that case was based upon the propositions that 'the streets are natural and proper places for the dissemination of information and opinion' and that the ordinances there considered abridged what the courts designated as 'the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature.' The ordinance here in question has no such effect. In *Schneider v. Irvington*, *supra*, the court further said: 'We are not to be taken as holding that commercial soliciting and canvassing may not be subject to such regulation as the ordinance requires,' referring to an ordinance which required a per-

mit for canvassing from house to house. As far as appears here, the activities of the defendants were of a purely commercial nature.

"The judgments are affirmed."

[8] The recent case of *Nippert v. City of Richmond*, 66 S.Ct. 586, 90 L.Ed. 760, relied upon by petitioner, was decided since the *Carver* case. The Richmond ordinance imposed an annual license tax on solicitors of \$50. and one-half of 1% of the gross earnings, receipts, fees or commissions for the preceding license year in excess of \$1,000. The court held (66 S.Ct. at page 593, 90 L.Ed. 760) the ordinance to be "discriminatory in favor of the local merchant as against the out-of-state one." 66 S.Ct. at page 590, 90 L.Ed. 760, the court said, "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden." The burden was there held to be undue and discriminatory. *Real Silk Hosiery Mills v. City of Portland*, 268 U.S. 325, 45 S.Ct. 525, 69 L.Ed. 982, is also relied on by petitioner. That case is discussed in the *Nippert* opinion, 66 S.Ct. at page 588, 90 L.Ed. 760, where the court points out that there "a municipal ordinance requiring solicitors to pay a license fee was held unconstitutional as a forbidden burden upon interstate commerce when applied to an out-of-state corporation whose representatives solicited orders for subsequent interstate shipment." Neither case is in point.

4th: Equal protection of the laws.

[9,10] The petitioner claims that the ordinance is discriminatory in that it prohibits solicitation for future deliveries while permitting it for immediate deliveries. The difference between the handling of an immediate sale, where the pedestrian knows what he wants beforehand, and the routine necessarily involved in halting a pedestrian, arresting his attention, "selling" him the idea of becoming a subscriber, and then filling out an order blank and getting his signature on the dotted line, is so palpable as to require no elaboration. The two operations are as distinct as those involved in door-to-door solicitation (which is not prohibited) and sidewalk solicitation. The

ordinance plays no favorites among or within the class of persons similarly situated, but operates uniformly upon them (People v. Sullivan, 60 Cal.App.2d 539, 541, 141 P.2d 230, supra; 18 Cal.Jur. 827; 12 Am. Jur. 144); it draws no line between magazines published within the city or state and those published elsewhere (cf. In re Robinson, 68 Cal.App. 744, 230 P. 175); it simply prohibits the solicitation of sidewalk traffic for future delivery, by anybody and everybody alike and at all times. It therefore is not at all within the cases cited by petitioner, for here there is a valid and reasonable ground of distinction with nothing arbitrary about it (see 5 Cal.Jur. 860, sec. 213; People v. St. John, 108 Cal. App.Supp. 779, 789, 790, 288 P. 53; Sieroty v. City of Huntington Park, 111 Cal.App. 377, 380, 295 P. 564).

The petitioner also claims that there is discrimination in the enforcement of the ordinance in that members of Jehovah's Witnesses are permitted to solicit subscriptions for their publications. Several recent cases illustrate the distinction between activities of a purely commercial nature *which are subject to prohibition or regulation*, and those which are directed to the spreading of a religious belief, or the dissemination of some social, economic or political thought or some other doctrine or idea believed to be of public interest or general concern, *which can not be stopped*. Valentine v. Chrestensen, supra; Schneider v. Irvington, supra; Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; Jones v. City of Opelika, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290; Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 111, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 1297, 146 A.L.R. 81; Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L. Ed. 265; Pittsford v. City of Los Angeles, supra; see also, "Freedom of Speech and Commercial Solicitation" 30 Cal. Law Rev. 655. Our Supreme Court has recognized this distinction in the recent case of Gospel Army v. City of Los Angeles, 27 Cal.2d 232, 242, 163 P.2d 704. Hence there was no discrimination on this score.

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5th: The claim that the ordinance cannot be sustained as an emergency measure.

The ordinance, enacted in 1939 as an emergency measure, recites as reasons for its adoption that "due to the existing war emergency there are daily on the streets * * * a large number of the armed forces" who "by reason of their service * * * can give no definite place of address, and it is impossible to deliver to said members of the armed forces, and other persons engaged in necessary war work, the articles subscribed to and sold for future delivery, and said persons are often times deprived of any payment made on account of said subscriptions for said periodicals or on account of the down payment made on the sale of any article of personal property * * *." And "further when said members of the armed forces are asked as to where said publication subscribed for, or articles of personal property sold, should be delivered, said members of the armed forces inadvertently divulge military information which should not be available to the public at large."

[11] Granting that there was an emergency when the ordinance was enacted, the fact that it is less acute now, or has entirely passed, would not invalidate the ordinance. If the supervisors had the power to enact the ordinance—emergency or no emergency—then it is still a good piece of legislation. Even if there had been no emergency when they declared that one existed, the ordinance would not be void, but its effective date would be merely postponed for 30 days (18 Cal.Jur. p. 922).

If this ordinance interfered with interstate commerce the recitals therein that subscribers might be deprived of their payments would not save it (Real Silk Hosiery Mills v. City of Portland, supra, citing Shafer v. Farmers Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909), but we have already seen that there is no such interference. The fact that the city or state might, under other laws, be able to prevent and punish frauds would not make void this ordinance, enacted under the police power to regulate traffic on the streets.

[12] It must be conceded, of course, that "The Constitution of the United States

is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances". Ex parte Milligan, 4 Wall. 2, 120, 121, 71 U.S. 2, 120, 121, 18 L.Ed. 281. See also United States v. A. L. A. Schechter Poultry Corporation, 295 U.S. 495, 528, 55 S.Ct. 837, 79 L.Ed. 1570, 1579, 97 A.L.R. 947, and Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425, 54 S.Ct. 231, 78 L.Ed. 413, 422, 88 A.L.R. 1481.

If the supervisors had the power before the emergency arose to enact such an ordinance, then such power was not removed or diminished by the emergency. That they had the power is beyond question (see earlier discussion, and particularly People v. Galena, supra), for the ordinance deals directly with a traffic problem—one involving the public peace, safety, convenience, comfort and welfare.

A case dealing directly with the power of the legislative branch with respect to emergency measures is Davis v. Los Angeles County, 12 Cal.2d 412, 420, 84 P.2d 1034; see also Stevenson v. Colgan,

91 Cal. 649, 652, 27 P. 1089, 14 L.R.A. 459, 25 Am.St.Rep. 230; Lukens v. Nye, 156 Cal. 498, 505, 105 P. 593, 20 Ann.Cas. 158, 36 L.R.A.,N.S., 244; Plum v. State Board of Control, 51 Cal.App.2d 382, 385, 124 P.2d 891.

It may well be that the petitioner, or others similarly situated, may be able to persuade the supervisors that, because hostilities have ceased, or for other reasons, the ordinance should be repealed. Such repeal cannot, however, be effected by the courts for the subject is purely a legislative one.

The conclusion at which we have arrived finds support on several of the points raised and discussed herein, in the case of In re Hartmann, 25 Cal.App.2d 55, 76 P.2d 709, and in Town of Green River v. Fuller Brush Co., 10 Cir., 65 F.2d 112, 88 A.L.R. 177, cited in the Carver case, supra.

The petition is denied and the petitioner remanded to custody.

NOURSE, P. J., and DOOLING, J., concur.

28 Cal.2d 761

Petition of GAFFNEY.

S. F. 17287.

Supreme Court of California, in Bank.
Aug. 23, 1946.

1. Attorney and client ☞61

The Supreme Court has inherent power to reinstate an applicant for readmission to practice law in the state who has been previously disbarred, despite an unfavorable report upon his application by the Board of Governors.

2. Attorney and client ☞61

The final determination of a petition for readmission to practice law after petitioner's disbarment by the Supreme Court rests with the Supreme Court, whose powers in this respect are plenary and whose judgment is conclusive, and the recommendation of the Board of Governors is advisory only.

3. Attorney and client ☞61

Record sustained local committee's recommendation that petitioner for reinstatement to practice law who had been disbarred be readmitted to practice law, notwithstanding his failure, due to inability because of deceased earning power, to make complete restitution of amount of which the client had been defrauded.

4. Attorney and client ☞58

The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them.

5. Attorney and client ☞61

In reaching a fair conclusion on the question of reformation of a petitioner for readmission to practice law after his disbarment, the favorable testimony of acquaintances, neighbors, friends, associates, and employers with reference to their observation of the daily conduct and mode of living of the attorney should weigh heavily in the scale of justice.

Proceeding in the matter of the petition of James F. Gaffney for readmission to the State Bar of California.

Petitioner restored as an attorney and counsellor of the Supreme Court.

J. W. S. Butler, Robert A. Zarick, Stanley W. Reckers, Lloyd Buchler, R. B. Hibbitt, C. K. Curtright, and Thomas O'Hara, all of Sacramento, for petitioner.

Jerold E. Weil, of Los Angeles, for respondent.

CARTER, Justice.

Petitioner has applied for readmission to practice law in this state after his disbarment by this court. *Gaffney v. State Bar*, 20 Cal.2d 735, 128 P.2d 516.

The application for reinstatement is based upon the ground that petitioner has rehabilitated himself and now possesses the moral qualifications and mental attainments necessary to entitle him to be restored as a member of the bar; and also upon the ground that although the Board of Governors of The State Bar, by a divided vote, failed to make a recommendation for readmission, nevertheless the local committee to which the matter has previously been referred, made favorable findings which are fully supported by the evidence, and unanimously recommended petitioner's reinstatement.

[1,2] This court has inherent power and authority to reinstate an applicant previously disbarred despite an unfavorable report upon his application by the Board of Governors; the recommendation of that body is advisory only; the final determination rests with this court, and its powers in this respect are plenary, and its judgment conclusive. In *re Lacey*, 11 Cal.2d 699, 701, 81 P.2d 935, and cases cited.

[3] A review of the record has convinced us of the fairness and accuracy of the committee's findings. They state in substance the following: Petitioner, now a man of 60 years of age, was disbarred in the fall of 1942. He immediately ceased the practice of law and has not at any time resumed it. From October, 1942, to April, 1943, he worked as a principal clerk in the shipyards. Because of congested living conditions and lack of proper eating facilities, petitioner then returned to his home at Sacramento where he worked for about

two months as an office clerk. He was thereafter employed by the Army Air Force as a counselor, that is, a grievance man acting for employer and employee. Petitioner's income from these activities averaged a little short of \$200 a month. In April, 1943, he lost the home which he had built, and with his wife and daughter was obliged to rent an apartment in Sacramento. His entire income has been required to meet the living expenses of his wife and himself. He has not been able to make complete restitution of the \$1,050 of which he defrauded a client (the matter which resulted in his disbarment), but he has made partial restitution to the amount of about half that sum.

In this connection the committee found that it has been impossible for petitioner from his earnings since his disbarment or from his property, to make further restitution, and also that it has been impossible for petitioner, from those sources, to pay certain other indebtedness listed in his petition; that the earnings of petitioner have been sufficient only to support himself and his wife during the period in question.

At the two hearings held by the local committee more than 30 witnesses testified, including a United States District judge, three of the four superior judges in Sacramento County, and all three city municipal judges. Petitioner's application for review was filed on his behalf by seven attorneys, and was concurred in by about 50 other members of the bar. Informal notice of the proceeding was given to the president of the Sacramento County Bar Association, but no appearance was made on behalf of the association to protest reinstatement. Petitioner's main debtor, a woman who has held his note for \$3,500 since 1939, appeared as a witness and attested for complete confidence in petitioner and her indifference to his slowness in paying off the note. Convincing evidence was given of outstanding ability on the part of petitioner in the performance of work undertaken since his disbarment.

The local committee found "that since his disbarment the conduct of petitioner has been beyond reproach; that he has kept himself steadily employed during that pe-

riod; has supported himself and his wife, without borrowing from friends or relatives; and that he has in all ways comported himself as an honest citizen; that he has made such efforts as time and opportunity made practicable to keep himself abreast with the developments of the law and in condition touching his learning of law, to resume the practice thereof if he be reinstated * * * that the petitioner has accepted in a proper spirit the penalty of his disbarment, and has made every reasonable effort thereafter to rehabilitate himself from the standpoint of morals and good conscience; that he has taken his punishment in proper spirit and has constantly by his conduct evidenced his appreciation of the gravity of his offenses, for which he was disbarred, and has manifested a steady determination to rehabilitate himself. * * * That the petitioner has rehabilitated himself in respect of the conduct for which he was disbarred, and that he is now possessed of the moral qualifications and the learning in law required for admission to practice law in the State of California."

[4, 5] The evidence abundantly supports these findings and they express the views of this court upon a review of the record. Undue emphasis has been placed upon petitioner's failure to have made complete restitution to his defrauded client. In this connection the language found in the case of *In re Andreani*, 14 Cal.2d 736, at pages 749, 750, 97 P.2d 456, at page 462, is pertinent. As there said in part: "The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them." The 'door of hope' should no more be conclusively or finally shut as to them than it should be thus closed as against any other person who has erred and consequently may have suffered a somewhat similar penalty through the disciplinary functioning of the law. Reformation and regeneration are open to any man and, when effected, should merit a just reward. * * * In reaching a fair conclusion on the question of reformation in such a matter, the favorable testimony of acquaintances, neighbors, friends, associates and employ-

ers with reference to their observation of the daily conduct and mode of living of an attorney who has suffered disbarment should weigh heavily in the scale of justice. Furthermore, in cases such as the one here concerned, which involve a charge of misappropriation of funds, it should be clear that although restitution may seem to indicate repentance, such act in itself 'works no magic.' Nor does the failure to restore, in whole or in part, definitely establish lack of contrition. The importance of making restitution, and a conclusion respecting the weight which should be attached thereto, should be determined largely by the financial or other ability of the attorney to restore that which he has misappropriated, as well as by his attitude of mind regarding the matter. A wealthy attorney who has suffered disbarment should not be commended too highly for the restoration of a sum of money, however great, where such act would involve no appreciable hardship on him. Nor should one in straightened circumstances be condemned for failure to make restitution, where the return of a comparatively insignificant amount might involve great sacrifice. In the matter of making financial amends, each should be judged not only by his ability to restore, his sacrifice of financial advantages or bodily comforts of himself or family, but also by his attitude toward the subject as evidenced by a spirit of willingness, earnestness and sincerity. From a consideration of the foregoing, therefore, in the instant matter, it would appear that greater weight might have been given to the recommendation of the local administrative committee—which not only had the opportunity to observe directly the petitioner and the numerous witnesses and to consider the testimony in the first instance, but also heard the matter anew after admonition to give careful attention to the question of rehabilitation. And if reformation may be 'proved' by testimonies of meritorious conduct, the conclusion must be that petitioner has fully established his right to an order of reinstatement in the practice of the law."

It is ordered that the petitioner be and he is hereby restored as an attorney and

counselor of this court, and that his name be reinstated upon the roll of attorneys thereof upon payment of the fees and taking the oath required by law, and that he be entitled henceforth to practice in all the courts of this state.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



28 Cal.2d 363

MARKET ST. RY. CO. v. RAILROAD

COMMISSION et al.

S. F. 16988.

Supreme Court of California, in Bank.

June 18, 1946.

Rehearing Denied July 15, 1946.

1. Appeal and error ⇨1185

The Supreme Court could entertain application to modify order which stayed enforcement of reduction in street railway rates pending final determination of validity of reduction and which impounded excess fares in custody of court, where Supreme Court expressly retained jurisdiction to modify the order.

2. Deposits in court ⇨11

Excess street railway fares, collected after order staying enforcement of reduction in fares pending final determination of validity of reduction, were "impounded funds in custody of court" although represented by securities on deposit, and Supreme Court had inherent power to dispose of such funds, and in exercise of such power could use broad discretion to avoid an unlawful or unjust result, and could apply applicable principles of law and equity for the protection of the litigants and the public whose interests would be affected by the final disposition of such fares.

See Words and Phrases, Permanent Edition, for all other definitions of "Impounded Funds in Custody of Court".

3. Deposits in court ☞11

A street railway company accepted conditions of order staying enforcement of reduction in passenger fares pending final determination of validity of reduced fares by accepting the stay, and hence company had no claim of legal ownership to excess fares which remained unrefunded after affirmance of order reducing fares, where the stay order recognized that company should be entitled to the excess only if order reducing fares should be annulled, and expressly provided for refund and disposition of excess otherwise than to the company in the event of affirmance of order reducing fares.

4. Deposits in court ☞11

The reasonableness of Railroad Commission's order reducing street railway fares was a matter within jurisdiction of commission, subject to review by the courts, and was not a matter to be considered in determining whether street railway company was entitled to unrefunded excess fares collected pending final determination that commission's order reducing fares was valid.

5. Deposits in court ☞11

A street railway company was not entitled as a matter of equity to unrefunded excess fares collected and impounded in the custody of court pending final determination that Railroad Commission's order reducing fares was valid, where the company had transferred the railway to city and the substantial effect of recognizing the company's claim would be to permit the company to add the amount of the unrefunded excess fares to the price received for the company's capital assets.

6. Deposits in court ☞11

After deletion of provision, in Public Utilities Act, that in the event of the affirmance of an order reducing public utility rates any unrefunded excess accumulated pending final disposition in review proceedings should be paid to the state, state was not entitled to unrefunded excess as a matter of right, but was not precluded from taking the excess as a matter of equity, and the disposition of such excess was left to the sound discretion of the court or other body having jurisdiction to order such disposition. Gen.Laws, Act 6386, § 68(d).

7. Deposits in court ☞11

Excess street railway fares which were collected pending final determination that railroad commission's order reducing fares was valid, and which were impounded in custody of court, would be paid as a matter of equity to city which acquired street railway properties pending final determination of validity of order reducing fares, since such distribution of the excess and the expenditure thereof in the rehabilitation of the properties would inure to the benefit of the persons whose payments accumulated the fund.

EDMONDS and SCHAUER, JJ., dissenting.

In Bank.

Proceeding by the Market Street Railway Company against the Railroad Commission of the State of California and others for a modification of an order staying enforcement of reduction in street railway rates pending final determination of the validity of reduction.

Order in accordance with opinion.

John J. O'Toole, City Atty., and Dion R. Holm, Cyril Appel, Ivores R. Dains, and Pillsbury, Madison & Sutro, all of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondents.

SHENK, Justice.

The city and county of San Francisco has moved in this proceeding for a modification of the stay order issued on March 8, 1944. The Market Street Railway Company opposes the motion and seeks a modification of the order in its own behalf. The State of California resists both applications, and seeks to have the order stand without modification.

On November 30, 1943, the Railroad Commission ordered a reduction from seven to six cents in passenger fares charged by Market Street Railway Company in the operation of its street railway lines in the city and county of San Francisco. The company petitioned for a review of the commission's decision and order. This court issued a stay order pending final de-

termination of the proceeding. The questions presented on that review have been determined adversely to the company's contentions, and the commission's order reducing the fare has become final. *Market St. Railway Co. v. Railroad Commission*, 24 Cal.2d 378, 150 P.2d 196, affirmed 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171, rehearing denied 324 U.S. 890, 65 S.Ct. 1020, 89 L. Ed. 1438. The opinions of the courts in those cases are referred to for a more complete statement of the facts leading to the review proceeding and to the issuance of the stay order involved on the present applications.

The purpose of the stay order, as stated therein, was to prevent the great and irreparable damage which would result to the company in the event of annulment, because it "would be unable to collect the difference between its present fare of seven cents per passenger and the fare of six cents per passenger" ordered by the commission. The company was required to file monthly reports showing the amounts received in excess of the reduced rate. It was also required to post a bond of \$100,000 and to deposit with the clerk of this court on the first of each month during the pendency of the review proceedings a \$100,000 Certificate of Indebtedness issued by the United States Government to be held subject to the order of this court "as further security to enforce the prompt payment by petitioner of all damages caused by the delay in the enforcement of said decision and order of the Commission and of all moneys any person may be compelled to pay petitioner for transportation pending review in excess of the charges fixed by said decision and order of the Railroad Commission, and of all moneys payable to the State of California, in the event said decision and order are affirmed." Section 68(d) of the Public Utilities Act empowers the court to order impounded any excess fares collected pending the period of the stay, "under such conditions as the court may prescribe."

The order contained the following further provisions:

"In the event that this court finally affirms said decision and order of the Rail-

road Commission, and in the further event that the persons entitled to a refund of the excess charges collected by petitioner during this review proceeding do not claim all of such excess charges or moneys within six months after final decision of this court, the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund, to be paid to it under such terms and conditions as the court may hereafter prescribe.

"Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and a consent to the terms and conditions prescribed herein.

"This court retains jurisdiction to alter, amend, modify or supersede this order, on motion of either party, or on its own motion, as the interests of justice may require."

Following the affirmance of the commission's order and pursuant to the plan of publication and refund to passengers as ordered by this court on May 31, 1945, the company made refunds to all who presented refund coupons, and the six months' period within which claimants might apply for refunds expired on December 31, 1945. The total amount of excess collected subject to refund was \$705,794.96. Of that amount the sum of \$12,014.45 was refunded to claimants, leaving \$693,780.51 subject to disposition pursuant to the order of this court. The company has expended the sum of \$5,028.93 for publication and other costs in making the refunds, and concerning which there is no controversy.

Since the issuance of the stay order and during the pendency of the review the city and county of San Francisco purchased all of the operative properties of Market Street Railway Company for the sum of \$7,500,000, and on September 29, 1944, the transfer of the properties to the ownership of the city was consummated. The city thereupon commenced joint operation of the former company and the municipal lines and has continued such operation under a uniform seven cent fare.

The city now requests this court to modify its stay order by substituting the city and county of San Francisco in the place of the State of California as the recipient

of the unrefunded portion of the excess fares. By its application Market Street Railway Company seeks to be discharged from any further liability in making refunds, to have the unrefunded moneys declared to be its property, and to be restored to possession of all impounded funds and securities on deposit. The state's opposition to both requests is based on its position that it is the lawful and proper recipient of the fund.

[1, 2] Preliminarily it is asserted by the state that the provisions of the order sought to be modified are final and may not now be disturbed. The state relies on the case of *Inland Steel Co. v. United States*, 306 U.S. 153, 156, 59 S.Ct. 415, 83 L.Ed. 557, as support for its contention that, the benefits of the stay order having been accepted and no objection having been made by the company or the city to the conditions therein provided, both the company and the city are now precluded from seeking a modification thereof. The basis upon which the contention rests, however, is the acceptance of the benefits of the stay order, and is therefore more properly addressed to the propriety of the application of the railway company on whose behalf the stay was granted. In any event the jurisdiction of this court to entertain the applications on their merits is not affected. The court expressly retained jurisdiction to modify its order on the application of a party to the proceeding, or on its own motion. The retention of jurisdiction precludes the finality asserted by the state. It leaves the provisions of the order open to alteration or modification as the exigencies may require or justify. The excess fares are impounded funds in the custody of the court, although they are represented by the securities on deposit. *Natural Gas Pipeline Co. v. Federal Power Comm.*, 7 Cir., 128 F.2d 481, 485. This court has the power and the responsibility of protecting the fund and of disposing of it in accordance with the applicable principles of law and equity for the protection of the litigants and the public whose interests are affected by the final disposition thereof. The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid

an unlawful or unjust result. *United States v. Morgan*, 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211.

Pursuant to its retained jurisdiction and its inherent power to dispose of the impounded moneys in accordance with the foregoing principles, this court will consider the merits of the claims of each of the parties and dispose of the fund in accordance with the law and the equities thus appearing. In this treatment the legal and equitable considerations presented by each claimant will be discussed separately.

The Claim of Market Street Railway Company.

The company urges that the law and the equities favor its request. It contends that the excess is its property and that its legal ownership represents a claim superior to that of any other party. It cites *Illinois Bell Telephone Co. v. Slattery*, 7 Cir., 102 F.2d 58, as support for a conclusion that a debtor and creditor relationship existed as between the company and the paying passengers which upon termination of the refunding period left the legal ownership of the balance in the company. In that case the court stated that a debtor-creditor relationship existed as between the utility and the rate payers under an order which provided that the utility should be released from all liability as to refunds which it was unable to make within the time limited. The court's observation was pertinent in denying the claim to the unrefunded balance made by the State of Illinois, which was not named in the order. The result there is not controlling in a case where, as here, there was no provision for release to the utility of an unclaimed balance.

[3] Legal ownership is not a factor appearing in the present case. The Railroad Commission's order limited the fare to be collected to a six cent base. In the stay order it was recognized that the company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the commission's order was annulled. That the company should have no legal ownership in the excess in the event of affirmance was recognized in the stay order, namely, in the purpose to prevent loss to the company if the

order should be annulled, and in the further provision for refund and disposition of the excess otherwise than to the company in the event of affirmance. The company necessarily accepted the conditions of the order by acceptance of the stay (*Inland Steel Co. v. United States*, supra, 306 U.S. 153, 156, 59 S.Ct. 415, 83 L.Ed. 557), and, in view of affirmance by this court and by the Supreme Court of the United States, it may not now win an amount on a claim of legal ownership to which it was never entitled either under the commission's order or the stay order of this court. Both this court and the Supreme Court of the United States have determined that the company has been accorded due process. It follows that the company was and is not entitled as of right to more than the six cent fare ordered by the commission.

[4, 5] The company bases its claim of equity on its financial statement for the seven months between March 1, 1944, and September 29, 1944 (the period of its operation pending review) showing an alleged operating loss, if operation be based on the six cent fare. Assuming the correctness of the result from the figures presented, it does not follow that the company is entitled to the undisposed of excess as a matter of equity. Neither the commission's order nor the stay order may be said to have guaranteed to the company an operating profit under the reduced fare. The reduction was calculated to increase the proportion of the traffic on the company lines, by rediverting to the company traffic which had previously been diverted to the municipal lines after the company had been granted a seven cent fare and the city continued to operate under a five cent fare. See *Market St. Railway Co. v. Railroad Commission*, supra, 24 Cal.2d at page 403, 150 P.2d at page 209. The company contends that the commission's order was experimental. If so, the experiment was never tried because of the stay order issued at the instance of the company. Collection of the seven cent fare, even though a refund coupon was assumed to be available, was not a real test of the inauguration of a six cent fare. By accepting the stay order, the company assumed the risk attendant upon a postponement of any such experiment, and

because of the sale and transfer to the city prior to the affirmance of the commission's order it became certain that the experiment could not be initiated nor consummated. The company contends, however, that subsequent to the transfer the joint operation of the company and city lines under a uniform (seven cent) fare did not bring back to the company lines the proportion of the traffic which the commission calculated. Be that as it may, that result could not afford a criterion of what the division of traffic might have been under a uniform (six cent) fare and improved service had the company properties remained in private ownership. In the final analysis these arguments relate to the reasonableness of the rate order, which was a matter within the jurisdiction of the commission (*Pacific Gas & Electric Co. v. Railroad Comm.*, D.C., 16 F.Supp. 884) subject to the review which has been accorded to the company. Parenthetically we note the inclusion of a retirement (depreciation) reserve of \$562,500 in the company's financial statement for the seven months' period. In view of the city's acceptance of the company's offer on May 16, 1944, and the ultimate transfer of the properties to the city on September 29, 1944, it seems more appropriate, for the immediate purpose at least, to consider all reserves, accumulated during the seven months' period with the exception of the excess fare reserve, to be merged in the price received for the capital assets. So considered, the figures show an operative gain rather than an operative loss. Otherwise considered, the substantial effect of recognizing the company's claim on that basis would be to permit it to add that figure to the price received for its capital assets. In view of the ultimate sale and transfer of the properties to the city, we do not perceive that any possible equities asserted by the company are superior to the equities presented by other claimants to the unrefunded portion of the excess fare fund.

The Claim of the State of California.

Prior to 1933 section 68(d) of the Public Utilities Act, Stats.1915, p. 115, Deering's Gen. Laws 1931, Act 6386, provided that in the event of the affirmance of an order reducing rates any unrefunded excess ac-

accumulated pending final disposition in review proceedings should be paid "into the state treasury for the benefit of the general fund." In 1933, Stats.1933, p. 1158, Deering's Gen. Laws, 1933 Supp., Act 6386, that subdivision of section 68 was amended by deleting the provision for payment of the unrefunded excess to the state. As the section now reads provision is made for refund to those who had contributed any portion of the excess, but no specific direction is made with reference to the disposition of the unrefunded portion of the excess.

Section 68 refers to public utilities generally. However, section 68.01 of the act, added by Stats.1939, p. 2871, Deering's Gen. Laws, 1939 Supp., Act 6386, relating to toll-bridge corporation refunds, provides that the "State shall be entitled to all such moneys * * * which the toll-bridge corporation has unsuccessfully attempted to refund, which are not claimed" within the specified period. The new section was undoubtedly added to provide for such refunds as were involved in the Carquinez Straits bridge matter. See *American Toll Bridge Co. v. Railroad Comm.*, Sept., 1938, 12 Cal.2d 184, 83 P.2d 1.

[6] It is contended by the company and by the city that the deletion of the similar provision in section 68 is tantamount to a legislative determination that the state is not entitled to the unrefunded portion of the moneys. This does not necessarily follow. The fact that the Legislature included the provision in respect to toll-bridge corporations indicates rather a recognition that the state is the natural beneficiary and recipient of the fund when the utility may be said to serve the people of the state generally. The equity in respect to toll-bridge refunds is therefore expressly declared by the Legislature. But the absence of a similar provision in respect to public utilities generally is consistent with the legislative determination to leave the disposition of unrefunded moneys to the sound discretion of the court or other body having jurisdiction to order it. The effect of the elimination of the escheat provision in section 68 is therefore a declaration by the Legislature in effect that the state is not entitled to the unclaimed moneys as a

matter of right, and, as hereinbefore indicated, to place upon the court in this case the duty of disposing of the moneys as the rights or equities of the parties may appear. In the absence of a claimant having a greater right or equity, the provisions of section 68 as they now read would not preclude a disposition of the fund to the state on the ground that the equities of the case require it. But in view of our determination on the merits of the equities on behalf of the city and county of San Francisco it is unnecessary to discuss at length other points raised in connection with the state's opposition to a modification of the order. It is sufficient to say that there appears to be no applicable principle of bona vacantia (in the absence of statutory escheat) to require disposition of the fund to the state as a matter of right. *Illinois Bell Telephone Co. v. Slaterry*, supra, 102 F.2d at page 68.

The Claim of the City and County of San Francisco.

The city participated in the proceedings before the Railroad Commission and no contention is made that it is not a proper party to move for a modification of the stay order. See *Bodinson Mfg. Co. v. California Employment Comm.*, 17 Cal.2d 321, 331, 109 P.2d 935. Pursuant to appropriate direction by the board of supervisors the city's motion for modification was filed in April, 1945, prior to the date of the order of May 31, 1945, setting up the plan for making refunds to the persons who had paid excess fares, but subsequent to its purchase of the physical properties of the railway company. After the stay order was made and before the expiration of the time when claims to the impounded moneys might be filed, the situation of the city was changed by the acquisition of the properties of Market Street Railway Company. That change justifies and requires this court, under its retained jurisdiction and the principles enunciated in *United States v. Morgan*, supra, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211, to consider the equities asserted by the city.

The city bases its claim for distribution to it of the unrefunded excess in part on its acquisition and operation of the properties of the railway company. The city refers to the greatly depleted and depreciated state

of the properties, and to the condition of the roadbeds which alone necessitates the expenditure of over \$1,600,000 to defray the cost of the repairs as to which the railway company was in arrears under its franchise at the time of sale and transfer. See *Market Street Railway Co. v. Railroad Comm.*, supra, 24 Cal.2d at pages 386, 402, 150 P.2d at pages 201, 209; also *Id.*, 324 U.S. at page 567, 65 S.Ct. at page 780, 89 L.Ed. 1171.

It is also contended that inasmuch as the people of the city paid the excess fares they are the natural beneficiaries thereof. It is urged that the disposition of the unclaimed portion of the fund to the city will effect in substance its return to those who collectively are charged with the maintenance of the railway property, namely the people of the city, for the benefit of all who may avail themselves of the transportation service; and that this will more nearly fulfil the intendments of the statutory provisions for refund. Tables are presented showing that but 12.82 per cent of all of the passengers carried on the street railway lines in San Francisco are assumed not to be residents of the city. With an unimportant exception the city operates all of the street railway lines in the city. Since the city is charged with the duty to operate the system for all of its patrons it must maintain it for outsiders as well as for the inhabitants of the city, all of whom are the beneficiaries of the transportation service. It thus appears that the showing of equity in favor of the city is particularly persuasive in view of the fact that the people of the city, who were for the most part the contributors to the fund, have now acquired the properties furnishing the service and are now responsible to the public for their operation. They are now interested in those properties in a proprietary as well as in a consumer capacity. In this respect they are doubly affected by the disposition of the unrefunded excess fares.

[7] The transportation problems involved in this entire proceeding are essentially the city's problems. The people of the city are those principally concerned with their solution. The payment of the excess fares was made by them and their claim that the unrefunded balance be made available for

improvement in the service is convincing. The city felt called upon to acquire the Market Street Railway system in such an outmoded and depreciated condition that it would require a vast expenditure of money to put it in repair and keep it in operation. The fund here involved was accumulated by what has been determined to be an unlawful exaction from the patrons of that system. In equity and good conscience it would seem that the fund should be made available for the benefit of those who were compelled to submit to this unlawful exaction even though most of them deemed it unnecessary or inconvenient to pursue the refunds, small individually, but very substantial in the aggregate. The individual refunds averaged about \$2.00, and were made only on written application of the claimant under oath at the office of the company. Equitable considerations dictate that the people of the city, who contributed the moneys and who now own and operate the properties which furnished the service when the excess fares were paid, are entitled to have them distributed for their benefit in the rehabilitation of the physical properties which were acquired during the pendency of the review proceeding, and for the improvement of the service afforded thereby. The distribution of the fund in that manner and its application to the purpose specified will inure to the benefit of those whose payments accumulated the fund, including both the people of the city and outsiders who have occasion to avail themselves of the service.

We therefore conclude that the equities urged by the city should be deemed paramount. Accordingly its application for modification of the stay order is granted.

It is ordered that the order of this court dated March 8, 1944, staying execution of the order of the Railroad Commission pending final determination of the review proceeding, be and the same is hereby modified by substituting and naming the city and county of San Francisco as the recipient of the unclaimed portion of the excess fares accumulated during the pendency of the review proceeding.

It is further ordered that upon receipt by the clerk of this court of a cashier's or a certified check in the sum of \$688,751.58

(representing the sum of \$693,780.51, the amount of the unclaimed excess fares, less the sum of \$5,028.93, the company's expenses in making refunds), payable to the city and county of San Francisco, the clerk is directed to deliver to Market Street Railway Company's duly authorized representative the securities deposited by the company pursuant to the order of March 8, 1944, and to sign and accept signed mutual acknowledgments evidencing the completed transaction. Thereupon the Market Street Railway Company shall be deemed discharged from further liability under the stay order and the surety on its bond of \$100,000 shall stand exonerated.

GIBSON, C. J., and CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, Justice (dissenting).

In my opinion, the Market Street Railway Company is entitled to retain the accumulated fund representing excess fares paid by its patrons. It is said that, because of the provisions of the stay order, the carrier may not successfully maintain a claim of legal ownership of the money now in its possession. But by such an order, this court could not confiscate for the public property which the railroad might thereafter lawfully acquire, nor prevent passengers from abandoning to the corporation amounts paid in excess of the reduced rate during the time the order of the railroad commission was held in abeyance.

The Public Utilities Act specifies, in great detail, the procedure to be followed and the conditions which must be found by this court to exist as a prerequisite to the stay of an order or decision of the commission: Stats. 1933, p. 1158, 2 Deering's Gen.Laws, Act 6386. By the terms of section 68 of that statute, no stay order shall be made except upon five days' notice and after a hearing; the order suspending a decision of the commission "shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to petitioner and specifying the nature of the damage." Subd.(b). The court is given the power to grant a temporary stay before a hearing

under specified circumstances and only for a limited time. The statute enumerates the conditions of such an order, provides for hearing at the earliest possible time, and requires the court to dissolve the temporary bar to enforcement if the petitioning party does not proceed with the application for a stay. Subd.(c).

The statute also declares that the order of the court is not to become effective "until a suspending bond shall have first been executed and filed with and approved by the court * * * sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all moneys which any person or corporation may be compelled to pay pending the review of the proceedings * * * in case said order or decision is sustained." If a public utility challenges a decision lowering rates, it may be directed, "to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court may prescribe," all sums collected in excess of the rate fixed by the commission. Subd. (d).

Accounts showing the excess charges received by it during such period are to be kept by the utility. If the commission's order is upheld, all moneys which may have been collected at a rate higher than that authorized by the order subjected to review, together with reasonable interest, shall be promptly paid to the corporations or persons entitled thereto in such manner, and through such methods of distribution, as may be specified. Subd. (e).

Although this court has power under the Constitution to issue a writ of supersedeas whenever it is necessary to protect the rights of the parties to an appeal and it cannot be deprived of that power by legislative enactment, there is no constitutional right to an appeal. That procedure is entirely statutory. The Legislature has complete authority to specify the requirement for a stay of execution pending an appeal. *Trede v. Superior Court*, 21 Cal. 2d 630, 634, 134 P.2d 745; *United States v.*

Berg, 202 Cal. 10, 13, 258 P. 942; see *Ex parte Queirolo*, 119 Cal. 635, 51 P. 956; *Foster v. Superior Court*, 115 Cal. 279, 47 P. 58; *Phillips v. Patterson*, 34 Cal.App.2d 481, 93 P.2d 807. In the absence of statutory regulation, ancillary terms, such as those specified in *United States v. Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211; *Inland Steel Co. v. United States*, 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557, and similar cases, may be exacted as a prerequisite to the issuance of a stay order; but where, as here, the legislature has conditioned the issuance of the writ "in the manner hereinafter provided," the court may not go beyond the clearly prescribed legislative requirements and impose other conditions taking from a public utility property which it otherwise would own, or to which it might later acquire title. And, certainly, the provision allowing this court "in its discretion" to order the impounding or deposit of money collected in excess of the rates fixed by the commission "under such conditions as the court may prescribe" does not authorize the disposition of the accumulated fund without regard to legal ownership. It is obvious from a reading of the statute that the conditions which may be prescribed are those having to do with the place and form of the deposit, the time and manner of withdrawal, and other details of that kind.

A condition which exceeds these limitations violates the rule of law that a public utility is the owner of money collected by it in violation of a regulatory statute or order, subject to the right of the court to require the corporation to restore the excess charges to the rate payer. The repayment of such amounts may be ordered by the court in connection with its review of the commission's order and a consumer has a cause of action for damages to recover excess charges paid by him. See *California Adjustment Co. v. Atchison, etc., R. Co.*, 179 Cal. 140, 175 P. 682, 13 A.L.R. 274; *Southern Pacific Co. v. Superior Court*, 27 Cal.App. 240, 150 P. 397, 404; *Central States Elec. Co. v. City of Muscatine*, 324 U.S. 138, 65 S.Ct. 565, 89 L.Ed. 801; *United States v. Morgan*, *supra*; *Inland Steel Co. v. United States*, *supra*; *Spiller v. Atchison T. & S. F. R. Co.*, 253

U.S. 117, 40 S.Ct. 466, 64 L.Ed. 810; *Erwin v. United States*, 97 U.S. 392, 24 L.Ed. 1065; *Natural Gas Pipeline Co. v. Federal Power Comm.*, 7 Cir., 141 F.2d 27; *Natural Gas Pipeline Co. v. Federal Power Comm.*, 7 Cir., 128 F.2d 481; *Illinois Bell Telephone Co. v. Slatery*, 7 Cir., 102 F.2d 58; *Bell v. United States*, D.C., 49 F.Supp. 505; *McGrew Coal Co. v. Missouri Pac. R. Co.*, 280 Mo. 466, 217 S.W. 984, 13 A.L.R. 289.

The history of section 68 of the Public Utilities Act, *supra*, clearly shows that the state has changed its originally declared policy in regard to excess unrefunded charges of a public utility. When that statute was enacted, it provided for payment of such amounts to the state. In 1933 the provision was stricken out. Stats. 1933, p. 1158, *Deering's Gen.Laws*, 1933 Supp. Act 6386. By that action, and the later amendment relating to refunds by a toll bridge corporation, Public Utilities Act, *supra*, § 68.01, added by Stats. 1939, p. 2871, *Deering's Gen.Laws*, 1939 Supp. Act 6386, the state relinquished the right by escheat to excess charges of public utilities generally. In the absence of an escheat statute, a railroad corporation is entitled to retain unclaimed excess charges either upon the theory of legal ownership or upon the common law doctrine of abandoned property.

Justification for taking from the Market Street Railway Company the accumulated excess fares is placed upon the ground that the stay order of this court was a determination, adverse to the corporation, upon the issue of ownership of the overcharges collected by it during the pendency of the review and not claimed by the passengers. Upon the authority of *Inland Steel Co. v. United States*, *supra*, it is said that the carrier "necessarily accepted the conditions of the order by the acceptance of the stay." However, the facts of that case are quite different from those shown by the record now before this court, and the decision concerned only the conflicting claims of a shipper and the carrier which had been subjected to a regulatory order.

The litigation arose when the steel company sued to set aside an order of the

Interstate Commerce Commission restraining Indiana Belt Railroad Company from paying allowances for spotting cars. The district court "suspended, stayed and set aside" the commission's decision pending a hearing of the case. 23 F.Supp. 291. Upon stipulation of counsel for the steel company, the interlocutory injunction provided that until further order, the railroad company should set up on its books of account any and all sums in controversy, the amount claimed by the shipper to be paid to it "or canceled" only upon final determination of the case.

In later proceedings, the court dismissed the suit for want of equity, dissolved the injunction, and ordered the railroad company to retain the accrued allowances. The United States Supreme Court affirmed that determination. Answering the steel company's claim to the fund, it decided that a court of equity has inherent power to impose terms and conditions upon a litigant who seeks its aid. Otherwise, said the court, rights may be impaired or cut off while a challenged order is stayed. But there was no holding that, by either a stay order or final decree, a fund accumulated pending a determination as to the validity of a rate regulation may be given to the public; indeed, the decision recognized that the money which was set aside under the injunction of the district court belonged either to the shipper, who stood in the position of the passengers of the Market Street Railway Company, or to the carrier. It should also be noted that the district court, in fixing the terms of its interlocutory injunction, was not acting under a statute such as the Public Utilities Act, *supra*, which specifies the conditions which may be included in a stay order. Of equal importance is the fact that the steel company expressly accepted the terms of the injunction.

The right to impounded funds was also a question at issue in *United States v. Morgan*, *supra*, but that decision is not authority for the conclusion reached in the present litigation. *Morgan* and others, conducting market agencies, sued to set aside a schedule of maximum rates to be charged for stockyard services. The United States

Supreme Court held the order invalid for want of due procedure and remanded the case for further proceedings.

By the remand, the secretary of agriculture was left free to take such further proceedings as the statute permitted. Motion to stay proceedings until he should enter a final order was denied by the district court, and an appeal was taken from an order granting a countermotion by appellees to distribute the fund among them. The only holding as to the money accumulated by the payment during the litigation of the challenged rates was that it should be retained pending a final determination by the secretary of agriculture in the reopened proceedings. 307 U.S. 198, 59 S. Ct. 795, 83 L.Ed. 1211. Neither the right of any particular person to the fund nor the authority of the court to order the payment to the public of charges collected in excess of the regulation under review was presented to or considered by the court.

Abandonment of property occurs when the owner voluntarily relinquishes it without vesting title in any particular person and with the intention of terminating his ownership, possession, and control. See *Moon v. Rollins*, 36 Cal. 333, 95 Am.Dec. 181; *Peal v. Gulf Red Cedar Co.*, 15 Cal. App.2d 196, 59 P.2d 183; 1 C.J.S., *Abandonment*, § 1, p. 4; 1 Am.Jur. 2. Although a state may by statute claim abandoned or unclaimed property (see *Public Utilities Act*, *supra*, § 68.01; *Code Civ.Proc.* § 1268 et seq.; *Abandoned Property Act*, *Code Civ.Proc.* § 1274.1 et seq.; *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138, 102 A. 569, 1 A.L.R. 1048), in the absence of an appropriate statute of escheat, title is acquired by the first occupant, or by the first finder, who reduces it to possession. Such person thereupon obtains an absolute property therein by virtue of an actual taking with the intent to reduce it to possession. See 1 Am.Jur. 3; 1 C.J.S., *Abandonment*, § 9, p. 18. But abandonment results only when the intention to part with the ownership accompanies the act of relinquishment. See 1 Am.Jur. 4; 1 C.J.S., *Abandonment*, § 3, p. 8. The railway company, therefore, became the legal owner of the excess fares paid by passengers who either refused re-

fund slips or failed to claim the overcharges within the time specified by this court in its order fixing the conditions upon which repayment should be made. And assuming that the accumulated money constitutes an impounded fund in the custody of the court, the possession of it, so far as the doctrine of abandonment is concerned, was and is in the company.

Furthermore, applying the common law rule that the real party in interest is the proper party to maintain an action for the recovery of excessive charges, it has been held that although a shipper, who occupies the same position as a passenger of Market Street Railway Company, may maintain an action to recover overcharges unlawfully exacted from him by a common carrier, the state, and upon principle its subdivisions, including municipalities, have no right to recover on behalf of individual shippers the amounts paid by them in excess of established rates. *State v. Chicago & A. R. Co.*, 265 Mo. 646, 178 S.W. 129, L.R.A. 1916C, 309; 13 A.L.R. 299. I would, therefore, exonerate the sureties on the bond of the Market Street Railway Company and direct the clerk of this court to deliver to the carrier the securities deposited by it pursuant to the stay order.

SCHAUER, J., concurred.



28 Cal.2d 536

**DANSKIN et al. v. SAN DIEGO UNIFIED
SCHOOL DIST. et al.**
L. A. 19729.

Supreme Court of California.
June 26, 1946.

1. Constitutional law ¶90, 91

Freedom of speech and of peaceable assembly are protected by the First Amendment against infringement by Congress and by the 14th Amendment against infringement by state legislatures. U.S.C.A. Const. Amends. 1, 14.

2. Constitutional law ¶90, 91

However reprehensible a Legislature may regard certain convictions or affiliations, it cannot forbid them if they present no clear and present danger that they will bring about the substantive evils that the Legislature has a right to prevent; the question being one of proximity and degree. U.S.C.A. Const.Amends. 1, 14.

3. Constitutional law ¶90, 91

A Legislature that makes convictions and affiliations a condition of free speech is striking at something less than clear and present danger. U.S.C.A. Const.Amends. 1, 14.

4. Insurrection and sedition ¶2

The Criminal Syndicalism Act can be applied only when there is imminent danger that the advocacy of the doctrines it seeks to prohibit will give rise to evils that the state may prevent. Gen.Laws, Act 8428.

5. Constitutional law ¶91 **Insurrection and sedition** ¶2

The Criminal Syndicalism Act cannot be constitutionally supplemented by a provision which is not even directed specifically against the advocacy of revolutionary doctrines, but which would suppress speech and assembly on any subject by the advocates of such doctrines or by those who are merely affiliated with such advocates. Education Code, § 19432; Gen.Laws, Act 8428.

6. Constitutional law ¶90, 91

The state cannot suppress free expression except in the presence of clear and present danger and hence cannot enforce a precautionary measure that would deny right of assembly to those whose political creeds it disapproves.

7. Constitutional law ¶90, 91 **Schools and school districts** ¶72

The state need not make school buildings available for public meetings but if it elects to do so it cannot arbitrarily prevent any members of the public from holding such meetings, nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights.

Education Code, § 19432; U.S.C.A. Const. Amends. 1, 14.

8. States ⇨87

The state cannot impose an unconstitutional requirement as a condition for granting a privilege, though the privilege is the use of state property.

9. Constitutional law ⇨90, 91

A state cannot compel subversive elements directly to renounce their convictions and affiliations and cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. Education Code, § 19432; U.S.C.A. Const. Amends. 1, 14.

10. Constitutional law ⇨90, 91

The ancient right to free speech in public parks and streets cannot be made conditional upon the permission of a public official, if that permission is used as an instrument of arbitrary suppression of free expression. U.S.C.A. Const. Amends. 1, 14.

11. Constitutional law ⇨90, 91

The state need not open the doors of a school building as a forum and may at any time choose to close them but once it opens the doors, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. Gen. Laws, Act 8428; U.S.C.A. Const. Amends. 1, 14.

12. Constitutional law ⇨90, 91

The state cannot control the influence of a public forum by censoring the ideas, the proponents or the audience, and cannot frustrate the purpose of a forum to interchange ideas by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who hold them, but granting it to those whose convictions and affiliations happen to be acceptable. U.S.C.A. Const. Amends. 1, 14.

13. Constitutional law ⇨90, 91

The state may not constitutionally require proof from any persons or groups that they are not subversive elements as condition of their exercise of their rights of free speech and assembly at places where others are allowed to speak and assemble. U.S.C.A. Const. Amends. 1, 14.

14. Constitutional law ⇨90, 91

Schools and school districts ⇨72

The statute defining subversive elements and authorizing governing boards to require execution of affidavits to aid in determining whether any person or organization applying for use of school property is a subversive element, violates constitutional rights of freedom of speech and peaceable assembly, as applied to members and officers of organization which sought use of high school auditorium for a series of meetings on the general theme of the Bill of Rights in post war America. Education Code, § 19432; U.S.C.A. Const. Amends. 1, 14.

15. Statutes ⇨64(2)

The unconstitutionality of provision in the Civic Center Act defining subversive elements and authorizing governing boards to require execution of an affidavit to aid in determination of whether any person or organization applying for use of school property is a subversive element does not invalidate the rest of the Act. Education Code, §§ 19431-19439.

16. Statutes ⇨64(1)

Unconstitutional provisions of a statute will not vitiate the entire statute unless such provisions enter so entirely into scope and design of the law that it would be impossible to maintain the statute without the unconstitutional provisions.

17. Statutes ⇨64(2)

The Civic Center Act can be upheld and enforced without unconstitutional provision, added by amendment, making use of school buildings for public meetings dependent on a determination that users are not subversive in sense specified in the amendment. Education Code, §§ 19431-19439.

18. Statutes ⇨143

When an act that has stood valid over the years is amended by an unconstitutional provision, ordinarily the amendment alone is invalid.

19. Statutes ⇨64(2)

The Civic Center Act as a part of the Education Code is governed by the general rules of construction contained in preliminary provision that if any provision of the Code or application thereof is held

invalid, the remainder of the Code and application of such provision to other persons or circumstances shall not be affected thereby. Education Code, §§ 26, 19431-19439.

20. Statutes 64(1)

Code provision that if any provision thereof or the application thereof to any person or circumstances is held invalid, the remainder of the Code and the application of such provision to other persons or circumstances shall not be affected thereby cannot be read as an inexorable command but may be considered by the court as a declaration of the Legislature's intention that in so far as lay within its power, a separable invalid portion of the Act should not destroy the whole. Education Code, § 26.

SPENCE and SHENK, JJ., dissenting.

In Bank.

Mandamus proceeding by Kenneth L. Danskin, and others, against the San Diego Unified School District, and others, to compel School Board to grant petitioners permission to use auditorium without condition.

Peremptory writ granted.

* These rules provide:

"4. Pursuant to Section 8271 Education Code no public meeting or entertainment held on the school property will be permitted to reflect in any way upon citizens of the United States because of their race, color, or creed.

"7. The Governing Board may require that it be furnished reasonably in advance with a complete program, with copies of all speeches and addresses and script of any entertainment proposed to be given in school property. If such copy reasonably demonstrates that the program will be in violation of law or of these rules, the proposed use shall not be permitted.

"11. Permission to use school facilities will be granted in accordance with a schedule of charges adopted by the Board of Education from time to time. Copies of the same may be obtained on application.

"17. Any individual group or organization using school property for Civic Cen-

A. L. Wirin and J. B. Tietz, both of Los Angeles, for petitioners.

Thomas Whelan, Dist. Atty., and Carroll H. Smith, Chief Trial Deputy Dist. Atty., both of San Diego, for respondents.

William C. Ring, of Los Angeles, as amicus curiae on behalf of respondents.

TRAYNOR, Justice.

Petitioners are members and officers of the San Diego Civil Liberties Committee affiliated with the American Civil Liberties Union. On January 10, 1946, they filed an application with respondent board for the use of the Roosevelt Junior High School Auditorium for a series of meetings on the general theme of the "Bill of Rights in Postwar America." Speakers were to include the late Judge John Beardsley of the Superior Court of Los Angeles, Colonel Evans F. Carlson, Thomas Whelan, District Attorney of San Diego County; George R. Baird, United States Commissioner; Reverend Edward Radcliff, Dr. W. P. Winters, Reverend Kenneth L. Danskin, one of the petitioners herein, and Clarence Novotny. In December, 1945, the board had adopted rules and regulations to govern the use of school property for public purposes and as a civic center. In their application, petitioners stated that they would not comply with rules 4, 7, 11, 17 and 20*,

ter or other purposes shall hold the San Diego Unified School District, its Governing Board, the individual members thereof, and all District officers, agents and employees free and harmless from any loss, damage, liability, cost or expense that may arise during or be caused in any way by such use or occupancy of school property.

"20. Upon receipt of notice that a permit has been issued to a nonschool agency for use, the principal in charge of the school shall designate a regular employee to open the building, be in charge during the use, and to close the building after the use. The School District employee in charge of the building or grounds, within or upon which any meeting may be held, is empowered to take all necessary means to enforce these rules. If the use requires service outside of the regular hours of the employee's assignment, he shall be reimbursed at the rate of \$1.00 per hour with a minimum for any opening of \$2.00."

which they claimed were in violation not only of the Civic Center Act, Education Code, §§ 19431-19439, but of their constitutional rights. On January 15, 1946, the board adopted a resolution granting permission to petitioners to use the auditorium upon the sole condition that the persons who signed the application subscribe to and file with the board the following oath:

"I, * * * being first duly sworn, on oath say:

"I am a member of the San Diego Civil Liberties Committee affiliated with the Southern California Branch of the American Civil Liberties Union and one of the applicants for the use of Roosevelt Junior High School auditorium for a series of meetings on January 25th, February 22nd, March 22nd, April 26th, May 24th, and June 28, 1946.

"I do not advocate and I am not affiliated with any organization which advocates or has as its object or one of its objects the overthrow of the present Government of the United States or of any State by force or violence, or other unlawful means."

Petitioners refused to comply with this condition on the grounds that it violates not only the Civic Center Act but the Constitution of the United States and the Constitution of California. Respondent board refuses to grant the use of the auditorium to petitioners except upon this condition. By this proceeding in mandamus petitioners seek to compel respondent board to grant them permission to use the auditorium free of this condition.

Under the Civic Center Act, Education Code, §§ 19431-19439, the governing boards of school districts must grant the free use of school auditoriums for the purposes specified in section 19431 of the Education Code, which provides: "There is a civic center at each and every public school building and grounds within the State where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs, and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from

time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside."

Section 19432, as amended by Stats. 1945, ch. 1213, provides: "Any use, by any individual, society, group, or organization which has as its object or as one of its objects, or is affiliated with any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence, or other unlawful means shall not be granted, permitted, or suffered.

"Any person who is affiliated with any organization, which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof, by force or violence or other unlawful means, or any organization of persons which advocates or has for its object or one of its objects the overthrow of the present government of the United States or any State, Territory, or Possession thereof, by force or violence or other unlawful means, is hereby declared to be and is characterized, a subversive element.

"Notwithstanding any of the other terms of this chapter, no such governing board shall grant the use of any school property to any person or organization who or which is a subversive element as herein defined.

"For the purpose of determination by such governing board whether or not such person or such organization of persons applying for the use of such school property, is a subversive element as herein defined, such governing board may require the making and delivery to such governing board, by such person or any members of such organization, of affidavits in form prescribed by such governing board, stating facts showing whether or not such person or organization is a subversive element as herein defined.

"Reference is hereby made to the provision of law relating to perjury and the punishment therefor shall be applicable to

persons making and delivering affidavits provided for under the provisions of this chapter."

Pursuant to this section the board has provided in its rules and regulations that "No use or occupancy of school property will be permitted by any subversive element as defined in section 19432 Education Code. For the purpose of aiding in the determination of whether or not any person or organization applying for use of school property is a subversive element, the Governing Board may in its discretion require the making and delivery to it, by such person or any member of such organization, of any speaker, of affidavits in form approved by the District Attorney and County Counsel, stating facts showing whether or not such person or organization or speaker is a subversive element as defined in said section."

Petitioners contend that the board acted arbitrarily in requiring them to file affidavits, on the ground that they are known as law-abiding citizens and their organization is known as an important civic organization whose purposes are recognized as useful by the President of the United States and that during the last five years no one has heretofore been required to furnish the affidavits required of petitioners. Section 19432 as it now reads is based on an amendment to the Education Code, which became effective on September 15, 1945. Before that date the section did not contain the definition of a subversive element or the provisions concerning the filing of affidavits. The rules and regulations of the board were adopted in December, 1945, and the affidavits were required of petitioners on January 15, 1946. If the section is valid, it is clear that the board acted reasonably when it provided for affidavits in its rules in conformity with the legislative amendment. In view of the recent change in the statute it is immaterial that during the past five years other applicants were not required to furnish affidavits. The validity of the regulation depends therefore upon the validity of section 19432 of the Education Code.

Petitioners contend that this section on its face violates freedom of speech and of

peaceable assembly as guaranteed by the Constitution of the United States and the Constitution of California.

[1] Freedom of speech and of peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected by the Fourteenth Amendment against infringement by state Legislatures. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430; *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278. However reprehensible a Legislature may regard certain convictions or affiliations, it cannot forbid them if they present no "clear and present danger that they will bring about the substantive evils" that the Legislature has a right to prevent. "It is a question of proximity and degree." *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. The United States Supreme Court has been live to the difference between negligible dangers and substantial ones, between remote dangers and immediate ones. In *Bridges v. California*, 314 U.S. 252, 261, 62 S.Ct. 190, 193, 86 L.Ed. 192, 159 A.L.R. 1346, it declared: "As Mr. Justice Brandeis said in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 374, 47 S.Ct. 641, 648, 71 L.Ed. 1095: 'This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present.' Nevertheless the 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck v. United States*, *supra*; *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173; under a criminal syndicalism act, *Whitney v. California*, *supra*; under an 'anti-insurrection' act, *Herndon v. Lowry*, *supra* [301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066]; and for breach of the peace at common law, *Cantwell v. Connecticut*, *supra* [310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.

1213, 128 A.L.R. 1352]. And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destruction of life or property, or invasion of the right of privacy.' *Thornhill v. Alabama*, 310 U.S. 88, 105, 60 S.Ct. 736, 745, 84 L.Ed. 1093. Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney v. California*, supra, 274 U.S. at page 374, 47 S.Ct. at page 647, 71 L.Ed. 1095; it must be 'serious', Id., 274 U.S. at page 376, 47 S.Ct. at page 648, 71 L.Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155. What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

[3] When the United States Supreme Court held in *Bridges v. California*, supra, that the suppression of freedom of speech in the absence of a clear and present danger of substantive evils is a violation of the constitutional guaranty of free speech, it adopted the views of Mr. Justice Holmes and Mr. Justice Brandeis in their minority opinions in *Gitlow v. New York*, 268 U.S. 652, 672, 45 S.Ct. 625, 69 L.Ed. 1138; *Whitney v. California*, 274 U.S. 357, 372, 47 S.Ct. 641, 71 L.Ed. 1095, and other cases. These opinions were based on the reasoning that doctrines advocating the overthrow of the government by force do not of themselves constitute a substantial danger, and that the state is therefore not justified in suppressing the freedom of speech of those who happen to be members of an organization committed to such doctrines. In the *Bridges* case the court referred to

language in the opinions of those justices to amplify its statements as follows: "Restatement of the phrase 'clear and present danger' in other terms has been infrequent. Compare, however: '* * * the test to be applied * * * is not the remote or possible effect'. Brandeis, J., dissenting in *Schaefer v. United States*, 251 U.S. 466, 486, 40 S.Ct. 259, 266, 64 L.Ed. 360; '* * * we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*' Holmes, J., dissenting in *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173. 'To justify suppression of free speech *there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.*' Brandeis, J., concurring in *Whitney v. California*, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 71 L.Ed. 1095. The italics are ours." 314 U.S. 262, 62 S.Ct. 193, 86 L.Ed. 192, 159 A. L.R. 1346, Note 5; see, also, *Thomas v. Collins*, 323 U.S. 516, 527, 65 S.Ct. 315, 89 L.Ed. 430. It follows from this principle that a Legislature that makes convictions and affiliations a condition of free speech is striking at something less than clear and present danger. See, *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 640-642, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674.

[4-6] It is contended that section 19432 of the Education Code merely supplements the California Criminal Syndicalism Act, Stats.1919, p. 281, 3 Deering's Gen.Laws, Act 8428, the constitutionality of which was upheld by the United States Supreme Court and the courts of this state. *Whitney v. California*, supra, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; *People v. Steelik*, 187 Cal. 361, 203 P. 78; *People v. Malley*, 49 Cal.App. 597, 194 P. 48; *People v. Chambers*, 22 Cal.App.2d 687, 72 P.2d 746. The decisions upholding the constitutionality of that act, however, particularly *Whitney v. California*, supra, must now be read in the

light of the United States Supreme Court's holding in *Bridges v. California*, *supra*. See, also, *Pennkamp v. Florida*, 66 S.Ct. 1029, 90 L.Ed. 1295; *Thomas v. Collins*, 323 U.S. 516, 540, 65 S.Ct. 315, 89 L.Ed. 430. One must therefore look to the concurring opinion of Justices Brandeis and Holmes in the *Whitney* case for the reasons why the act as applied in that case was constitutional. Applying the clear and present danger test to the case *Brandeis, J.*, said in his concurring opinion [274 U.S. 357, 47 S.Ct. 649]: "I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise, to show that such a conspiracy would be furthered by the activity of the society of which Miss *Whitney* was a member. Under these circumstances the judgment of the State court cannot be disturbed." The Criminal Syndicalism Act can thus be applied only when there is imminent danger that the advocacy of the doctrines it seeks to prohibit will give rise to evils that the state may prevent. It follows that the act cannot be constitutionally supplemented by a provision which is not even directed specifically against the advocacy of revolutionary doctrines, but which would suppress speech and assembly on any subject by the advocates of such doctrines or by those who are merely affiliated with such advocates. Since the state cannot suppress free expression except in the presence of clear and present danger, it cannot enforce a precautionary measure that would deny the right of assembly to those whose political creeds it disapproves.

One must inquire why the measure in question seeks to prohibit "subversive elements" from holding meetings in a school building, when presumably they can hold them elsewhere without arousing fears of baneful consequences. Is it reasonable to suppose that meetings that would be harm-

less elsewhere would take on a sinister quality in a school building? When one searches deeper for the reason that motivates the prohibition of such meetings, there is no escaping the conclusion that the Legislature denies access to a forum in a school building to "subversive elements," not because it believes that their public meetings would create a clear and present danger to the community, but because it believes the privilege of free assembly in a school building should be denied to those whose convictions and affiliations it does not tolerate. What it does not tolerate it seeks to censor.

[7,8] The state is under no duty to make school buildings available for public meetings. See *Merryman v. School Dist.*, 43 Wyo. 376, 5 P.2d 267, 86 A.L.R. 1195, 47 Am.Jur. 344. If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349, 59 S.Ct. 232, 83 L.Ed. 208, see *Marsh v. Alabama*, 66 S.Ct. 276, 280, 90 L.Ed. 265. Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. *Frost v. Railroad Commission of California*, 271 U.S. 583, 594, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457; *Hague v. C.I.O.*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423; *Murdock v. Pennsylvania*, 319 U.S. 105, 110, 111, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81; see the brief of the Bill of Rights Committee of the American Bar Association filed in *Hague v. C.I.O.*, *supra*, reprinted in 25 American Bar Association Journal, 7, 8, 74.

[9] Since the state cannot compel "subversive elements" directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. Such a condition is as unconstitutional as the condition that a foreign corporation pay a tax for the privilege of doing business that could not otherwise

be constitutionally imposed on it (*Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355), or agree to abstain from resort to the federal courts (*Terral v. Burke Construction Co.*, 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352, 21 A.L.R. 186), or the condition that a public carrier obtain a certificate of public convenience and necessity before using the public roads. *Frost v. Railroad Commission of California*, supra, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, 47 A.L.R. 457.

There is a parallel between the privilege in question and the privilege of using the mails at less than cost. In *Hannegan v. Esquire*, 66 S.Ct. 456, 461, 90 L.Ed. 586, Mr. Justice Douglas speaking for the court declared: "But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 421-423, 430-432, 437, 438, 41 S.Ct. 352, 357, 358, 360, 361, 363, 65 L.Ed. 704. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country." The dissent of Mr. Justice Brandeis in the *Burleson* case to which the court referred in the *Esquire* case stated: "Congress may not through its postal police power put limitations upon the freedom of the press which, if directly attempted, would be unconstitutional. This court also stated in *Ex parte Jackson* [96 U.S. 727, 24 L.Ed. 877], that—'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of trans-

portation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.' *Cummings v. Missouri*, 4 Wall. 277, 325, 18 L.Ed. 356. The government might, of course, decline altogether to distribute newspapers, or it might decline to carry any at less than the cost of the service, and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal would prove an effective censorship and abridge seriously freedom of expression." 255 U.S. 407, 430, 431, 41 S.Ct. 352, 361, 65 L.Ed. 704.

[10, 11] The convictions or affiliations of one who requests the use of a school building as a forum is of no more concern to the school administrators than to a superintendent of parks or streets if the forum is the green or the market place. The ancient right to free speech in public parks and streets cannot be made conditional upon the permission of a public official, if that permission is used as an "instrument of arbitrary suppression of free expression." *Hague v. CIO*, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423; *In re Porterfield*, Cal.Sup., 168 P.2d 706. It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting. School desks and blackboards, like trees or street lights, are but the trappings of the forum; what imports is the meeting of minds and not the meeting place.

[12] The very purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that

would label certain convictions and affiliations suspect, denying the privilege of assembly to those who held them, but granting it to those whose convictions and affiliations happened to be acceptable and in effect amplifying their privilege by making it a special one. In the competitive struggle of ideas for acceptance they would have a great strategic advantage in making themselves known and heard in a forum where the competition had been diminished by censorship, and their very freedom would intensify the suppression of those condemned to silence. It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of democratic assembly would be stilled. And the dulling effects of censorship on a community are more to be feared than the quickening influence of a live interchange of ideas.

[13] If it is unconstitutional for the state to prohibit certain persons or groups classified as "subversive elements" from exercising their rights of free speech and assembly at places where others are allowed to speak and assemble it is a fortiori unconstitutional to require proof from any persons or groups that they are not subversive elements. If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than the exercise of the rights of free speech and free assembly, it is immune to such a restriction." *Thomas v. Collins*, 323 U.S. 516, 540, 65 S.Ct. 315, 327, 89 L.Ed. 430; see, also, *Near v. Minnesota*, 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1357. In the present case registration would be a reasonable requirement, facilitating the administration of meetings and imposing no censorship on the proponents. Requirement of proof of one's convictions and affiliations, however, as a condition of exercising the rights of free speech

and free assembly, would compel a forfeiture of those rights by those who were unable or unwilling to submit proof that was acceptable.

[14] Respondents contend that an affidavit like that required of petitioners is similar to the test oath held constitutional in *Cohen v. Wright*, 22 Cal. 293, and *Ex parte Yale*, 24 Cal. 241, 85 Am.Dec. 62. The question whether a test oath is a permissible mode of proof is pertinent only when proof can constitutionally be required. Moreover, these cases related to statutes enacted after the Civil War requiring litigants, as a condition to the maintenance of actions in the courts of this state, and attorneys, as a condition to admission to practice, to file affidavits disclaiming any participation in the Civil War on the side of the Confederate States. Similar statutes were held unconstitutional by the United States Supreme Court on the grounds that they were ex post facto laws and bills of attainder and that they "subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition in the form of an expurgatory oath, into the consciences of the parties." *Cummings v. Missouri*, 4 Wall. 277, 328, 18 L.Ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366.

The present case is clearly distinguishable from *Communist Party v. Peek*, 20 Cal.2d 536, 127 P.2d 889. That case was concerned with a statute that excluded from primary elections political parties that advocate the overthrow of the government by unlawful means or by "a program of sabotage, force and violence, sedition or treason against, the Government of the United States or of this State." Elections Code § 2540.4. In providing for such exclusion, the Legislature exercised its power under section 2½ of article II of the California Constitution "to determine the tests and conditions upon which

electors, political parties, or organizations of electors may participate in any such primary election." The power of the Legislature under the Constitution of this state to determine the conditions upon which political parties may participate in primary elections concerns, not the fundamental rights of free speech and of peaceable assembly, but the selection of persons to fill positions of responsibility in the government service. See *Leland v. Lowery*, 26 Cal.2d 224, 229, 157 P.2d 639; *Schostag v. Cator*, 151 Cal. 600, 605, 91 P. 502; *Heney v. Jordan*, 179 Cal. 24, 27, 175 P. 402; *Socialist Party v. Uhl*, 155 Cal. 776, 790, 103 P. 181. These cases involved the general test of reasonableness under the due process clause, whereas the present case calls for the application of the strict standard of the First Amendment, which in the fields protected by that amendment are read into the Fourteenth Amendment. In the words of the United States Supreme Court: " * * * it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628, 147 A.L.R. 674.

The state can of course safeguard the primary purposes of public property from

interference by other uses that it permits. Under the Civic Center Act "the educational activities of schools shall at all times take precedence over other permissive but secondary uses of school buildings" and a school board must "consider the probable effect of the proposed use on the regular school program and must deny one that would lead to an interference with that program." *Payroll Guaranty Association v. Board of Education*, 27 Cal.2d 197, 203, 163 P.2d 433, 436, 161 A.L.R. 1300. This consideration is not relevant here, however, for the provisions in question relate, not to the educational program of the schools, but to the protection of the community from "subversive elements." They purport to protect the community, not by preventing outright the use of school buildings for meetings for the dissemination of subversive doctrines, but by denying the privilege of holding a public meeting at a civic center to "subversive elements" or to anyone who refuses to prove that he is not subversive, even though they would devote their meetings to the purposes designated in the Civic Center Act, and even though there is no reason to suppose that anyone at such meetings would advocate the overthrow of the government. Those who are under the ban of the statute could not hold a meeting to pronounce their views with regard to pending legislation, constitutional amendments, election of political candidates, or even artistic or educational matters. It is a drastic censorship that would not tolerate the presentation in a public forum of the views on any subject of those whose convictions and affiliations it disapproves. Its principal effect is not to prevent abuses of free speech, but to discourage certain convictions and affiliations and to stifle the freedom of speech on any subject of those who hold them. "The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that

constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093; see, also, *Near v. Minnesota*, supra, 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1357; *In re Porterfield*, Cal.Sup., 168 P.2d 706.

There is a close analogy between the present case and the suppression of a public meeting by criminal prosecution, held invalid in *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278. In that case a defendant was convicted of violating an Oregon statute similar to the California act prohibiting criminal syndicalism, which contained a provision that, as construed by the state court, made it a crime to preside over or participate in a public meeting held under the auspices of an organization advocating criminal syndicalism, even though the meeting was not devoted to the advocacy of criminal syndicalism. The United States Supreme Court was not concerned with the constitutionality of the Oregon criminal syndicalism statute as a whole but had to determine only whether, even if its other provisions were constitutional, their operation could be secured by a precautionary measure like the one in question. Speaking for the court, Mr. Chief Justice Hughes stated: "While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application. * * * Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment to the Federal Constitution. * * * The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States v. Cruikshank*, 92 U.S. 542, 552, 23 L.Ed. 588: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.' The First Amend-

ment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. *Hebert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270, 48 A.L.R. 1102; *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158, 84 A.L.R. 527; *Grosjean v. American Press Co.* [297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660], supra. These rights may be abused by using speech or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. * * * The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other

violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge. We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party." 299 U.S. 353, 363-366, 57 S.Ct. 255, 259, 81 L.Ed. 278; see, also, *Near v. Minnesota*, supra, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357; *Hernndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484.

The *De Jonge* case cannot be distinguished on the ground that it involved a criminal statute, while the statute in the present case sought to suppress free speech and free assembly by requiring an administrative board to deny permits for meetings of those whose objects and affiliations are disapproved. In each case the state sought to suppress free speech and assembly and it is immaterial that it sought to accomplish that objective in the one case by threat of punishment and in the other by censorship. See *Near v. Minnesota*, 283 U.S. 697, 715, 51 S.Ct. 625, 75 L.Ed. 1357; *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093; *Hague v. CIO*, 307 U.S. 496, 516, 59 S.Ct. 954, 83 L.Ed. 1423.

The privilege of using a school building as a public forum is one too valuable to be given lightly or lightly taken away. It is also too valuable lightly to be received. It can be lost to the whole community if some persons or groups abuse it frivolously, maliciously, or dangerously. The state must be on the alert for any clear and present danger to the community, sensitive to the warning signals, the ambiance in which a forum is planned, the atmosphere that envelops it. It cannot look with equanimity upon those whose words or actions have already left in their wake a trail of violence.

Always it must distinguish, however, between speech, no matter how unorthodox,

that remains on a theoretical plane, and speech, no matter how skillfully intoned, that creates a clear and present danger to the community. "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason. Cf. *Bridges v. California*, 1941, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 [159 A.L.R. 1346], and Justice Brandeis' concurring opinion, *Whitney v. California*, 274 U.S. 357, 372-380, 47 S.Ct. 641, 647-650, 71 L.Ed. 1095. See, also, *Taylor v. Mississippi*, 1942, 319 U.S. 583, 63 S.Ct. 1200, 87 L.Ed. 1600." *Schneiderman v. United States*, 320 U.S. 118, 157, 63 S.Ct. 1333, 1352, 87 L.Ed. 1706.

There is no sign that any danger would arise from the proposed meetings in the present case. The "Bill of Rights in Post-war America" is not only a legitimate subject of discussion but one of great public interest. The proposed speakers include men well qualified to discuss the subject and there is no likelihood that any substantive evil would arise out of their discussion. The proponents of the meetings, officers of the San Diego Civil Liberties Committee affiliated with the American Civil Liberties Union, have made it clear that they refuse to comply with the requirement of respondent board that they file affidavits as to their convictions and affiliations because that requirement violates their constitutional rights of free speech and free assembly. They take their stand on a constitutional principle that does not commit them to approval of those who believe in the overthrow of government by violence. It may seem ironic that others who hold such beliefs may seek from the state the privilege of a public forum. But when the principles of free speech and peaceable assembly are at stake, the state has more to gain than to lose by a generous tolerance of the convictions and affiliations of its many citizens so long as they present no

clear and present danger to the community.

[15-20] The unconstitutionality of section 19432 does not invalidate the rest of the Civic Center Act, contained in sections 19431 and 19433-19439 of the Education Code. "It is a general rule supported by an unbroken line of decisions that a provision in or a part of an act may be unconstitutional and beyond the power of the legislature to enact, and still the whole act may not be void. The accepted doctrine in such case is that the constitutional portions of the statute may stand alone and remain in force if they can be separated from the portions which are void. The unconstitutional provisions will not vitiate the whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions." *People v. Lewis*, 13 Cal.2d 280, 284, 89 P.2d 388, 390; see 5 Cal.Jur. 643, 644. The Civic Center Act can be upheld and enforced without the unconstitutional provision. The Civic Center Act was first enacted in 1913, Stats.1913, p. 853; in 1929 it was incorporated into the School Code, Sch.Code, 1929, §§ 6.750-6.772. Neither in its original form nor as enacted into the School Code did it contain any provision similar to section 19432. It was not until 1935, when public meetings in school buildings had become a time-honored institution that the act was amended by adding a provision making the use of the school buildings for public meetings dependent on a determination that the users were not subversive in the sense specified in section 19432. Stats.1935, p. 1460. When an act that has stood valid over the years is amended by an unconstitutional provision, ordinarily the amendment alone is invalid. *Miller v. Union Bank & Trust Co.*, 7 Cal.2d 31, 36, 59 P.2d 1024; *Frost v. Corporation Commission*, 278 U.S. 515, 525, 526, 49 S.Ct. 235, 73 L.Ed. 483. Any doubt as to the validity of the rest of the Civic Center Act is dispelled by the fact that as part of the Education Code it is governed by the general rules of construction contained in the preliminary provisions thereof. Government Code, § 9603. Section 26 of the Education Code provides: "If any provision of this code, or the application thereof to any

person or circumstances is held invalid, the remainder of the code, and the application of such provision to other persons or circumstances, shall not be affected thereby." Although such language cannot be read as an inexorable command it is well settled that "The use of such language may rightly be considered by the court as a declaration of intention on the part of the legislature that in so far as lay within its power a separable invalid portion of the act should not destroy the whole." *Bacon Service Corp. v. Huss*, 199 Cal. 21, 32, 33, 34, 248 P. 235, 240; *In re Portnoy*, 21 Cal.2d 237, 242, 131 P.2d 1; *People v. Perry*, 212 Cal. 186, 195, 298 P. 19, 76 A.L.R. 1331; *Crowell v. Benson*, 285 U.S. 22, 63, 52 S.Ct. 285, 76 L.Ed. 598; see 11 Am.Jur. 846.

Let the peremptory writ issue forthwith.

GIBSON, C. J., and EDMONDS and SCHAUER, JJ., concur.

CARTER, Justice (concurring).

In my opinion the writ should issue, and I agree with the views expressed in the opinion prepared by Mr. Justice TRAYNOR in this case with the exception of what is said therein relative to the holding in the majority opinion in *Payroll Guaranty Ass'n v. Board of Education*, 27 Cal.2d 197, 163 P.2d 433, 161 A.L.R. 1300. I adhere to the views expressed in my dissenting opinion in the last mentioned case, and for that reason, cannot concur unqualifiedly in the opinion prepared by Mr. Justice TRAYNOR in the case at bar.

As I see the question presented here, it is whether or not the Legislature may authorize the use of school property as a civic center and at the same time place it within the power of the governing school board to deny permission for the use of said property to persons who may be affiliated with organizations which the Legislature has declared to constitute a subversive element. The effect of such legislation is to permit a prior censorship on the right of assembly and expression. In my opinion this cannot be done without violating the provisions of the First and Fourteenth Amendments to the Constitution of the United States. The First Amendment unqualifiedly guarantees free-

dom of speech and freedom of assembly. No restriction on the exercise of these rights is mentioned in the Constitution or the amendments thereto. The restrictions which have been placed upon these rights are found in the judicial decisions interpreting the provisions above mentioned. In *Schenck v. United States*, 249 U. S. 47, at page 52, 39 S.Ct. 247, at page 249, 63 L.Ed. 470, Mr. Justice Holmes said: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439, 31 S.Ct. 492, 55 L.Ed. 797, 34 L.R.A., N.S., 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." The clear and present danger rule has been followed and applied by the Supreme Court of the United States in numerous decisions in the interpretation of statutes designed to proscribe the rights of freedom of speech and of assembly under varying circumstances and conditions. The trend of these decisions as disclosed by the citations thereof in the opinion prepared by Mr. Justice TRAYNOR in this case is toward a more liberal application of the provisions of the First and Fourteenth Amendments of the Constitution of the United States to the end that freedom of speech and of assembly may not be denied to persons because of their affiliation with organizations declared by a state to constitute a subversive element. This thought was clearly expressed by Chief Justice Hughes in *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 260, 81 L.Ed. 278, where he said: "We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that party."

I can see no escape from the proposition that if membership in or affiliation with an organization declared to constitute a subversive element does not deprive one of his right to freedom of speech or of assembly, it is then beyond the power of the Legislature to authorize restrictions against the use of school property which will prevent such persons from using such property in the same manner as other members of the public may be permitted to use the same in the exercise of their rights of speech and assembly.

SPENCE, Justice.

I dissent. The respondent board has granted to petitioners permission to use a school auditorium, subject only to the condition that they subscribe to and file with the board affidavits containing the following declaration: "I do not advocate and I am not affiliated with any organization which advocates or has as its object or one of its objects the overthrow of the present Government of the United States or of any State by force or violence, or other unlawful means." Petitioners refuse to file such affidavits and they seek a writ of mandate to compel the respondent board to grant such permission unconditionally, claiming that the condition imposed is violative of their constitutional rights.

Section 19432 of the Education Code, as amended in 1945, Stats.1945, chap. 1213, is set forth in the majority opinion and need not be repeated here.

It is but one section of the Civic Center Act, which was reframed and reenacted in 1943, Stats. 1943, pp. 690-692, Education Code, §§ 19431-19439, which act constituted a grant of power to the governing boards of school districts to permit the use of school buildings, subject to the limitation or exception contained in section 19432. It is conceded in the majority opinion that "If the section is valid, it is clear that the board acted reasonably when it provided for affidavits in its rules in conformity with the legislative amendment." The conclusion reached in the majority opinion is that the provisions of section 19432 are unconstitutional and void, that petitioners may not be required to file the affidavits, and that peti-

tioners are therefore entitled to the issuance of the writ. With these conclusions I cannot agree.

While the Supreme Court of the United States has jealously guarded civil liberties, there is no decision of that court or of any other court which compels the conclusion that the provisions of section 19432 of the Education Code are unconstitutional and void. Here the question presented is not whether particular acts or utterances may be punished under a criminal statute without infringing upon the provisions of the First or Fourteenth Amendment of the Constitution of the United States; or whether a public official may be granted arbitrary power to grant or deny a permit to persons who desire to assemble and speak in a public place which is open generally to members of the public at all times. We have here the simple question of whether the Legislature may provide that those who seek permission to use as meeting places our public schools, which are erected and maintained by our government primarily for educational purposes and are not open generally to the public at all times or for all purposes, may be required to take an oath, as a condition to the enjoyment of such use, that they do not advocate and are not affiliated with any organization which advocates the overthrow of that government by force or violence or other unlawful means. Section 19432 authorizes the respondent board to require such oath and in my opinion it authorizes nothing which is unreasonable or which violates any of the constitutional rights of those who seek permission for such use. It is worthy of note that only a few months ago this court assumed the constitutionality of the same provisions of section 19432 of the Education Code which are now challenged, when it said in *Payroll Guaranty Assn. v. Board of Education*, 27 Cal.2d 197, at page 200, 163 P.2d 433, at page 434, 161 A.L.R. 1300, "The respondent board may not only make reasonable regulations with regard to the use of the school auditorium for authorized purposes but may deny an application for its use if (1) such use would further, directly or indirectly, the overthrow of the present government of the United States or any

State, Territory or Possession thereof, by force or violence or other unlawful means,
* * *"

Reference has been made in the briefs and in the majority opinion to the so-called "clear and present danger" rule. While that rule finds expression in certain majority opinions in the decisions of the United States Supreme Court, as well as in certain concurring and dissenting opinions, it has yet to be defined in such manner as to permit any degree of certainty in its application. In the concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 374, 47 S.Ct. 641, 648, 71 L.Ed. 1095, he said: "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present." In the majority opinion in a very recent decision of the United States Supreme Court, handed down on June 3, 1946, (*Pennekamp v. Florida*, 66 S.Ct. 1029, 1038), it is frankly said: "No definition could give an answer" and that the rule still has the "vice of uncertainty." In any event, no decision of the United States Supreme Court has been called to our attention in which the "clear and present danger" rule has been applied to a situation similar to that presented here, and in my opinion it has no application.

It seems clear that our government is not required to maintain its public buildings for the use as meeting places of those who advocate its overthrow by force and violence. I believe that the limitation or exception found in the statute might have been made broader, if the Legislature had seen fit, and that the Legislature might have withheld power from the governing boards of school districts to permit the use of the school buildings by those who advocate other serious crimes. There could be no valid constitutional objection to a limitation or exception denying the use of our school buildings to those who advocate lynching or who advocate the assassination of the President of the United States or who advocate other crimes of violence against persons; and for similar reasons, there can be no valid objection to denying the use of such buildings to those who advocate the overthrow of the government by force and

violence. It is impossible to divorce crime from its criminal aspects even though it may be committed for a purpose having a political tinge; and the advocacy of crime does not become sacrosanct merely because of the nature of the motives or purposes of its advocates. When those advocating the overthrow of our government by force and violence seek the use of our school buildings as meeting places, consideration of the safety of our educational facilities would appear to be alone sufficient to justify the denial of such use; and the question of whether there may be said to be a "clear and present danger" of the overthrow of our government by force and violence would appear to be immaterial.

But if such considerations be deemed insufficient to render immaterial the question of "clear and present danger," there are nevertheless no definite indications in the decisions of the United States Supreme Court that the provisions of section 19432 of the Education Code should be declared unconstitutional. On the contrary, the wording of that section bears similarity to the wording of the Criminal Syndicalism Act, Stats. 1919, p. 281, and that act has been held to be constitutional in unanimous decisions of the United States Supreme Court and of this court. *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; *People v. Steelik*, 187 Cal. 361, 203 P. 78. That act, unlike the act before us, was a penal statute. The "clear and present danger" rule was discussed in the concurring opinion in the *Whitney* case but the conviction under the act was unanimously sustained. *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, is adequately discussed in *People v. Chambers*, 22 Cal. App.2d 687, at page 699, 72 P.2d 746 at page 751. The *De Jonge* case likewise involved a penal statute and while the court reversed the conviction upon the ground that the "Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the Fourteenth Amendment," [299 U.S. 353, 57 S.Ct. 260] it cited with approval both *Whitney v. California*, *supra*, and *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138.

In the last mentioned case the United States Supreme Court said at page 669 of 268 U.S., at page 631 of 45 S.Ct.: "That utterances inciting to overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency."

This court has said: "The right of free speech does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property" (*People v. Steelik*, 187 Cal. 361, 375, 203 P. 78, 84); and the United States Supreme Court has said: "The Constitution was adopted to preserve our Government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it." *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 414, 41 S.Ct. 352, 355, 65 L.Ed. 704.

In *Whitney v. California*, 274 U.S. 357, at page 371, 47 S.Ct. 641, at page 646, 71

L.Ed. 1095, the United States Supreme Court stated: "Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*, 268 U.S. 652, 666, 668, 45 S.Ct. 625, 69 L.Ed. 1138 [1145, 1146], and cases cited.

"By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, 123 U.S. 623, 661, 8 S.Ct. 273, 31 L.Ed. 205 [210]; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Great Northern R. Co. v. State of Minnesota ex rel. Clara City*, 246 U.S. 434, 439, 38 S.Ct. 346, 62 L.Ed. 817[819].

"* * * We cannot hold, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right

of free speech, assembly or association, * * *".

And in considering the validity of our election statute, this court said in *Communist Party v. Peek*, 20 Cal.2d 536, 551, 127 P.2d 889, 898: "There is no doubt, however, that the remainder of section 2540.4 comes within the Legislature's power to prescribe tests and conditions for participation in primary elections. This power certainly includes the right to adopt tests designed to exclude those political parties advocating the overthrow of the government by unlawful means or those parties carrying on a program of sabotage, force and violence, sedition or treason. Such groups constitute an immediate threat to the functioning of our institutions, including the continued exercise of the right of suffrage. Since it is within the power of the state as to such groups to restrict even the rights of free speech and free press (see for example, *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278), it clearly was within the reasonable bounds of the Legislature's power to determine that these bodies should also be barred from the primary election ballot. Under such circumstances we have no doubt that the Legislature's power to exclude parties and individuals from participation in a primary election extends to those groups whose political beliefs create a clear danger to the continued existence of the institutions under which our constitutional form of government functions."

In the obscurity of the definition and application of the "clear and present danger" rule, it has been suggested that there may be some doubt as to whether the Supreme Court of the United States would still adhere to the views expressed in the *Gitlow* case, *supra*, in the consideration of a similar conviction under a penal statute. I am of the opinion that it would but I believe there is no doubt that it would still adhere to those views in upholding the right of any state to adopt reasonable provisions, such as those embodied in section 19432 of

the Education Code, seeking to prevent the use of its school buildings as meeting places by those whose avowed purpose is the overthrow of our government by force and violence or by those who are unwilling to disclaim such purpose. Until the United States Supreme Court may have definitely repudiated those views, I believe this court should uphold the reasonable and salutary provisions of that section.

It might be stated that some application of the "clear and present danger" test since the *Gitlow* case, *supra*, has been in cases such as habeas corpus proceedings arising after commitments for contempt, in which there has been no legislative evaluation of the particular type of utterance or its consequences. Thus, it was said in *Bridges v. California*, 314 U.S. 252, at page 261, 62 S.Ct. 190, at page 193, 86 L.Ed. 192, 159 A.L.R. 1346: "The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation." It has always been recognized that where the Legislature has appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance, such determination should be given great weight when the law is challenged on constitutional grounds. See *Herndon v. Lowry*, 301 U.S. 242, 258, 57 S.Ct. 732, 81 L.Ed. 1066; *Cantwell v. Connecticut*, 310 U.S. 296, 307, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; *Graves v. Minnesota*, 272 U.S. 425, 428, 47 S.Ct. 122, 71 L.Ed. 331; *Bridges v. California*, 314 U.S. 252, 260, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346. Here the Legislature has appraised the situation and has made its determination, which determination should be accorded great weight and should not be set aside by this court unless it clearly appears that it was without any foundation.

While I do not believe that further reasons for sustaining the constitutionality of section 19432 of the Education Code are necessary, one further consideration should be mentioned. The reenactment of the Civic Center Act in 1943 and the amendment to section 19432 in 1945, together with the facts giving rise to its application here, all occurred during a time of emergency when a state of war, as declared by Congress,

existed between our government and certain foreign powers. During such periods of national emergency the imperative need for united effort to sustain our government and for all reasonable measures to prevent attempts at its overthrow, from without or within, seems obvious. Regardless of any divergent views concerning the "clear and present danger" rule, it should be clear that it is not for the courts, in such times of emergency, to declare that no "clear and present danger" exists when Congress, by its declaration of a state of war, has declared otherwise, and the Legislature has enacted legislation which tends to minimize that danger.

In passing, it should be stated that no question concerning the validity of other rules of the respondent board is involved. It should be further stated that the claims of petitioners—that they are known to be law-abiding citizens and that their organization is known as an important civic organization with useful purposes—are entirely beside the point. The sole question is whether all persons seeking permission to use the school buildings may be required to file affidavits in the form above set forth.

If it should be assumed, however, that the majority opinion is correct in concluding that the provisions of section 19432 are unconstitutional and void, the petitioners are nevertheless not entitled to the issuance of the writ. The Civic Center Act, as enacted in 1943, Education Code, §§ 19431 to 19439, was based upon former sections of the School Code, including section 6.750 of the latter code, which last mentioned section had long embraced the limitation or exception now contained in the first paragraph of section 19432 of the Education Code. That limitation denies to the governing boards of school districts the power to grant the use of school buildings to those who advocate the overthrow of our government by force and violence. The amendment made in 1945 to section 19432 Stats.1945, chap. 1213, p. 2301, specifically authorized the governing boards of school districts to require the above mentioned affidavits as an aid in determining the facts.

According to the majority opinion, the limitation and 1945 amendment are void

but the remainder of the act stands. This can be so only if it clearly appears that the Legislature intended the part remaining to be enforceable even though the other part should fail. *Bacon Service Corp. v. Huss*, 199 Cal. 21, 32, 248 P. 235; *In re Portnoy*, 21 Cal.2d 237, 242, 131 P.2d 1; *Robison v. Payne*, 20 Cal.App.2d 103, 107, 66 P.2d 710; 5 Cal.Jur. § 73, p. 648. The so-called severability clause (Education Code, § 26) referred to in the majority opinion is not determinative as to all possible contingencies arising out of invalidation of provisions of the code (see *Bacon Service Corp. v. Huss*, 199 Cal. 21, 34, 248 P. 235; *In re White*, 195 Cal. 516, 521, 234 P. 396; *In re Portnoy*, 21 Cal.2d 237, 242, 131 P.2d 1), and placed as it is among the general provisions prefixing the entire Education Code, can be of little aid when we come to the real problem of discerning the precise intent of the Legislature with reference to the Civic Center Act. It is to be remembered that this act was last enacted in a time of war and during an emergency that has not yet been declared over. Factors of safety and domestic security have already been alluded to, and whatever may have been the attitude of the legislators at any time prior to such enactment, there is no question but that such factors were paramount in their minds at that time. There is nothing in the Civic Center Act to support the conclusion that the Legislature would have enacted the act without the limitation which it includes. It follows that if the limitation is invalid, the entire grant of power to the governing boards of school districts is invalid, in which event there is neither duty nor right upon the part of the respondent board to grant the use of the school building to petitioners.

This view finds support in *Pasadena City High School Dist. v. Upjohn*, 206 Cal. 775, 276 P. 341, 343, 63 A.L.R. 408. The court there considered section 1741 of the Political Code which provided: "The high school board of any high school district may provide, in such manner as they deem best, for the transportation to and from the high school of such pupils thereof, *except pupils living within the limits of any city*, as such board find to be in need of

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such transportation; and the cost of such transportation shall be deemed a part of the cost of maintaining the high school and paid accordingly." (Emphasis added.)

The constitutionality of the emphasized exception, which had been added by amendment, was there challenged. This court said at page 779 of 206 Cal., at page 343 of 276 P., 63 A.L.R. 408: "Assuming for the moment that the entire exception be void, its invalidity would destroy the whole grant of power, for there is no indication that the Legislature would have enacted the amended section without including the exception. See *Bacon Service Corp. v. Huss*, 199 Cal. 21, 248 P. 235; *Mordecai v. Board of Supervisors*, 183 Cal. 434, 192 P. 40. On the contrary, the character of the legislation plainly indicates that it was not the intention of the Legislature to permit free transportation to be afforded to all high school pupils regardless of the proximity of their homes to the high school if the exception should be held invalid." See, also, 5 Cal.Jur. § 71, p. 645; 11 Am. Jur. § 155, p. 842; *Lewis' Sutherland Stat. Const.*, 2d Ed., vol. 1, § 306.

Here, as in the *Pasadena High School* case, the entire act constituted a grant of power, subject to a limitation or exception, and only the limitation or exception was challenged on constitutional grounds. To paraphrase the language of the *Pasadena High School* case in its relation to the case at hand: "The character of the legislation plainly indicates that it was not the intention of the legislature to permit the use of school buildings to be afforded to all persons, regardless of their advocacy of the overthrow of our government by force and violence, if the exception should be held invalid."

For the foregoing reasons, I conclude first, that the provisions of section 19432 are constitutional, and second, that even if it be assumed that those provisions are unconstitutional, petitioners are not entitled to the relief demanded.

In my opinion, the alternative writ should be discharged and the peremptory writ should be denied.

SHENK, J., concurs.

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PEOPLE v. THOLKE.**Cr. 2396.**District Court of Appeal, First District,
Division 2, California.

Aug. 29, 1946.

1. Criminal law Ⓒ784(5)

When a case is one of circumstantial evidence and admits of a theory either of guilt or innocence, the defendant is entitled to an instruction embodying the rule that to justify a conviction the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

2. Criminal law Ⓒ814(17)

In prosecution for first-degree burglary, the evidence with respect to the flash and the report of a gun was purely circumstantial and where it was the only evidence on which the jury must have based its finding of first-degree burglary, refusal to give requested instruction on circumstantial evidence was error. Pen. Code, § 460.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Edward Tholke was convicted of first-degree burglary, and from such conviction, and from an order denying a new trial, he appeals.

Judgment and order reversed, and cause remanded for a new trial.

Archer Zamloch, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Dennis Hession, Deputy Attys. Gen., and Edmund G. Brown, Dist. Atty., and Alvin E. Weinberger, Asst. Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

This appeal is from a judgment of conviction of first degree burglary and from an order denying a new trial.

On August 23, 1945, the premises of Stewart Chevrolet Company on Mission street near 29th in San Francisco, were burglarized. The store runs through to Valencia street, the show-room being on the Mission street end and the service shop being in the rear, with an entrance on Valencia.

About 11:55 p. m. a special policeman, making his rounds, entered from Mission street and heard a loud, metallic noise inside. On switching on the lights he saw that a drill had been inserted in the office safe in the aperture from which the combination dial had been removed. The metallic noise was followed by the sound of breaking glass. He searched the place but found nobody.

About 11:55 p. m. the attention of a telephone operator leaving St. Luke's Hospital (directly opposite the Stewart Chevrolet entrance on Valencia) was attracted by breaking glass, and she saw two men within the premises smash their way out through a plate glass window. They walked southerly on Valencia at a fast pace, broke into a run, and disappeared from her view behind a double-faced, illuminated billboard. On direct examination she testified that one of the men was of medium height, the other a head taller. On cross-examination she was not positive as to their height, and did not identify either man.

The attention of a pedestrian was likewise attracted by breaking glass and he, too, saw two men walking southerly on Valencia at a fast pace. They passed within twenty feet of him near the illuminated bill-board and he positively identified the appellant (whose height is six feet four inches) as the taller of the two. They ran up Tiffany avenue and disappeared into a vacant lot near an apartment house. Soon thereafter this witness, who had followed them to the front of the apartment house, saw a flash and heard what apparently was a gunshot. The direction from which this sound came is not clear. No witness saw any gun fired at this time.

Another special officer, attached to St. Luke's Hospital, heard the breaking glass

and went up to the apartment house and waited in front. He, too, heard the shot.

A witness living in the apartment house returned home about 11:55 and drove into the garage in the rear. As he turned off his lights two men, one of whom he identified as the appellant, demanded the keys to his car. Instead of yielding them up he ran into the house.

Presently the appellant came out from between the apartment house and the next house and was confronted by the waiting officer who, gun in hand, ordered "hands up." Appellant did not obey, and after some temporizing the officer shot him through the leg. The other man was not seen further, and apparently was never apprehended.

Appellant at all times denied having taken any part in the burglary. He testified that he had been drinking heavily during the afternoon and evening and that he was intoxicated. The arresting officer and the doctor at the emergency hospital testified that he was sober. Appellant accounted for his presence near the scene of the crime by saying he had been out to the Glen Park district and was walking home when he ran into this "commotion" on Tiffany avenue where he says he, too, saw men running, and where, also, he says he heard the report of a gun.

The appellant contends that the evidence is insufficient to support the verdict and that the court erred in failing to give the jury any instructions on circumstantial evidence.

The entry was proved by a broken window in the side of the building; foot marks in the dust and oil at the oil pumps; the drill in the safe; the metallic sounds heard by the officer—all circumstantial evidence showing an entry by *somebody*. There was also direct evidence of entry, for the telephone operator on leaving the hospital saw two men inside the building making their exit through the window. No other witness saw this. The intent to steal was inferable from the condition of the safe. So much for the proof of the elements of the offense.

The telephone operator's eye-witness testimony, however, did not connect the ap-

pellant with the crime, for on cross-examination she "couldn't identify them positively." The pedestrian who identified the appellant as the taller of the two men hurrying south on Valencia, did not see them in the store or their exit therefrom. His evidence was circumstantial for it simply placed appellant near the scene of the crime, apparently in flight.

Moreover, no gun was found on appellant, hence the only evidence upon which a finding of *first degree* burglary could have been based was the flash and the report, from which the jury must have drawn the inferences 1st, that it was the discharge of a gun; 2nd, that the gun was discharged by appellant or his companion, and 3rd, that if they had a gun at that time they must have been "armed with a deadly weapon" while in the store. This of course was nothing but circumstantial evidence.

From what has been said it is clear that the case substantially, and for the most part, was proved, by circumstantial evidence.

No instruction whatever was given on the subject of circumstantial evidence. The appellant, however, tendered and requested the following instructions, which the court refused:

"The prosecution in this case has relied upon circumstantial evidence in its effort to prove defendant guilty as charged.

"Circumstantial evidence is indirect evidence. It is evidence which tends to establish the fact in dispute by proving another, and which, even if taken as true, does not of itself conclusively establish the facts in dispute, but which affords an inference or presumption of its existence.

"Where circumstantial evidence is relied upon by the prosecution, it must not only be consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis."

In *People v. Warren*, 16 Cal.2d 103, 116, 117, 104 P.2d 1024, 1031, the court quoted 8 Cal.Jur. 309 as follows, "It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves.

* * *” In *People v. Bender*, 27 Cal.2d 164, 175, 163 P.2d 8, 15, after quoting this the court added, “In a criminal case where circumstantial evidence is substantially relied upon for proof of guilt it is obvious that ‘instructions on the general principles of law pertinent to such cases’ necessarily include adequate instructions on the rules governing the application of such evidence.”

[1] Further, it has been settled ever since *People v. Dick*, 32 Cal. 213, that, as stated in 8 Cal.Jur. 371, “When a case is one of circumstantial evidence, and admits of a theory either of guilt or innocence, the defendant is entitled to an instruction embodying the rule that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion * * *.” In *People v. McClain*, 115 Cal.App. 505, 510, 1 P.2d 1085, and *People v. Rayol*, 65 Cal.App.2d 462, 150 P.2d 812, the refusal of an instruction embodying that rule was held to be reversible error. The *McClain* case was followed in *People v. Kinowaki*, 39 Cal.App.2d 376, 380, 103 P.2d 203, and in *People v. Hatchett*, 63 Cal.App.2d 144, 153, 146 P.2d 469. Both the *Hatchett* and *Rayol* cases are cited approvingly in *People v. Bender*, *supra*. See also *People v. Chénault*, 74 Cal.App.2d 487, 169 P.2d 29. The supreme court in denying a hearing in *People v. Heuss*, 95 Cal.App. 680, 684, 273 P. 583 reaffirmed the rule.

[2] The tendered instruction that circumstantial evidence “must not only be consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis” was phrased in substantially the language approved by the authorities. Whatever might be said of the other evi-

dence, that with respect to the flash and the report was purely circumstantial. It was that alone on which the jury must have based its finding of first degree burglary, for the place was not an inhabited dwelling-house or building and there was no assault. Sec. 460, Pen.Code; *People v. Clinton*, 70 Cal.App. 262, 264, 233 P. 413. The appellant was entitled to have the jury instructed to apply that rule to this, as well as to the other, circumstantial evidence.

We cannot agree with the State when it claims that “The prosecution did not rely solely or chiefly upon circumstantial evidence to prove its case.”

It is not necessary to review the authorities cited by the State for they are all cases (e. g. *People v. Hannon*, 44 Cal.App. 2d 484, 490, 112 P.2d 719) where the evidence was either “basically direct and positive, and not circumstantial” or the circumstantial evidence was merely cumulative or corroborative of direct evidence—at any rate not of any considerable consequence. In such cases instructions on circumstantial evidence need not be given. 8 Cal.Jur. 369.

Because the rejected instructions were requested by the appellant, it is not necessary to decide whether similar instructions should have been given anyway, *sua sponte* (see earlier quotations from the *Warren* and *Bender* cases).

Nor is it necessary to pass upon the claimed insufficiency of the evidence. The foregoing discussion assumes its sufficiency.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

NOURSE, P. J., and DOOLING, J., concur.

75 Cal.App.2d 821

O'NEILL et al. v. O'MALLEY.

Civ. 13063.

District Court of Appeal, First District,
Division 1, California.

Aug. 23, 1946.

Hearing Denied Oct. 24, 1946.

1. Judgment ⇨707

The State Veterans' Welfare Board, not made party to nor appearing in action to quiet title of deceased wife's estate to sale of contract between board and deceased husband and realty described therein, is not bound by judgment quieting husband's title thereto on his cross-complaint.

2. Vendor and purchaser ⇨207

A vendee's interest under contract to sell land is assignable. Civ.Code, § 683.

3. Vendor and purchaser ⇨54

A vendee under contract to purchase realty acquired an equitable estate in property involved.

4. Joint tenancy ⇨1

The equitable interest acquired in realty by vendee under contract to purchase it may be subject of joint tenancy.

5. Army and navy ⇨51

The provision of Military and Veterans' Code that no property sold thereunder by state Veterans' Welfare Board shall be transferred, assigned, or incumbered without board's written consent until purchaser has paid therefor in full is for vendor's sole benefit and does not affect validity of assignment by vendee as between assignor and assignee. Military and Veterans' Code, §§ 821 and 987.1.

6. Property ⇨11

There is strong public policy in favor of free transferability of property.

7. Husband and wife ⇨14(3)

Possession of property by grantee thereof is prima facie evidence of its delivery to him, and such presumption is alone sufficient to support trial court's finding that wife's assignment to her husband and herself as joint tenants of all rights and privileges under state Veterans' Board's contract for sale of realty to husband who had

assigned his entire interest in such contract to wife with board's approval was valid though there was no evidence that wife's assignment was actually delivered to husband.

8. Appeal and error ⇨169

Issues not raised by pleadings or relied on in trial court cannot be raised for first time on appeal.

9. Assignments ⇨134

A grant, such as an assignment, is presumed to have been delivered on date appearing thereon, in absence of contrary evidence. Civ.Code, § 1055.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Francis O'Neill, as executor of the last will and testament of Charlotte M. O'Malley, deceased, and others, against John Francis O'Malley to quiet the state's title to a contract of purchase on realty described therein in which defendant filed a cross complaint to quiet title in him. From a judgment quieting defendant's and cross-complainant's title, plaintiffs appeal.

Affirmed.

Wayne R. Millington, of San Francisco, for appellants.

Phil F. Garvey, of San Francisco, and Julia M. Easley, of San Jose, for respondent.

PETERS, Presiding Justice.

Plaintiffs and cross-defendants appeal from a judgment of the trial court quieting the title of defendant and cross-complainant to a certain contract and to certain real property in Marin County.

[1] The appellants are the executor of the estate of Charlotte M. O'Malley, deceased, and the trustees of certain devisees named in her will. The respondent is the surviving husband of Charlotte M. O'Malley. By this action appellants seek to quiet the title of the deceased wife's estate to a certain contract of purchase and to the property described therein, which contract was originally entered into between the

Veterans' Welfare Board of California on one side, and respondent on the other. It is admitted that subsequent to the date this contract was entered into it was, with the approval of the Board, assigned to Charlotte M. O'Malley as her sole and separate property, and the claim of appellants is based upon this assignment. The respondent claims title to the contract and property as the result of a later assignment made by Charlotte M. O'Malley to herself and respondent as joint tenants. This assignment was not approved by the Board. Judgment was rendered in favor of respondent. That judgment quiets respondent's title to the contract of purchase and to the real property involved as against appellants. It is from that judgment that this appeal is taken. It should here be noted that the Board was not made a party to this action, nor has it appeared herein. So far as any rights it may have are concerned it is not bound by the judgment.

The facts are not substantially in dispute, and are as follows:

On August 27, 1937, while Charlotte M. O'Malley and the respondent were husband and wife, the Board entered into a contract with respondent for the sale and purchase of the real property in question. This contract provided for installment payments. Respondent was named as sole purchaser. On October 25, 1943, the respondent assigned his entire interest in this contract to his wife, Charlotte M. O'Malley as her separate property. This assignment was formally approved in writing by the Board. At that time a divorce proceeding was pending between the O'Malleys and the assignment by respondent was made as part of a property settlement. On October 26, 1943, an interlocutory decree of divorce was entered. Subsequent to this assignment and until the time of her death on June 17, 1944, Charlotte M. O'Malley made all payments called for by the contract. The one-year period after the date of the interlocutory had not expired at the time of Charlotte M. O'Malley's death and no final decree had then been entered.

On March 15, 1944, under circumstances not disclosed by the record, Charlotte M. O'Malley and respondent entered into a

written contract whereby all the rights and privileges under the contract with the Board were assigned and transferred to themselves as joint tenants. By this contract they agreed that the property described in the contract with the Board was to be held and owned by them as joint tenants with all the rights and incidents appurtenant to an estate in joint tenancy, subject to the contract with the Board. It was stipulated that Charlotte M. O'Malley's signature to this contract was genuine. Prior to the death of Charlotte M. O'Malley this joint tenancy assignment was not submitted to the Board nor was its approval or consent secured. The assignment was not acknowledged nor was it in the form prescribed by the Board for the transfer of property in joint tenancy.

The original contract of sale with the Board contained a covenant against assignment without consent of the Board in the following language: "The real property described herein shall not, voluntarily or involuntarily by operation of law or otherwise, be transferred, assigned, encumbered, leased, let or sublet, in whole or in part, without the written consent of the Board, until the Purchaser has paid therefor in full and has complied with all the terms and conditions hereof." This provision was inserted pursuant to the statutes prescribing the terms of such contracts. See, Military and Veterans' Code, §§ 821 and 987.1.

After the death of Charlotte M. O'Malley, respondent, on October 6, 1944, secured a decree establishing the fact of her death, and terminating the joint tenancy. In the meantime, the will of Charlotte M. O'Malley was admitted to probate and letters testamentary were issued to Francis O'Neill, one of the appellants herein.

On October 11, 1944, a certified copy of the decree establishing the fact of Charlotte M. O'Malley's death and terminating the joint tenancy was sent by respondent to the Board and was received by it October 13, 1944. On November 16, 1944, the respondent presented to the Board the March 15, 1944, assignment, and later tendered the full balance of the purchase price. The Board refused to approve the assignment

or to give respondent a deed for the reason that the representatives of the estate of Charlotte M. O'Malley had written the Board claiming to own the contract of purchase and the property covered thereby. The Board, in view of the adverse claims, decided to take a neutral position and to let the parties litigate the issue. It should be again emphasized that the Board is not a party to this action.

[2-4] The main contention of appellants is that the March 15, 1944, assignment in joint tenancy was void because the consent of the Board was not secured. Before this main point is discussed, however, there are certain preliminary matters that should be mentioned. There would seem to be no doubt that, aside from the question of consent, the assignment of March 15, 1944, was valid. It complied with the requirements of § 683 of the Civil Code. There can be no doubt that the interest of a vendee under a contract to sell land is assignable. See cases collected 25 Cal.Jur. p. 698, § 176; 4 Williston on Contracts, Rev.Ed., p. 2608, § 930. A vendee under a contract of purchase acquires an equitable estate in the property involved (see cases collected 25 Cal.Jur. p. 603, § 111) and this equitable interest may be the subject of a joint tenancy. See cases collected 7 Cal.Jur. p. 337, § 6; 33 Cor.Jur. p. 906; § 8; 14 Am.Jur. p. 81, § 10.

This brings us to the question as to whether this assignment was invalid because the consent of the Board was not secured. Had the original contract of purchase been between private parties and contained the identical provision above quoted against assignment without consent of the seller, there can be no doubt at all that an assignment by the vendee without consent of the vendor would as between the parties and those claiming under them be valid. This exact problem has recently been reviewed by the Supreme Court in *Johnston v. Landucci*, 21 Cal.2d 63, 130 P.2d 405, 148 A.L.R. 1355. That case involved the validity of an assignment made by Landucci of his interest in a contract of purchase of real property. In the original contract between the vendor and vendee

there was a provision that: "Neither this contract nor any interest therein shall be assignable without the written consent of the seller." (21 Cal.2d at page 67, 130 P.2d at page 407, 148 A.L.R. 1355.) It was contended that because such consent had not been secured the assignment was invalid. The court discussed the problems as follows (21 Cal.2d at page 67, 130 P.2d at page 408, 148 A.L.R. 1355):

"Although there are no cases directly in point in California, the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment, such as that contained in paragraph 17 of the Miller & Lux contract, are for the benefit of the vendor only, and in no way affect the validity of an assignment without consent as between the assignor and assignee. In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the original seller. This is the rule set forth in the Restatement of the Law of Contracts. Section 176 reads as follows: 'A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from discharging his duty under the contract in any way permissible if there were no such prohibition.'

"The rule that such provisions are for the benefit of the seller and in no way affect the validity of an assignment as between the assignor and assignee is the rule adopted by the United States Supreme Court (*Portuguese-American Bank [of San Francisco] v. Welles*, 242 U.S. 7, 37 S.Ct. 3, 61 L.Ed. 116, Ann.Cas.1918D, 643), and is the rule approved by Williston in his work on Contracts (*Williston on Contracts*, Revised Ed., vol. II, § 422). Although there are no cases in California dealing directly with the assignment of choses in action in violation of a provision against assignment, there are several cases which hold that the prohibition in a lease against assignment is for the benefit of the lessor, and that an assignment without consent passes the interest of the assignor to the assignee. [Citing 4 cases.]"

See for an interesting discussion of the problem 31 Michigan Law Rev. 1.

[5, 6] It is quite clear, if the same rule applies between the state and an individual as applies between individuals, that, under the rule of the Landucci case the assignment here between the husband and wife creating the joint tenancy was valid between the parties even though the consent of the Board was not secured. The assignment would then, of course, be valid as to appellants who claim through Charlotte M. O'Malley. Appellants urge, however, that the powers of the Veterans' Welfare Board are limited by statute, and that under §§ 821 and 987.1 of the Military and Veterans' Code there is a limitation made by law against assignment. Section 821 provides: "Board to specify terms of contract: No transfer without board's consent. The board in each individual case may specify the terms of the contract entered into with the purchaser, but no property sold under the provisions of this chapter shall, voluntarily or involuntarily, by operation of law or otherwise, be transferred, assigned, encumbered, leased, let or sublet, in whole or in part, without the written consent of the board, until the purchaser has paid therefor in full and has complied with all the terms and conditions of his contract of purchase." Section 987.1 is in substantially identical language.

There can be no doubt at all that under these sections there is a limitation against assignment written into every Board contract by operation of law even if not expressed. But it is quite clear that if private individuals incorporated into their contract the exact language of the two statutes, under the Landucci case, such language would be interpreted to be for the sole benefit of the vendor and would in no way affect the validity of the assignment between the assignor and assignee. It would seem that that language when used in a statute should not be given a different meaning. What appellants have overlooked is that there is a strong public policy in favor of the free transferability of property, and that such provisions have quite uniformly been interpreted as being for the sole benefit of the vendor and do not

affect the rights inter se of the assignor and assignee. The Board is not a party to this action and its rights are not involved. The Legislature, in the absence of compelling language to the contrary, must be held to have meant by the language used exactly what private individuals would have meant had they used the language. Words do not acquire a peculiar and different meaning because used in a statute. Moreover, even if it be urged that the statutory provisions in question are intended to protect the veteran purchaser, it cannot be contended that they would apply to a situation such as is here presented where the veteran-purchaser is also the assignee. In such event the reason for any such assumed rule does not exist.

[7] The appellants also suggest that the assignment of March 15, 1944, may be invalid because there is no evidence that it was actually delivered. The point is without merit. The law is clear that possession by the grantee is prima facie evidence that it has been delivered to him. *Miller v. Jansen*, 21 Cal.2d 473, 477, 132 P.2d 801; *Butler v. Woodburn*, 19 Cal.2d 420, 425, 122 P.2d 17; *Stewart v. Silva*, 192 Cal. 405, 409, 221 P. 191. This presumption is alone sufficient to support the finding of the trial court. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529.

[8] The appellants also suggest that, inasmuch as the assignment was made between husband and wife, under § 158 of the Civil Code it is subject to the rules which apply to persons in a confidential relationship, and urge that under § 2235 of the Civil Code it must be presumed that the transaction was entered into without consideration and under undue influence. These issues were not raised by the pleadings, nor were they relied upon in the trial court. Under such circumstances they cannot be raised for the first time on appeal. *Conneally v. San Francisco S. & L. Soc.*, 70 Cal.App. 180, 232 P. 755.

[9] The appellants also suggest that, since the exact date of delivery of the assignment was not shown in the evidence, although it is dated March 15, 1944, it may

have been delivered prior to October 25, 1943, the date respondent assigned his interest to his wife. A grant, in the absence of evidence to the contrary, is presumed to have been delivered on the date appearing thereon. § 1055, Civil Code; *Miller v. Jansen*, 21 Cal.2d 473, 477, 132 P.2d 801; *Ward v. Dougherty*, 75 Cal. 240, 17 P. 193, 7 Am.St.Rep. 151. There was no contrary evidence.

The judgment is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.



75 Cal.App.2d 775

CARRADINE v. CARRADINE et al.
Civ. 15226.

District Court of Appeal, Second District,
Division 1, California.
Aug. 16, 1946.

1. Appeal and error ⇌82(3)

An order vacating an order of civil arrest is not among those enumerated in Code of Civil Procedure from which an appeal may be taken, and hence appeal from such order must be dismissed unless it is a final judgment. Code Civ.Proc. §§ 479-481, 503; § 963, subsd. 1, 2.

2. Appeal and error ⇌82(3)

Order vacating order of civil arrest before trial was not appealable as an order made after judgment. Code Civ.Proc. §§ 479-481, 503; § 963, subd. 2.

3. Appeal and error ⇌78(2)

"Civil arrest" being an auxiliary remedy designed to keep defendant within reach of court's final process, an order of civil arrest is not appealable if merely interlocutory. Code Civ.Proc. §§ 479-481; § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Arrest".

4. Appeal and error ⇌76(1)

A "final judgment" from which appeal will lie is not limited to those decisions which finally determine all the issues presented by the pleadings, but it includes a decree, order, or decision which finally determines a collateral matter distinct or severable from the general subject of the litigation. Code Civ.Proc. § 963, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

5. Appeal and error ⇌76(1)

An order not specifically mentioned in Code of Civil Procedure among those from which an appeal may be taken may be appealed from as a "final judgment" only when such order is made in collateral proceedings and determines the rights of the parties in the property involved or directs the performance of an act by or against a party. Code Civ.Proc. § 963, subsd. 1, 2.

6. Appeal and error ⇌82(3)

An order vacating an order of civil arrest was not a "final judgment" from which appeal could be taken, since it did not finally determine plaintiff's rights in property or money involved in the action or in other relief sought and did not direct performance of any act by or against plaintiff. Code Civ.Proc. §§ 479-481, 503; § 963, subd. 1.

Appeal from Superior Court, Los Angeles County; *Roy V. Rhodes*, Judge.

Action by Ardanelle M. Carradine against John R. Carradine and others to recover a money judgment against named defendant and another and for other relief. From an order vacating an order of civil arrest of named defendant, discharging him, and exonerating his bond, plaintiff appeals and defendants move to dismiss the appeal.

Appeal dismissed.

Werner O. Graf, of Los Angeles, and Roderick Johnston, of North Hollywood, for appellant.

Leonard Wilson, Ben C. Cohen, and Arnold L. Leader, all of Los Angeles, for respondents.

WHITE, Justice.

On June 29, 1945, plaintiff filed an action in the Superior Court of Los Angeles County against her former husband, John R. Carradine, and the other above named defendants. In that action the relief prayed for was (1) to have it judicially declared that defendant John Carradine Productions, Inc., a corporation, was the alter ego of her divorced husband; (2) for judgment against defendant John R. Carradine and the corporation in the sum of \$5,000; (3) for an accounting; (4) for attorney's fees; and (5) for appointment of a receiver.

On the same day that plaintiff filed her complaint she also filed in the proceeding an affidavit wherein she averred in part that her action was one for the recovery of money on a cause arising upon express contract; that the defendant John R. Carradine was about to depart from the State of California with the intent to defraud his creditors, and particularly to defraud plaintiff herein. Upon the filing by plaintiff of an undertaking in the sum of \$1,000, an order was issued for the arrest of defendant John R. Carradine. Code Civ.Proc. secs. 479, 480, 481.

On July 2, 1945, a motion was made on behalf of defendant John R. Carradine to vacate the order of arrest. Code Civ.Proc. sec. 503. According to the clerk's transcript now before us, the motion was "argued by counsel on the sufficiency of the affidavit of Ardanelle M. Carradine on file herein." It was upon this affidavit that the order for the arrest of defendant John R. Carradine was issued. After hearing arguments by counsel for the respective parties, the court made an order granting the aforesaid motion, discharging defendant John R. Carradine, and exonerating his bond. From the order granting the motion to vacate the order of arrest plaintiff appealed.

When the record on appeal was lodged in this court, and following the filing of appellant's opening brief, respondent moved to dismiss the appeal on the ground that the order from which the appeal was taken is not an appealable order within the purview of section 963 of the Code of Civil Procedure

"or any other provisions of the laws of the State of California"; and on the further ground "that the issues involved in said order of arrest and the subsequent order vacating said order of arrest have now long since become moot, your affiant being presently in the State of California with no intent to depart therefrom except and unless in furtherance and in compliance with professional" (theatrical) "engagements, * * *."

[1, 2] As respondent points out, the order appealed from is not one enumerated in subdivision 2 of section 963 of the Code of Civil Procedure from which an appeal may be taken. Unless, therefore, it can be held that this is a final judgment within the meaning of subdivision 1 of section 963 of the Code of Civil Procedure, it would appear that the motion to dismiss is well taken. The order here appealed from is not one made after judgment.

[3] Generally speaking, we think it may be said that civil arrest is an auxiliary remedy designed to keep the defendant within reach of the court's final process. In that regard it is analogous to an attachment, and is not appealable if merely interlocutory. Orders dissolving or refusing to dissolve an attachment are, however, specifically made appealable by subdivision 2 of section 963 of the Code of Civil Procedure.

[4] The term "final judgment" is not limited to those decrees or decisions which finally determine all the issues presented by the pleadings. The term is equally applicable to a decree, order or decision which finally determines a collateral matter distinct or severable from the general subject of the litigation. 2 Cal.Jur. 144, sec. 21. Thus, in the case of *Hibernia S. & L. Soc. v. Ellis Estate Co.*, 216 Cal. 280, 281, 13 P.2d 929, an appeal was taken from an order setting aside and vacating an order appointing a receiver, for which no appeal is provided in subdivision 2 of section 963 of the Code of Civil Procedure. The contention was advanced that the order appealed from was a final judgment, in that it amounted to a final determination of a collateral matter distinct from the general subject of the litigation—a judgment that was conclusive of a ques-

tion in the case, and final as to that question. After pointing out the effect of an order appointing a receiver, the Supreme Court says (216 Cal. at page 282, 13 P.2d at page 929): "Therefore, it would seem that the order vacating the order appointing the receiver and directing him to pay the money collected by him over to the defendants, which order, in effect, amounts to a discharge of the receiver, is of such finality on that phase of the case as to be appealable as a final judgment within the meaning of section 963 of the Code of Civil Procedure. * * * (Citing cases.)"

[5] From a review of the cases arising in this state determining the question of what is a "final judgment", we are convinced that an appeal may be taken from an order not specifically mentioned in subdivision 2 of section 963 of the Code of Civil Procedure only when such order is made in collateral proceedings and determines the rights of the parties in the property involved or directs the performance of an act by or against a party. 2 Cal.Jur. 144, sec. 21, and cases therein cited.

We have been cited to no California cases bearing on the precise question now before us, nor has our search in that regard been fruitful. However, in *Crooker v. Knudsen*, 232 F. 857, 858, the United States Circuit Court of Appeals for the Ninth Circuit, in dismissing a writ of error on the ground that an order setting aside an order of civil arrest is not a final judgment and is not appealable, said: "And the state courts have uniformly held that, in the absence of a statute allowing an appeal, no appeal lies from an order sustaining or dissolving a writ of arrest in a civil action. * * * (Citing cases from other jurisdictions.)"

[6] The order with which we are here concerned does not finally determine the rights of appellant in the property or money involved in the action or in other relief sought, or in any part thereof, nor does it direct the performance of any act by or against appellant, and thus, as was said in *Grant v. Superior Court*, 106 Cal. 324, 39 P. 604, it lacks "one essential element of a final judgment."

171 P.2d—58

The foregoing conclusion at which we have arrived renders it unnecessary to discuss or decide the other grounds advanced for a dismissal of the appeal.

The appeal is dismissed.

YORK, P. J., and DORAN, J., concur.



75 Cal.App.2d 735

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. GUSMEROLI.

Civ. 7194; Sac. 5737.

District Court of Appeal, Third District,
California.

Aug. 10, 1946.

Taxation §59

Owner of redwood timber tract, who gave "lay-outs" of timber to tie-makers and purchased from them finished redwood lumber split products if such products came up to a specified grade, but who otherwise exercised no control over tie-makers, was not an "employer" of tie-makers and money paid to tie-makers upon purchase of products did not constitute "wages" so as to make owner of timber tract liable for contributions under the Unemployment Compensation Act.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer" and "Wages".

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by California Employment Stabilization Commission, successor to the California Employment Commission, formerly the Unemployment Reserves Commission, against the Pio Gusmeroli for the collection of unpaid contributions. From a judgment for defendant, plaintiff appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Blaine McGowan, of Eureka, for respondent.

ADAMS, Presiding Justice.

This case is similar to *California Employment Stabilization Commission v. Wirta*, Cal.App., 171 P.2d 728, and it is conceded by appellant that it "presents a question of law virtually identical" with that presented therein. The action was instituted under the provisions of Sections 37, 38 and 44 of the California Unemployment Insurance Act, Gen.Laws, Act 8780d, for the collection of contributions for the period beginning April 1, 1937, and ending March 31, 1939. The trial court found that during the period alleged Gusmeroli entered into contracts with certain persons as independent contractors for the manufacture of redwood products; that he was not an employer and that he did not make payments of wages with respect to employments subject to the Unemployment Insurance Act; that whatever moneys he paid as set forth in the complaint were paid by him to various persons who performed independent contracts and were independent contractors and were not his employees. Judgment was rendered for defendant and after denial of a motion for new trial this appeal was taken.

The evidence shows that Gusmeroli, who was in the business of selling redwood split products and maintained a yard at Redway, Humboldt County, owned some 320 acres of redwood timber. It was his custom to give to men known as "tie-makers" what is referred to as a "lay-out" consisting of a strip of timber containing from fifteen to thirty trees. These trees the tie-makers felled and made therefrom posts, ties, shakes, etc., which, if up to standard, were thereafter bought by Gusmeroli. The lay-outs would sometimes be assigned to one man and sometimes to two men. The only requirement of a man operating a lay-out was that the products he made must be up to the standards set in the split products industry or Gusmeroli would not buy them. No instructions were ever given by re-

spondent as to how the standing timber should be felled. No tie-maker was required to work any specified time. He furnished his own tools and his transportation from his place of residence to the place where his work was done. He might take someone else to work with him without consulting Gusmeroli and in such event Gusmeroli paid only the man to whom the original lay-out was assigned. Respondent checked the number of the products only when the tie-makers needed money or requested him to come into the woods. Without any directions from respondent the tie-makers manufactured from each tree the split products for which they deemed the tree most advantageous. Gusmeroli did not furnish board to any of the tie-makers nor was board given to them as a part of their compensation. He never paid any weekly wages or stipulated wages of any sort. The men worked as and when they pleased and if the holder of a lay-out became intoxicated for a period of time, which Gusmeroli said was not an uncommon occurrence, he could return and conclude working on his lay-out whenever he saw fit. Some men worked from daylight to dark, others worked only a few hours a day, and under their contract with Gusmeroli they were not required to work any specified time. One of the tie-makers who worked during the period involved in this litigation was a carpenter who worked on his lay-out part of the time and the rest of the time did carpentering work for others than Gusmeroli. Some of the tie-makers drew money every day, some every six months and some every one or two months. Respondent retained the right to cull the products and if they did not come up to the particular standard of the particular type of split product he could refuse to buy them. None of the men was ever paid any weekly wage or stipulated wage of any sort and no payment was made to anyone on the basis of time involved. No man was ever removed from the lay-out by respondent, and respondent reserved no right to remove men from their lay-outs because they worked only a limited number of hours a day. The tie-makers furnished all of their own tools which consisted of drag saws, costing

around \$175, cross cut saws, costing from \$25 to \$30, and also wedges, hammers, axes and all other tools necessary for the manufacture of split products. Also they furnished their own gasoline to operate the drag saws, and respondent never furnished any gasoline or any tools. Regardless of the time it took a man to make a product the price he received therefrom was the same. Respondent kept no foreman or time keeper in the woods and did not act in either capacity himself. No man was told how to perform his work and no criticism was ever made of the way his work was done. No man was permitted to go on the lay-out assigned to another man, and no instructions were given as to wasting timber or material. There was no condition in the arrangement between respondent and the tie-makers that any of them could be discharged, the only condition being that if the products did not come up to standard respondent would not buy them. Any man holding a lay-out had a right to leave it at any time he wished and none of the men holding lay-outs was covered by workmen's compensation insurance.

The only distinction between the facts in this case and those in the Wirta case is that the evidence in this case does not show whether or not the tie-makers operating in Gusmeroli's timber purchased the trees from which they made their products or whether, if Gusmeroli ever refused to take such products, they were free to sell them to others. There is no evidence that any were so sold, but Gusmeroli stated that when men were given lay-outs "the lay-out was theirs"; that all he wanted was the finished products. He also indicated that he considered the products as belonging to the tie-makers for he stated that he "bought" the finished products from them.

In *Empire Star Mines Co. v. California Employment Comm.*, 28 Cal.2d 33, 168 P.2d 686, the court stated the factors which distinguish an employee from an independent contractor. Of these the most

important factor—the right to control the manner and means of accomplishing the results desired—is entirely lacking here. Gusmeroli testified in this connection "I had good men working for me, they knew more about it than I did." Also lacking is any evidence of the right to discharge at will without cause. It appears from the evidence in this case, and that in the Wirta case, that the business of tie-making, or the making of split products, is a distinct occupation and a skilled one, and that in the locality the work is usually done by such specialists without supervision. Here also the tools necessary for the making of such split products were furnished by the operators, payment was not made by the time, and the parties apparently did not consider that they had created the relationship of employer-employee.

As was said in the *Empire Star Mines* case, this evidence tends to prove that the tie-makers were carrying on their activities at their own risk, in their own way, for their own profit, and places the trial court's findings beyond the reach of an appellate court.

Appellant contends that since in *Pacific Lumber Co. v. Ind. Acc. Comm.*, 22 Cal.2d 410, 139 P.2d 892, an award by the Commission was affirmed and its finding that one Turkovich, a tie-maker, was an employee was held supported by the evidence, that it must follow that the tie-makers in the case before us must be held to have been employees of Gusmeroli. But the facts in that case are in some respects different from those in the case before us; and there the court said specifically that the question whether Turkovich was in the employ of the company at the time of his injury was a question of fact for the determination of the Commission, and that in reviewing its findings the court was without power to disturb them unless there was a lack of substantial evidence.

The judgment is affirmed.

PEEK' and THOMPSON, JJ., concur.

75 Cal.App.2d 852

HENSLEY v. POPKIN et al.

Civ. 13022.

District Court of Appeal, First District,
Division 2, California.

Aug. 29, 1946

1. Appeal and error ⇨805

Appeals from order denying appellants' motions to tax costs were abandoned, where no presentation was made by appellants in support of the appeals.

2. Evidence ⇨332(1)

The record of a proceeding in another court was admissible, insofar as concerned the same parties in instant quiet title action, under statute listing as a disputable presumption that a judicial record, when not conclusive, correctly sets forth the rights of the parties. Code Civ.Proc. § 1963, subd. 17.

3. Evidence ⇨332(1)

The objection that record of proceeding in another court, whose judgment was not yet final, was hearsay and was not binding evidence in quiet title action, was properly overruled, where the record contained the verified pleadings of parties to quiet title action disclosing their respective claims to the property and their stipulations agreeing that their respective interests in the property were precisely what the trial court found their interests to be on the evidence in the quiet title action. Code Civ. Proc. § 1963, subd. 17.

4. Appeal and error ⇨204(4)

A defendant in quiet title action could not complain on appeal that record of proceeding in another court was improperly admitted, where defendant made no objection to the offer of the record in evidence.

5. Appeal and error ⇨1052(8)

A judgment would not be reversed and cause remanded for another trial for alleged erroneous admission of evidence, where no other result could follow under the admitted facts properly appearing in the record.

Action to quiet title by Jessie R. Hensley against Robert Popkin, Fred Kuznetsoff, and Albert Graham, etc. From the judgment and from the order denying their motions to tax costs, Jessie R. Hensley and Fred Kuznetsoff appeal separately.

Judgment affirmed and appeals from order dismissed.

Alexander Riaboff, Fred Leve, and Charles N. Douglas, all of San Francisco, for appellants.

A. Don Duncan, of San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Plaintiff sued in the superior court in Monterey County to quiet title to real property situated in that county. At the same time an action was pending in the superior court in the City and County of San Francisco for dissolution of a partnership between Hensley, Popkin and Graham. The defendant Kuznetsoff, claiming an interest through an assignment from Popkin, petitioned for leave to intervene in the suit pending in the City and County of San Francisco, but his petition was denied. He was joined as a defendant in the action brought in Monterey County as one claiming some adverse interest in the property. The trial court found that Hensley and Graham were each the owners of a one-half interest in the real property subject to certain prior liens and adverse claims which are not contested on the appeal. The plaintiff Hensley and the defendant Kuznetsoff appeal separately from the judgment and from the order denying their motions to tax costs. No presentation is made by either appellant in support of the second appeals, and for that reason they will both be deemed to be abandoned.

The facts are complicated because of the numerous cross-filings of the respective parties, but a detailed statement is not necessary because neither of the appellants makes any attack upon the findings of the trial court. On August 20, 1940, Hensley and Popkin entered into a partnership agreement reciting that Popkin had purchased the real property and pumping plant and machinery from Tidewater Associated Oil Company for \$6500; that Popkin and

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Hensley should share the profits on a fifty-fifty basis; all money coming in from the sale of the machinery located on the property should go to Hensley until he had received \$2500 which he agreed to advance for the purchase of the real property and the machinery. Popkin agreed to transfer the title to the property to Hensley until the latter had been reimbursed in full for the money he had put into the transaction.

On August 22, 1940, Popkin entered into an agreement with Kuznetzoff by which he assigned all his right and interest "in the following deals: * * * said deals representing eight (8) boilers." On the 22nd of August Popkin and Kuznetzoff entered into an agreement of partnership "to carry out the boiler deals" mentioned in the foregoing assignment and to divide the profits therefrom equally between them.

On August 15, 1940, Graham filed a suit in the City and County of San Francisco against Popkin for breach of contract. In February, 1941, Popkin consented to a judgment being entered against him and execution and a charging order on Popkin's interests in the real property and partnership were issued. On May 29, 1942, a stipulation was entered into by Graham, Popkin and Hensley that an accounting should be had of the Hensley-Popkin partnership. On October 15, 1942, Popkin, Graham and Hensley entered into another stipulation dispensing with further partnership accounting and stipulating that through the partnership agreement of August 20, 1940, between Popkin and Hensley each party receive an equal one-half interest in the partnership property; that Hensley was entitled to be paid \$2475.02 and that Popkin was entitled to be paid \$300.71 before the division of the partnership property would be made, and that the interest of Popkin was subject to a first lien through a charging order filed by Graham. It was also agreed that Popkin should promptly obtain from Kuznetzoff a cancellation of his assignment or that he would hold the other parties free from any claim of Kuznetzoff in the partnership. This stipulation was filed in proceeding No. 296850 pending in the superior court in San Francisco between Graham, Popkin and Hensley to determine the respective inter-

ests of the several parties in the property involved in the pending action.

On May 1, 1943, Popkin filed a suit against Kuznetzoff seeking a dissolution of their partnership. He alleged that they had entered into and formed a co-partnership for the purpose of engaging "in the purchase and sale of second hand boilers and similar merchandise." This allegation was admitted by Kuznetzoff in his answer. What disposition was made of that action does not appear.

On February 15, 1944, Graham under the execution and charging order sold Popkin's interest in the Hensley-Popkin partnership at public auction. The purchaser defaulted and on the second sale this interest was sold to Graham.

On May 14, 1945, the superior court in San Francisco in the action numbered 296850 entered its decree confirming the various stipulations and referee's reports filed therein and finally determined the interest of the respective parties in the Hensley-Popkin partnership based upon the stipulation of the parties heretofore noted. The trial in the present action was held two days after the entry of this decree. Graham introduced the decree along with the complete file of the stipulations, proceedings and referee's reports. The only objection to the offer was made on behalf of Hensley that the file of the proceedings was hearsay as to him since he was not a party to the action. The trial court pointed out that he had become a party by intervening and overruled the objection. The ruling was sound and is not criticised at this time. Thereafter the respondent offered in evidence the order of the trial court in San Francisco confirming and adopting the report of the referee. No objection was made to this offer by either party. Prior to the hearing on the appeals herein the decree of the San Francisco court became final.

[2,3] On the evidence stated the trial court found that Graham succeeded to the interest of Popkin in the partnership of Hensley and Popkin; that they owned the real property jointly; that the land was subject to a first lien of the bank which held a trust deed, to a second lien in favor of

Hensley for money he had advanced the partnership, to subordinate liens of others not involved in the litigation, and that the surplus should be divided equally between Hensley and Graham. It also held that Kuznetsoff had no interest in the real property in litigation. Neither appellant attacks these findings and it is patent that they are not subject to attack on any legal grounds. Both appellants rest their appeals on the single ground that it is unsupported by the evidence because it is based upon the decree of the superior court in San Francisco which was not final at the time the judgment herein was entered. The error of both appellants rests in the statement of their position. The judgment herein is not "based" on the decree of the San Francisco court; it is based upon the undisputed evidence of the interest or lack of interest of the respective parties in the realty involved and upon their stipulations and concessions. It is not necessary to cite or discuss the cases relating to the effect of a judgment which is not final at the time it is offered in evidence in another proceeding. That question is not involved here. The record of the San Francisco proceeding was admissible under the provisions of subd. 17 of section 1963, Code of Civil Procedure, listing as one of the disputable presumptions: "That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties." Here the record contained the stipulations of the parties to that proceeding, namely Hensley, Popkin and Graham agreeing that their respective interests in the Monterey property were precisely what the trial court found them to be on the evidence in this case. It contained the verified pleadings disclosing these respective claims. Hence the objection made on the behalf of Hensley that this record was hearsay and not binding evidence presents no legal obstacle to its admission in evidence and the objection was properly overruled. Therefore we may overlook any portion of the finding of

fact or conclusion of law which might have assumed the finality of the decree of the San Francisco court. If that case had not gone to judgment, the record of the stipulation would nevertheless be admissible to show the agreement of the parties as to their respective interests in this property.

[4] The appeal of Kuznetsoff presents a different situation. He was not a party to the San Francisco proceeding. He sought leave to intervene in that action but his petition was denied. He was not a signer of the stipulation fixing the interest of Graham, Hensley and Popkin which was filed in the San Francisco proceeding. Findings adverse to his interest in the Monterey realty were not based upon this stipulation nor upon any part of the record in the San Francisco proceeding. Those findings were based upon the record evidence, the express admission by this appellant in his answer filed in *Popkin v. Kuznetsoff*, and the evidence in this case showing that he had at no time acquired any interest in the realty, but that his transactions with Popkin were confined to the purchase and sale of some of the machinery. But if the record in the San Francisco case had any binding effect for any part of the judgment adverse to this appellant he can not now complain that it was improperly admitted because he made no objection to the offer of the record in evidence or to the admission of any part of it.

[5] Neither appellant can now claim "reversible" error because the San Francisco decree became final before the submission of these appeals. But, if there were error, which we do not concede, it would be an idle act to reverse the cause for another trial since no other result could follow under the admitted facts appearing in this record.

The appeals from the order taxing costs are dismissed. The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

75 Cal.App.2d 875

PEOPLE v. PERKINS.

Cr. 1956.

District Court of Appeal, Third District,
California.

Aug. 30, 1946.

1. Automobiles ⇨354

In prosecution of motorist for killing pedestrian, the mechanical condition of motorist's brakes and the precise nature, extent, and significance of the defects therein were facts which the jury was entitled to know.

2. Criminal law ⇨478(1)

A garage mechanic who had examined the defendant's automobile brakes was competent to testify to their condition.

3. Criminal law ⇨449(1), 469

Foundation facts are distinct from the ultimate fact at issue and may be established by either lay or expert witnesses.

4. Criminal law ⇨696(7)

A motion to strike out the entire testimony of witness who testified to facts observed as well as to opinion that automobile brakes were inadequate was too broad, and was properly denied.

5. Criminal law ⇨1169(2)

Where evidence was merely cumulative, any error in its admission was harmless.

6. Criminal law ⇨814(1)

An instruction is supported by the evidence if it addresses itself to any theory permissible under the evidence.

7. Automobiles ⇨357

Criminal law ⇨823(4), 1172(1)

In prosecution of motorist for killing pedestrian, instruction that driver of a motor vehicle when reasonably necessary to insure safe operation must give audible warning with his horn as provided by Vehicle Code was justified by the evidence, and was not prejudicial in view of all the evidence and other instructions, and could not have misled jury to find that it was defendant's automobile rather than an-

other automobile that caused pedestrian's death. Vehicle Code, § 671(b).

8. Criminal law ⇨1169(2)

In prosecution of motorist for killing pedestrian where the evidence of defendant's guilt both on the question of proximate cause and on the question of culpability was ample, any error in giving instruction on duty to sound horn was harmless. Vehicle Code, § 671(b); Const. art. 6, § 4½.

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Eunice Perkins was convicted of manslaughter, and, from such conviction and from an order denying her motion for a new trial, she appeals.

Affirmed.

George Olshausen, of San Francisco, for appellant.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

PEEK, Justice.

By an information defendant was charged with the crime of manslaughter to which she entered a plea of not guilty. The jury found her guilty of the crime as charged, and from the judgment entered pursuant thereto and from the order of the trial court denying her motion for a new trial she prosecutes this appeal.

The record discloses substantial evidence of the following facts: Agnes C. Severy, aged 84, and her daughter, Mrs. Naomi Schroeder, were struck by a car driven by defendant while they were walking within a clearly marked pedestrian lane on Sonoma street where it intersects Carolina street, in the city of Vallejo. Mrs. Severy died as a result of the injuries thereby sustained, and Mrs. Schroeder was severely injured. Although the night was dark and misty, the intersection was well lighted by street lights and by light shining through the open doors of a church located at said intersection. Defendant's car, as it approached the intersection, was pro-

ceeding at a speed of twenty to twenty-five miles an hour and was being overtaken by another car driven by one Lotspeich. Almost simultaneous with the happening of the accident, the Lotspeich car passed within a few feet to the left of defendant's car. Defendant was watching this car and did not see the two women in the crosswalk, at least not until her passenger, a small boy in the rear seat, called out: "There is some ladies." Her car struck the two women, swerved sharply to the right, and crashed into an automobile which was parked at the curb more than 40 feet beyond the intersection.

When testifying in her own defense, defendant admitted she was driving without an operator's license, that the brakes on her car were defective, and that she had been warned by her husband about driving the car with the brakes in that condition.

Defendant's first assignment of error is the refusal of the trial court to strike the testimony of a garage mechanic who examined the brakes on defendant's car after the accident. This witness testified that the brakes were "what might be termed inadequate" in that one application of the brake pedal would not brake the car but it would be necessary with the brakes in the condition in which they were that they be pumped at least three times before they produced any braking resistance at all. He explained that, according to the theory of hydraulic brakes, a master cylinder is filled with a hydraulic fluid; that by the pumping or pushing of the pedal the brake shoes in the wheels are expanded against the brake drums and thereby give more resistance; that at all times the shoes must be kept close enough to the drums so that they will hold by one stroke of the pedal, which is all that brakes in good condition require; and that if the brakes and shoes are allowed to become sufficiently worn the pedal must be pumped three or four times before the proper resistance is obtained.

Upon cross-examination, the witness admitted that he did not know the minimum stopping distance that a car traveling at the speed of 25 miles an hour would re-

quire according to the table contained in section 670 of the Vehicle Code which defines the standard of adequacy for automobile brakes.

Thereupon, counsel for defendant made a motion that the entire testimony of the witness be stricken, which motion was denied.

In excepting to this rule, defendant appears to take the position that, although she does not challenge the qualification of the witness as an expert generally, she does deny the materiality of his statement or conclusion that the brakes on the car were "inadequate", on the ground that it is not tantamount to a statement that the brakes would not stop the car within the distance specified by the code—which was the only thing to which he could have testified and which could have had any evidentiary value—because the witness had admitted he did not know what that distance was. Likewise on this same question she contends that the evidence given by this witness went beyond anything testified to by other witnesses, and therefore the refusal to strike it was prejudicial to her case, particularly in view of what she maintains was the uncertain state of the evidence on the question as to which of the two cars caused the death of Mrs. Severy.

[1-4] The mechanical condition of the brakes on defendant's car, and the precise nature, extent and significance of the defects therein, were facts which the jury was entitled to know. This witness had observed such facts and was competent to testify to them. It is the rule that "* * * foundational facts are distinct from the ultimate fact at issue, and they may be established by the testimony of either lay or expert witnesses." *People v. Gaines*, 1 Cal.2d 110, 115, 34 P.2d 146, 148. Consequently, irrespective of the admissibility of the ultimate fact or conclusion that the brakes were inadequate, defendant's motion to strike the entire testimony of the witness was too broad and was therefore properly denied. 8 Cal.Jur., p. 243, sec. 309, and cases cited.

[5] In any event the evidence in question was merely cumulative, and therefore

its admission was harmless. 4 Cal.Jur. Supp., p. 998, sec. 599. The only part of the testimony of said witness that properly could be said to be objectionable under defendant's theory, or under any tenable theory, is his statement that the brakes were "inadequate". However, substantially the same kind of evidence was given by other persons who were not shown to be unfamiliar with the provisions of section 670 of the Vehicle Code. Thus, the two police officers assigned to the case testified that defendant's husband stated that the brakes were "not very good" as they had to be pumped up, and he knew they were "poor" at the time his wife took the car out in the night in question. One of these witnesses further testified that shortly after the accident he made an examination of defendant's car and found that the brake pedal when depressed went freely to the floor boards "with a thump." Another witness testified that "I was there and seen the fellow (apparently referring to the police officer who made the examination) trying the brakes and it had no brakes." Moreover, defendant, while testifying in her own behalf, not only admitted the making of the statements above mentioned to the police officers, and the fact that she had been warned about the brakes and knew they were bad, but also testified that maybe it was necessary to pump once or twice before putting on the brakes, although she added "but if you knew the car you would know how to stop it right then." She further testified that when she noticed the car which was passing her on the left she slowed down by applying the brakes, yet her car continued to travel alongside the other car all the way through the intersection and did not come to a stop until she crashed into the parked vehicle beyond the intersection.

In view of such evidence it does not appear that the refusal to strike the testimony of the automobile mechanic relative to the inadequacy of the brakes could have constituted prejudicial error. In a somewhat similar situation, the supreme court, in holding that the denial of a motion to strike certain portions of a witness's testimony was not error, stated:

171 P.2d—58½

"The motion was quite sweeping, but waiving all technical objections that might be made as to the form of the motion, and conceding that error was committed in refusing to grant it, we cannot say that the verdict of the jury would have been different had the motion been granted. * * * The evidence objected to was merely cumulative, and could not have produced prejudicial error in the light of the other evidence which was properly admitted." *People v. McClenneen*, 195 Cal. 445, 472, 234 P. 91, 102.

Defendant's second assignment of error relates to the giving of the following instruction: "You are instructed that Section 671(b) of the Vehicle Code of the State of California reads, in part, as follows: The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn."

It is defendant's contention that the evidence did not warrant the giving of this instruction and that the error in giving it was prejudicial, because it suggested that defendant had failed to comply with an additional statutory requirement, thereby leading the jury to find that it was her car and not Lotspeich's that caused the death of Mrs. Severy.

The rules relating to the sufficiency of evidence which will warrant the giving of an instruction in a criminal case have been thus stated:

"It is elementary that the court may instruct a jury upon any material question upon which there is any evidence deserving of any consideration whatever. The evidence need not be direct and positive in character, and the fact that it is not of a character to inspire belief does not authorize the refusal of an instruction based thereupon, as this is a matter within the exclusive province of the jurors. It has been held that, however incredible the testimony of a defendant may be, he is undoubtedly entitled to an instruction based upon the hypothesis that it is entirely true." 8 Cal.Jur., p. 323, sec. 371.

[6] In other words, an instruction is supported if it addresses itself to any the-

ory permissible under the evidence. *People v. Hecker*, 109 Cal. 451, 465, 42 P. 307, 30 L.R.A. 403.

[7] The record discloses some evidence on the question of defendant's use of the horn. One of the witnesses testified that, when she walked over to defendant's car immediately after the accident, the latter said, repeating the words several times: "I saw them and I blowed and blowed but they kept on going." Defendant, however, when testifying in her own behalf, denied having said this.

It is difficult to see how the jury could have been misled by this instruction. Other instructions charged that "The presumption of innocence attaches at every stage of the case, and to every fact essential to a conviction"; that "the violation of a statutory duty alone does not constitute wilful misconduct"; and that the act with which defendant was charged must have "directly, immediately and proximately caused the killing." Still other instructions stated that the killing of a human being is excusable when committed by accident or misfortune, and without any lawful intent, and not done in a cruel and unusual manner; and that a person is not capable of committing a crime who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention or culpable neglect.

Defendant's argument to the effect that, save for such erroneous ruling of the trial court, the jury might have found that it was the Lotspeich car and not defendant's that caused the fatal injury, is without foundation. Even if full credence and effect be given to the testimony of the witness who stated that after defendant's car had struck one of the women "the second car (Lotspeich's) hit her and moved her a little bit," and to testimony of another witness read into the record as having been given at the coroner's inquest, where the witness had testified that Lotspeich's car was very close to defendant's—a statement partially corroborated by defendant—still this would not militate against a determination that the car driven by defendant

struck Mrs. Severy and inflicted injuries which proximately resulted in her death. *People v. Fowler*, 178 Cal. 657, 669, 670, 174 P. 892; *People v. Lewis*, 124 Cal. 551, 559, 57 P. 470, 45 L.R.A. 783; *People v. Cobler*, 2 Cal.App.2d 375, 379, 37 P.2d 869; 5 Am. Jur., p. 928, sec. 791. See, also, *People v. Pociask*, 14 Cal.2d 679, 687, 96 P.2d 788. It was stipulated that Lotspeich's car gave no appearance of having been in a collision of any kind, and his conduct after the accident and his testimony at the trial are barren of any suggestion that he was responsible for Mrs. Severy's death. Nor did defendant, either at the time of the accident or of the trial, contend otherwise.

[8] In short, the evidence of defendant's guilt, both on the question of proximate cause and on the question of culpability, is ample. Such being the case, any error in giving the instruction in question was harmless. *People v. Fuller*, 216 Cal. 81, 94, 13 P.2d 689; *People v. Salorse*, 62 Cal. 139, 144; *People v. Andrew*, 43 Cal.App.2d 126, 131, 110 P.2d 459; *People v. Shellenberger*, 25 Cal.App.2d 402, 407, 408, 77 P.2d 506; *People v. Montoya*, 17 Cal.App.2d 547, 550, 62 P.2d 383; *People v. Weaver*, 96 Cal.App. 1, 12, 274 P. 361.

The decisions cited by defendant on this point are readily distinguishable from the present case. Those cases involved instructions on matters vital to the defense of the accused, and dealt with situations where the evidence for and against guilt was closely balanced, or where, had the erroneous instruction not been given, a different verdict would have been returned.

In the present case, the instruction may be said to come fairly within the issues raised. It deals with an incidental as distinguished from a fundamental question, and in the light of other instructions it would not have a tendency to mislead the jury, particularly not in the respect urged by defendant. The case is not a close one from any impersonal view; and we are satisfied that if this instruction had not been given the jury still would have returned the same verdict. This being true, we are of the opinion that no miscarriage of justice has resulted within the meaning

of section 4½ of Article VI of the Constitution.

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.



HAMILTON v. ABADJIAN et al.

Civ. 15200.

District Court of Appeal, Second District,
Division 1, California.

Aug. 16, 1946.

Rehearing Denied Sept. 13, 1946.

Hearing Granted Oct. 14, 1946.

1. Appeal and error ⇐930(1)

Appellate court, in reviewing verdict and judgment in favor of plaintiff based on conflicting evidence, must indulge all inferences favorable to plaintiff.

2. Gaming ⇐49(3)

Evidence supported judgment for recovery by hotel's assignee of money received by guest on check cashed by hotel after guest had completed gambling operations and was leaving hotel, payment of which had been stopped by guest. Pen. Code, § 330.

3. Gaming ⇐49(3)

Evidence established that all but \$1,000 of proceeds of checks cashed for guest by hotel was lost by guest in gambling in hotel casino, and hence hotel's assignee could recover only \$1,000 on such checks, payment of which was stopped by guest. Pen. Code, § 330.

4. Gaming ⇐6

The game of blackjack or twenty-one is specifically prohibited by statute. Pen. Code, § 330.

5. Contracts ⇐138(1, 6)

Courts will not entertain an action in affirmance of an illegal contract, even though defendant does not object on ground of illegality, waives such objection, or expressly consents that such illegal contract may be enforced.

6. Contracts ⇐138(3)

Where money or property is lost in a transaction which is prohibited by law, neither of the parties to transaction has any standing in a court of law or equity to recover his losses.

Appeal from Superior Court, Los Angeles County; Harry B. Archbald, Judge.

Action by A. K. Hamilton against Irene Abadjian and others to recover money advanced on checks cashed by plaintiff's assignor. Verdict and judgment for plaintiff, and defendant O. Abadjian, individually and doing business as General Produce Company appeals.

Judgment reversed with directions.

Marcus L. Roberts, of Los Angeles (Joseph R. Vaughan, of Los Angeles, of counsel), for appellant.

Tripp, Callaway, Sampson & Dryden and DeWitt Morgan Manning, all of Los Angeles, for respondent.

YORK, Presiding Justice.

This action was brought by A. K. Hamilton, as assignee of Hotel Securities Co., owner and operator of the Hotel El Rancho Vegas at Las Vegas, Nevada, to recover the sum of \$11,450 which was advanced by the hotel when it honored six bank checks presented by the defendant O. Abadjian for encashment while a guest at the hotel over the weekend of August 12, 1944. Admittedly, plaintiff is not a holder in due course.

From a judgment on the verdict in favor of the plaintiff for \$5,000, defendant O. Abadjian prosecutes this appeal.

It appears from the record herein that on the weekend in question, appellant arrived on Friday and left on Sunday night; that continuously during that period he was playing "Blackjack" or "Twenty-One" and in connection therewith he presented to the hotel through its cashiers the six checks, five for \$2,000 each, and one for \$1,450, which were introduced in evidence as Plaintiff's Exhibits Nos. 2, 3, 4, 5, 6 and 7, respectively.

It was stipulated that the checks were signed by the appellant given to the hotel

and that they were not paid because payment of them was stopped.

With respect to checks 3, 4 and 5, respondent's witnesses could not recall whether cash was given to appellant for these checks or not, but appellant testified that he received chips with which to continue his game. However, it is obvious that the jury gave no recovery on these three checks.

[1,2] As to checks 2, 6 and 7, they total \$5,450. The trial court instructed the jury as a matter of law that the plaintiff could not recover \$450, that portion of check 7 which was admittedly in payment of a pre-existing gambling debt; hence, the \$5,000 verdict represents a recovery of \$2,000 each on checks 2 and 6, and \$1,000 on check 7. Both respondent's witnesses and appellant gave direct testimony as to the circumstances surrounding the presentment and encashment of checks 2, 6 and 7, respondent's witnesses testifying that they paid cash for them, and appellant testifying that he received chips. Appellant admits, however, that the "evidence as to the nature of the transaction is in direct conflict and indulging all inferences favorable to plaintiff, as we must, it will not be argued that the evidence is insufficient to support the verdict and the judgment insofar as it runs to check No. 7."

Appellant urges that the verdict and judgment as to checks 2 and 6 are wholly unsupported by the evidence and directly violate the law of the case. In this connection, he asserts that the trial court ably instructed the jury as to the law of the case as follows: "You are instructed that it is immaterial whether or not the plaintiff's assignor gave the defendant money or chips in exchange for the checks herein involved, if you find that the plaintiff's assignor knew or had reasonable ground to believe or know that the money so given to defendant O. Abadjian was to be used for gambling purposes in its gambling casino. It is against the policy of the law and violates good public morals to allow or encourage the practice of gambling. For this Court to enforce payment of checks given by a loser to a winner or lender in a gambling transaction where the person advanc-

ing the moneys knew or reasonably should have known that such moneys were to be used for gambling in his gambling casino would be to encourage such vice and be contrary to the public policy of this state. Hence, this Court, and the laws of this state, will lend no aid to plaintiff or plaintiff's assignor to collect payment of checks given for such a gambling loss. Thus if you find that plaintiff's assignor knew or had reasonable cause to believe that the money advanced by them to defendant O. Abadjian was to be used in connection with gambling activities in its gambling casino, then you will return your verdict for the defendant O. Abadjian and against the plaintiff."

With respect to check 2, the witness Val Sneed testified that he was an assistant manager of the hotel; that occasionally he dealt cards in gambling games; that the first night appellant arrived, the witness dealt cards to him; that according to his best recollection check 2 was written at the gambling table; that all of that check except the signature was in the witness' handwriting; that his name was on the check, he having okayed the same; that appellant received cash for check 2; that the witness could not recall whether he took chips to the table for this first \$2,000; that when appellant left the gambling casino Friday night, he had lost all the chips purchased with said \$2,000, and that the witness was at the blackjack table when appellant lost this first \$2,000.

The witness Charles W. Cole, an assistant manager of the Hotel El Rancho Vegas at the time in question, testified that he was present when check 2 was cashed; that appellant received cash therefor in the casino; that Mr. Val Sneed got the money from the casino cage and delivered it to appellant; that the witness saw the money taken to appellant who was then seated at the gambling table.

As to check 6, the witness Sneed testified that he could identify it; that it first came to his attention when the game started on Sunday between 11:00 and 12:00 noon; that appellant was at the gaming table when he wrote that check; that appellant received \$100 bills in exchange for it and

the witness was present when appellant so received them; that the witness himself brought the money to appellant at the table and that the gambling probably started immediately; that although he could not recall whether appellant started to play or not, he was quite sure that appellant played because he cashed the check for him.

With respect to check 6, the witness Cole testified that he was present when it was cashed and that Mr. Sneed took the money to appellant who was then seated at the gambling table.

Appellant urges that the evidence adduced with regard to these two checks, 2 and 6, is subject to no inference other than that respondent advanced the sum represented thereby for the purpose of inducing gambling and with the intent that the sum be so used; that it was so used; that respondent's participation in the illegal transaction is acknowledged, and therefore, the entire transaction, "being bound up in the illegality, no verdict for recovery can be upheld."

Respondent argues that "the real point is not whether * * * the person securing the money did use the money for gambling purposes, but whether he could have used it for some other purpose if he had so desired. In other words, if money be advanced upon the sole condition that it be used for gambling, the transaction is void, but if it be advanced with the mere knowledge that it may be used for gambling, although the person to whom it is advanced may use it for other purposes, the person to advancing the money may thereafter recover the same."

In accordance with such theory, respondent's witnesses testified that no restrictions were ever placed by the hotel on the use of the money derived from the cashing of a check by its cashiers, nor was a customer of the hotel required to promise that he would gamble with the proceeds of any check cashed. No questions were asked respecting what the customer intended to do with the money, and so far as the hotel was concerned, a customer could use the proceeds of a check cashed by the hotel for any purpose that he desired, i. e., gambling, any of the other facilities of the

hotel, or "take the money and go home." The witness Sneed also testified that in a conversation with appellant the latter admitted to him that he had lost \$2500 in another gambling establishment in Las Vegas during the weekend in question. Said witness also testified that appellant received \$1,000 in cash from the hotel in return for check 7, after he had finished gambling and just before his departure from the hotel on Sunday night.

[3-5] There is not the slightest doubt that the money represented by the checks here in question was lost at the gaming table with the exception of the \$1,000 which the evidence discloses was received by appellant after he had completed his gambling operations and was departing from the hotel. The game of "blackjack" or "twenty-one" is specifically prohibited by section 330 of the Penal Code, and as stated in *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 88 P. 708, 710, 9 L.R.A., N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609, an action to recover on promissory notes given to evidence an alleged indebtedness for money lost by the payor to the payee at a gambling game in a gambling house; "There is no better settled rule of law than the one to the effect that the courts will not entertain any action in affirmance of an illegal contract. As was said in *Hill v. Kidd*, 43 Cal. 615: 'It is equally well settled that no action in affirmance of an illegal contract can be maintained. When parties make such contracts they must rely upon the good faith of those with whom they deal for their performance, and that failing they are denied all redress.' See note to *Chateau v. Single*, 114 Cal. 91 [45 P. 1015, 33 L.R.A. 750], 55 Am.St.Rep. [63] 66. This universally acknowledged rule is not based upon any consideration for the party against whom the relief is sought, and who will be benefited by the refusal of the court to grant the same, but upon considerations of sound public policy. As said in *Kreamer v. Earl*, 91 Cal. 112, 118, 27 P. 735, 'it is not for the sake of the party who is benefited by the intervention, but for the sake of the law itself,' that a court refuses to allow the law and the machinery of the court to be made use of for the en-

forcement of illegal contracts, and leaves the parties precisely where it finds them, under the rule expressed in the maxim, 'ex turpi causa non oritur actio.' It is, therefore, settled that the failure of the party against whom such relief is sought to make objection upon the ground of illegality, or the waiver of such objection by him, or even his express consent that the court may enforce such illegal contract, will not justify a court in enforcing the same. The illegality appearing, the court will sua sponte withhold all relief."

[6] In the recent case of *Wallace v. Opinham*, Cal.App., 165 P.2d 709, 711, it was stated: "The California cases are uniform in holding that where money or property is lost in a transaction between the parties which is prohibited by law, neither of the parties has standing in a court of law or equity to recover his losses. *People v. Rosen*, 11 Cal.2d 147, 150, 78 P.2d 727, 116 A.L.R. 991; *Johnston v. Russell*, 37 Cal. 670; *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 88 P. 708, 9 L.R.A., N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609; *Bank of Orland v. Harlan*, 188 Cal. 413, 421, 205 P. 75; *Schur v. Johnson*, 2 Cal.App.2d 680, 683, 38 P.2d 844; *Brooks v. Brooks*, 63 Cal.App.2d 671, 676, 147 P.2d 417; *Asher v. Johnson*, 26 Cal.App.2d 403, 411, 79 P.2d 457."

In the same case at page 710 appears the following: "No California statute authorizes a party to an illegal transaction which is prohibited by law to recover gambling losses, regardless of the fact that one of them may have been the victim of fraud or deceit with respect to some incident of that illegal transaction. It has been frequently decided that courts will not become arbiters of incidental acts of participants in gambling games which are prohibited by law. All persons who are concerned in or who aid or abet the commission of either a crime or a misdemeanor, are deemed to be principals therein. Penal Code, § 31. Public policy prompts courts to decline to distinguish between degrees of turpitude of parties who engage in outlawed transactions. Otherwise courts might be compelled to decide which party cheated the most."

For the reasons stated, the judgment is reversed with directions to the trial court to enter a judgment for \$1,000 in favor of respondent; appellant to recover costs.

DORAN and WHITE, JJ., concur.



**SAN DIEGO COUNTY v. CALIFORNIA
WATER & TELEPHONE CO.**

Civ. 3613.

District Court of Appeal, Fourth District,
California.

Aug. 29, 1946.

Rehearing Denied Sept. 24, 1946.

Hearing Granted Oct. 24, 1946.

1. Trial ⇨404(2)

Where findings of trial court were based on facts not in dispute finding that the acts of county board of supervisors in connection with easements were ultra vires, void, and unenforceable, and that no estoppel arose from the facts stated, finding was a conclusion of law.

2. Highways ⇨73

Where there was a relocation of a portion of highway included within grant of easement, and an alteration of the existing road, there was an implication of a discontinuance of portions of highway which did not come within newly assigned limits and that those portions had been abandoned. Streets and Highways Code, § 960.1.

3. Dedication ⇨65

Highways ⇨120(4)

Where temporary easement was granted county on condition of reversion on completion of permanent highway, on non-user for 6 months and 90 days after notice of grantor's intention to construct dam, the conditions were binding, and a reversion resulted on failure of county to perform after acceptance of easement with full knowledge, and county should not be permitted to retain easement and recover damages for flooding of the land granted there-

under without complying with agreement to locate and establish a road higher up. Streets and Highways Code, § 960.1.

4. Highways ⇨73, 79(1)

Under the Streets and Highways Code, the board of supervisors may summarily vacate and abandon any portion of a county highway, which portion has been superseded by relocation, and the presumption is that the portion of road which was relocated was abandoned. Streets and Highways Code, § 960.1.

5. Dedication ⇨33

Highways ⇨79(1)

The county had the power to accept an easement which was a relocation of existing road and the power to summarily abandon the portion superseded by the relocation. Streets and Highways Code, § 960.1.

6. Dedication ⇨33

The board of supervisors has authority to accept easements which were temporary in character, the main consideration for which was the completion of a future permanent road. Streets and Highways Code, § 960.1.

7. Dedication ⇨65

Highways ⇨120(3, 4)

Equity would not permit board of supervisors to retain easements free from forfeiture and waiver of damage clauses, and enjoin grantor from flooding land over which the easements were given, nor permit the board of supervisors to recover damages resulting from such flooding. Streets and Highways Code, § 960.1.

8. Estoppel ⇨62(1)

A municipality or other governmental agency may be estopped as right and justice may require, where the act or contract relied on to create the estoppel was within its corporate powers although the method of exercising the power was irregular or unauthorized.

9. Estoppel ⇨62(3)

Where a county purported to bind itself either by contract or by conduct to do something within its general powers and a third party acts thereon to his prejudice, with full knowledge of the county, the latter

may be estopped to question the binding effect of its commitments or conduct or to object to the acts done by the third party in reasonable reliance thereon.

10. Estoppel ⇨62(3)

Where county had accepted easement containing reversionary and waiver of damage clauses and remained silent for approximately one year after knowledge of the beginning of work on dam which would result in damage to county, and during which time \$800,000 had been expended by grantor, county was estopped in equity suit from claiming permanent ownership rights in the easements conveyed free from any condition, and should not be authorized to recover damages from the construction of such dam.

11. Estoppel ⇨62(3)

County was estopped to repudiate burdens of forfeiture, reverter, and waiver of damage clauses, where it retained and asserted full rights to the benefit of the easements granted. Civ.Code, §§ 1589, 3521.

12. Equity ⇨65(1)

Court of equity acts only as conscience commands and, if the conduct of plaintiff is offensive to the dictates of natural justice, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by County of San Diego against California Water & Telephone Company to restrain the defendant from flooding a certain county road because of the impounding of water in a reservoir to be formed by means of a dam under construction by defendants. From a judgment for plaintiff, the defendant appeals.

Judgment reversed.

Claude M. Rosenberg and Bacigalupi, Elkus & Salinger, all of San Francisco, and P. S. Thacher, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., Frank T. Dunn, Asst. Dist. Atty., and Carroll H.

Smith, Chief Trial Deputy, all of San Diego, for respondent.

GRIFFITH, Justice.

The plaintiff, County of San Diego, instituted this action against defendant, California Water and Telephone Company, a corporation, to enjoin the latter from flooding a certain county road because of the impounding of water in a reservoir to be formed by means of a dam which was under construction by defendants at the time this action was commenced. The case was submitted upon a stipulation as to the facts. Defendant, by way of affirmative defenses, alleged the existence of facts, which were conceded to be true in the stipulation, by which facts defendant contends that plaintiff was estopped to deny the right of defendant to flood the roadway involved, or to claim damages therefor. It is further contended that plaintiff has failed to do equity and that it therefore was not entitled to equitable relief. These contentions are urged upon the ground that defendant constructed the dam in reliance upon a continuous and consistent course of conduct by plaintiff over a period of years whereby plaintiff represented, agreed and led defendant to believe that the county would relocate the county road so as to obviate any possibility of the flooding thereof upon construction of the dam.

The admitted facts of the pleadings and the statement of facts show that for over 25 years the county maintained a public road from the city of El Cajon to the town of Descanso, which was designated as road F-8. Between these two places the road crosses the Sweetwater River and Peterson Creek. Plaintiff maintained, since 1910, a bridge called Sacatara Bridge, across the Sweetwater River, and also one across Peterson Creek, which is tributary to the Sweetwater River. The Peterson Bridge was washed out on several occasions. On October 19, 1931, the Board of Supervisors adopted a resolution reciting that the Sacatara Bridge was unsafe to carry the maximum load permitted vehicles under the California Vehicle Act, St.1923, p. 517, and that "if a proposed dam on the Sweetwater River south of said bridge is constructed, it will be necessary to change the location of

said bridge, rendering it not advisable to rebuild or repair said bridge at this time * * *." On November 3, 1938, over seven years later, the then road commissioner of the county wrote a letter to defendant company stating that the county proposed "to make certain improvements on the road to Japatul" (road F-8) which project included the construction of a new bridge across the Sweetwater River; that the county was seeking to acquire new rights of way along this road and was applying to the defendant for such right of way across its property. The letter further stated that the easement was requested as a "temporary right of way" for the purpose of reducing the curvature along the portion of the then existing road east of the Peterson Bridge, and was to serve until such time as it became necessary to build a permanent line higher up to follow the high water contour of the proposed new dam on the Sweetwater River. A map was enclosed showing the temporary right of way sought and the "future permanent road" proposed. On August 29, 1938, the county had appropriated funds with which to construct the bridge referred to in the letter of November 3, 1938. The requested easement (No. 1) was granted by defendant and was dated November 26, 1938. It contained the following recitations:

"* * * for and in consideration of One (\$1.00) Dollar * * * and * * * by reason of the location and establishment by the County * * * of a public highway upon, over and across said lands," defendant signified its approval and consent to the temporary location and construction of such highway thereon. It granted, and dedicated, subject to restrictions expressed, a temporary right of way 60 feet wide, containing 4.726 acres and the grantor waived all claim for any compensation or damages on account of the location and construction thereof. It then provided that said right of way and all interest of the county shall revert to the grantor (1) upon the County's completion of the permanent highway which shall replace the temporary highway; (2) in the event the county shall cease to use it for a period of six consecutive months; and (3) 90 days after the owner shall have delivered

to the county written notice of said owner's intention to construct a dam on the Sweetwater River below the thereafter described property, and the county by the acceptance of this easement, agreed to the conditions of reversion and that the owner shall not be liable to the county for any claim of damages connected with the building of said dam. The above-mentioned temporary easement was accepted and ordered recorded by formal resolution on December 12, 1938. On April 20, 1939, the defendant company wrote the plaintiff stating: "With reference to the flow line elevation of the dam and reservoir proposed to be constructed at Sweetwater Falls at some future date, you are advised that two plans have had serious consideration"; that under one plan the spillway lip elevation would be 1355 feet and under the other it would be 1375 feet, but that in either case it would be reasonable to allow for a ten-foot flood crest, making the respective elevations 1365 feet and 1385 feet. It was stated further that inasmuch as "there is no definite information as to the time when construction of either of these will begin, * * * it is suggested that your department give consideration to constructing its highway and bridge over the river at approximately elevation 1400 * * *."

On May 8, 1939, the defendant company, according to a request from the county, tendered to it a temporary easement (No. 2) of right of way (executed April 29, 1939) over its property on road survey No. 631, which was a new right of way not covered by nor directly involved with road F-8. It contained similar provisions in reference to reversion and waiver of damages.

On June 22, 1939, the district attorney advised the plaintiff by letter that the original plan was to construct a bridge at an elevation of 1365 feet to provide for a contemplated dam to be built by defendant; that subsequently the company was notified that the bridge could not be built at the approximate elevation of 1400 feet and that the Road Commissioner was of the opinion that the cost at that elevation was prohibitive, and further that the easement should not be accepted in its present form due to certain provisions contained therein with ref-

erence to reversion and waiver of damages. By order of the Board of Supervisors the easement was refused and returned to the defendant with notice of such action.

On November 8, 1939, by resolution, the Board of Supervisors authorized the preparation of plans and specifications for the building of the Sacatara Bridge across the Sweetwater River on county road number F-8, upon the present alignment.

By resolution dated July 22, 1940, the plans for said bridge were approved, it being recited in the resolution that said plans "provide for the construction of a wood Howe Type truss bridge on concrete pier, the type of design having been decided upon because of the high salvage value of the superstructure in the event the Sweetwater Water Company elects to construct a dam in the vicinity of said crossing". The construction of the bridge was started in July, 1940, and finished in 1941.

On January 5, 1942, plaintiff, by resolution, accepted from defendant company and recorded an easement (No. 3) dated 12/19/41, for a new westerly approach road to the Sacatara Bridge. It was 60 feet wide and followed the general line of road F-8 up to a point about 2400 feet west of the Sacatara Bridge. The new road over the easement conveyed by (No. 3) left road F-8 (which was a part of road survey No. 277 and also the approximate location of old survey No. 59) and was a relocation of a portion of road F-8, and ran over and upon road survey No. 631, which has been designated as "proposed relocation," for a distance of approximately 2,000 feet, and thence on an easterly course to the approach of the Sacatara Bridge. This easement was not designated as a temporary easement but contained a provision that the right of way was granted subject to reversion to grantor in event the grantee "shall at any time for a period of six months fail or cease to use any of the rights herein granted, conveyed and/or dedicated in respect to the herein-described lands or any portion thereof, or in event that grantor should at any time construct, enlarge or raise a dam which would result in the flooding at any time of the year of any portion of said right of way * * *" and grantee will have no further right or

interest therein or in or to said lands or any portion thereof "or any claim for damages for the flooding of said lands or any portion thereof or for any other reason."

On June 18, 1943, defendant wrote plaintiff requesting that a certain road be lowered and widened "so that equipment to be used in connection with the proposed construction of a dam * * * may be moved over it." On June 25, 1943, defendant wrote plaintiff thanking it for the promptness in starting the work.

On September 29, 1943, defendant wrote plaintiff advising it that the company had started the construction of a dam and that it may result in flooding of a portion of the right of way granted under Easement No. 1, and that the easement provided that in the event of flooding, all rights therein granted plaintiff would revert to the grantor, and that "We will be glad to cooperate in any way that we may in the granting of a new easement, that will not be flooded by the construction of our dam."

On October 6, 1943, that letter was referred to the county counsel. On February 14, 1944, the Board met and a letter from the County Surveyor informed the Board that a field survey showed that the county road F-8 and the bridge built at Sacatara crossing would be flooded by the water to be impounded in the reservoir.

On September 6, 1944, a conference was held by agents of plaintiff and defendant. It was shown that defendant had already expended over \$800,000 toward the construction of the dam, and the company offered to grant to the county, without charge, an easement for the permanent road as proposed and surveyed by plaintiff, which was a proposed relocation of the old road F-8 at a higher level (road survey No. 631) which involves a distance of about 1500 feet. Plaintiff refused to accept the offer and contended that it held the easements free of any of the conditions of reversion or waiver of damage clauses, and instituted this equitable proceeding to have it so decreed. After trial and upon these agreed facts the trial court found that upon the completion of the dam a reservoir will be formed and the water will "back up, overflow and submerge a

portion of said highway F-8, and will overflow and submerge the Sacatara and Peterson bridges, and will * * * destroy the property of the plaintiff, to wit, a portion of said highway and the said two bridges without compensation unless * * * restrained by this court from so doing"; that the Board of Supervisors accepted easement (No. 1) for the purpose of realigning a portion of road F-8 as described therein; that the easement contained certain forfeiture, reverter and waiver of damage clauses, but that said clauses are not "binding or obligatory upon the plaintiff county"; that the Board of Supervisors was not authorized by law to accept or to consent to said forfeiture, reverter and waiver of damage clauses and that said clauses are of no force and effect; that said clauses constituted an attempt by the Board to abandon the county highway by contract, to surrender a county dominion and control over its streets and highways, and to make a gift of county property, not authorized by law; that defendant has not been misled to its prejudice or injury by any act, conduct or declaration of plaintiff relating to the construction of said dam.

The court then found that on December 19, 1941, defendant executed and delivered easement No. 3, and that the Board of Supervisors accepted it on January 5, 1942, for the purpose of relocating a portion of road F-8, and that said easement contained practically the same forfeiture, reverter and waiver of damage clauses as easement No. 1 above set forth, and that said clauses were not binding or obligatory upon the county for the same reasons heretofore mentioned.

Based upon these findings the court concluded that the acceptance by and consent of the Board of Supervisors to the aforesaid clauses mentioned in the easements constituted ultra vires acts on the part of the Board; that the County was not estopped to deny the validity of the clauses and not estopped to assert its rights in and to said highway and said bridges; that the flooding of plaintiff's highway and bridges by defendant will constitute a taking and damaging of plaintiff's property in violation of Article I, sec. 14 of the Constitution

of California, and that plaintiff is entitled to a permanent injunction forever restraining and enjoining defendant from taking, flooding or destroying or interfering in any way with County road F-8 or any portion thereof "or the Sacatara or Peterson bridges situated thereon, without first making just and adequate compensation to the plaintiff therefor." Judgment was entered accordingly.

[1] Since the facts upon which the findings are based are not in dispute, the finding of the court on the subject that the acts of the Board of Supervisors in connection with the easements are *ultra vires*, void and unenforceable, and that no estoppel arises from the facts stated, becomes a pure conclusion of law. *San Diego Trust & Savings Bank v. County of San Diego*, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416.

It is conceded by the plaintiff in its brief that if the forfeiture, reverter and waiver of damage clauses are valid and binding on the county "then there is an end to the litigation" but on the other hand, it is contended that if the clauses are null and void, then no estoppel can ever arise against the county.

[2] Easement No. 1 was but a "temporary location" of a 60-foot "temporary right of way" and it was thoroughly understood by all of the parties, at the time, that it was but a temporary easement. A part of the consideration for this temporary easement was the agreement of the county to locate and establish a new public highway upon defendant's lands at a higher level. The easement was merely for the purpose of "reducing the curvature along the portion of the then existing road." From the facts recited there apparently has been a relocation of a portion of highway F-8, included within the grant of easement, and an alteration of the existing road. Under such circumstances an implication is raised that there was a discontinuance of those portions of the highway which did not come within the newly assigned limits, and that those portions had been abandoned. 13 Cal.Jur. 334, sec. 26; sec. 960.1, Streets and Highways Code; *People v. Goodin*, 136 Cal. 455, 69 P. 85.

[3] The Peterson Bridge was erected on the north end of this easement (No. 1). The defendant granted the easement in good faith relying upon the plaintiff's agreement to relocate the road at a higher level. The temporary easement contained reversionary clauses that (1) it should revert to defendant when the County completed the permanent highway; (2) when the County ceased using it for six months; and (3) 90 days after defendant notified plaintiff that it intended constructing the dam. Notice was given under provision No. (3) and plaintiff refused to concede that the easement conveyed reverted. No moral reason appears why the temporary grant of the easement (No. 1), with the conditions of reversion so specified, should not be binding upon plaintiff, and a reversion effected for failure of plaintiff to perform after it had, by resolution, duly accepted the easement and caused it to be recorded, with full knowledge of the conditions and reversionary clauses. Under equitable principles, plaintiff should not now be allowed to retain said easement and recover damages for flooding the land granted thereunder without complying with its agreement to locate and establish a permanent road higher up.

This same argument applies to Easement No. 3. It was a complete relocation of a portion of road F-8. Although it was not designated as a temporary easement, it was given and accepted by the County with practically the same reversionary clauses.

[4-7] Under section 960.1 of the Streets and Highways Code, *supra*, the Board of Supervisors may *summarily* vacate and abandon any portion of a county highway, which portion has been superseded by relocation. The implication arises here that that portion of road F-8 which was relocated by easement No. 3 was abandoned. The County had the right and authority to so accept this new easement which was a relocation of the existing road F-8, and the right and authority to *summarily* abandon the portion superseded by the relocation. This did not constitute an *ultra vires* act, notwithstanding the finding of the trial court. The Board also had the authority to accept the two easements, which were temporary in character, the main consideration

for which was the completion of the "future permanent road." Equity will not allow the plaintiff to retain the easements free from the forfeiture and waiver of damage clauses, and by this action in equity enjoin the defendant from flooding the easements given. It should therefore not be held that the company must now pay plaintiff compensation for the resulting damage from the flooding of the land granted under such easements. It is a general rule that estoppel cannot operate against positive law, public policy or in aid of a contract which is expressly prohibited by constitutional or statutory provisions. 39 C.J.S., Highways, § 113, p. 1047, and cases cited; 7 Cal.Jur. p. 512, sec. 86; 18 Cal.Jur. p. 799, sec. 105.

Plaintiff relies mainly upon such cases as *Wills v. Los Angeles*, 209 Cal. 448, 287 P. 962, 69 A.L.R. 1044, which was a case where a strip of land was conveyed to the City for street purposes. A condition in the deed provided for the forfeiture of title in the event the same should be used for street railway purposes. It was held that such condition was *repugnant* to the grant and therefore void, leaving the grant in full and unrestricted operation.

[8] The converse of this doctrine is that a municipality or other governmental agency may be estopped as right and justice may require, where the act or contract relied on to create the estoppel was within its corporate powers, although the method of exercising the power was irregular or unauthorized. 31 C.J.S., Estoppel, § 144, p. 428, Note 78; *Miller v. McKinnon*, 20 Cal. 2d 83, 91, 124 P.2d 34, 140 A.L.R. 570; *Greene County v. Tennessee Eastern Electric Co.*, 6 Cir., 40 F.2d 184; 7 Cal.Jur., p. 515, sec. 88.

[9] Defendant does not question the principles of law or the authorities cited by plaintiff, because the County had the unquestioned right to relocate the existing road in the manner contemplated by it and, under the circumstances, if a county purports to bind itself, either by contract or by conduct, to do something within its general powers and a third party acts thereon to its prejudice, with full knowledge on the part of the county, the latter may

be estopped to question the binding effect of its commitments or conduct or to object to the acts done by the third party in reasonable reliance thereon.

[10] The County may not have been in a position to have been legally forced to proceed in accordance with its declared intention before defendant altered its position by commencing the construction of the dam. In view of the silence of the County for approximately one year after it knew that the work on the dam had actually commenced and during which period defendant expended over \$800,000 toward such construction, and since plaintiff actively participated in expediting the project, it must have known that defendant was relying on the agreement of the County and the terms of the reversionary and waiver of damage clauses in the easement. It surely cannot be held under these circumstances, that the company was not misled to its injury and prejudice. It further appears that the County would be greatly benefited by the building of the dam. Vast areas, now barren, might be put under cultivation; the assessment roll of the County would be greatly increased by the project; and public need for water in that area greatly outweighs the public need for the particular road here involved. The County can be and should be estopped, in this equitable proceeding, from claiming permanent ownership rights in and to the easements conveyed, free from any condition, and it should not be authorized by the decree to recover damages, in view of the course of conduct of both parties and the waiver of damage clauses agreed upon.

The case of *Times-Mirror Company v. Superior Court*, 3 Cal.2d 309, 44 P.2d 547, seems particularly appropriate to the facts in the instant case, which bear on the question of estoppel. That proceeding was instituted to require the Superior Court to proceed to trial with the condemnation proceedings which had been instituted by the City of Los Angeles to acquire valuable real estate owned by petitioner. The original case was tried and reversed on appeal. Thereafter the City filed a notice of abandonment of the proceedings to condemn plaintiff's building and fixtures. Relying upon the disclosed intention of the

City to condemn its building, petitioner erected a new one at great cost and equipped it with new machinery. It contended that the City was estopped to abandon the condemnation proceedings and the Supreme Court so held. After citing *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 P. 1002, it stated that the petitioner was justified in concluding that the City would complete its announced plans to condemn the old building and therefore it was bound by the rules of equity to prosecute the condemnation cause to final judgment.

Another case closely analogous to the instant one in principle is *McGee v. City of Los Angeles*, 6 Cal.2d 390, 57 P.2d 925, in which case it was stated that the facts constituted one of those exceptional situations recognized in the cases of *Times-Mirror Co. v. Superior Court*, supra, and *City of Los Angeles v. Cohn*, supra, where right and justice require the invocation of the principle of estoppel in pais in favor of a citizen or private party and against a municipality. See, also, *City of Los Angeles v. County of Los Angeles*, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; and *Pedro v. Humboldt County*, 217 Cal. 493, 19 P.2d 776, 777. In the latter case the plaintiff granted the County a deed to a strip of land for highway purposes. The deed, which the County accepted, provided that the County should maintain a certain ditch and construct a road from a cow barn to a field in the upper end of plaintiff's property. In holding that the County was bound to perform in accordance with the terms of the deed, the court said:

"Furthermore, it has been held that counties may not accept and retain the benefit of such conveyances and thereafter repudiate the reasonable burdens undertaken by them as a part of the consideration therefor (*Hill v. City of Oxnard*, 46 Cal.App. 624, 189 P. 825), and no good reason is suggested why that principle should not be applied in the present case."

[11] By application of the same theory, the plaintiff in the instant action is estopped to repudiate the burdens of the forfeiture, reverter and waiver of damage clauses, due mainly to the fact that it still retains and asserts full rights to the benefits of the

easements granted by defendant. *Tonini v. Ericcsen*, 218 Cal. 43, 21 P.2d 566; Secs. 1589 and 3521, Civ.Code.

[12] A court of equity acts only when and as conscience commands and if the conduct of the plaintiff be offensive to the dictates of natural justice then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. *Keystone Driller Co. v. General Excavator Company*, 290 U.S. 240, 54 S.Ct. 146, 78 L.Ed. 293; *Long v. Newman*, 10 Cal.App. 430, 435, 102 P. 534; *Bigelow v. City of Los Angeles*, 85 Cal. 614, 24 P. 778; 14 Cal.Jur. p. 175, sec. 3.

This sufficiently disposes of the issues presented by this equitable proceeding.

Judgment reversed.

BARNARD, P. J., concurs.



75 Cal.App.2d 846

Application of KECK et al.

KECK et al. v. LEVINGSTON et al.

SAME v. CYPRESS LAWN CEMETERY
ASS'N (LEVINGSTON, Intervener).

Civ. 12884, 13069.

District Court of Appeal, First District,
Division 2, California.

Aug. 29, 1946.

1. Dead bodies ⇌ 5

Under the Health and Safety Code, the superior court was without jurisdiction of a petition to remove cremated remains. Health and Safety Code, §§ 7526-7528.

2. Dead bodies ⇌ 5

In suit to remove the cremated remains from one niche to another, court will give due regard to the interest of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.

3. Appeal and error ⇨336(1)

Appeal of close friend of decedent from an order granting permission to remove cremated remains of decedent from one niche to another would not be dismissed although there was some doubt about legal right of appellant to maintain it.

4. Judgment ⇨577(2)

Where court was without jurisdiction of the subject matter, a recital in order denying petition that petitioner had not shown sufficient reason for the order was void, and not res judicata of any issue in the second action.

5. Courts ⇨40

Where court was without jurisdiction of subject matter, it could not validly adjudicate any fact other than its lack of jurisdiction.

6. Appeal and error ⇨1010(1)

Where next of kin convince a court of equity that a second plot in the same cemetery will furnish a more fitting resting place than the first, appellate court should not interfere with that determination where it rests upon substantial evidence.

7. Dead bodies ⇨5

In controversy concerning the right to remove the bodies of the dead to new places of interment, each case must be considered in equity on its own merits, having due regard to the interest of the public, the wishes of the decedent, the rights and feelings of those entitled to be heard by reason of relationship or association, the rights and principles of the religious body, or other institution, which granted the right to inter the body at the first place of burial, and whether consent was given to the burial in the first place of interment.

8. Dead bodies ⇨5

Evidence sustained order of trial court granting petition of closest surviving relatives to removal of cremated remains of decedent from one niche to another niche in the same columbarium, as against objections of a close friend of decedent.

Proceeding in the matter of the application of Ernest H. Keck and others for permission to disinter and remove the remains of Frederick Keck against Cypress Lawn Cemetery Association, wherein Babette M. Livingston intervened and objected, which objections were sustained, and subsequent suit by the same applicant against the same defendant, wherein there was a similar intervention and objection and a judgment for plaintiffs. From the order entered in the first case the petitioners appeal, and from the judgment entered in the second case the intervener appeals, and the appeals were consolidated for argument.

Order and judgment affirmed.

J. Harold Weise, of San Francisco, for intervener and appellant.

Smith & Smith, of San Francisco, for plaintiffs and respondent.

DOOLING, Justice.

Two separate appeals are consolidated for argument by stipulation of the parties.

The cremated remains of Frederick Keck were in 1932 interred in a niche in the columbarium in Cypress Lawn Memorial Park. In 1943 the cremated remains of the wife of William H. Warren were interred in the adjoining niche. Mr. Warren desiring to place his wife's ashes in the niche occupied by the ashes of Frederick Keck got in touch with the closest surviving relatives of the decedent Keck, two nieces and a nephew. Mr. Warren represented to them that he had arranged and paid for a perpetual weekly flower display for the niche in which his wife's ashes were interred, that the flowers could be more symmetrically displayed if her ashes were transferred to the niche occupied by the ashes of their uncle, and that if the transfer could be arranged he would also purchase and pay for a perpetual flower display for the niche to which their uncle's ashes would be transferred. The nephew and nieces acquiesced, and joined with Mr. Warren in filing a petition in the Superior Court for authority to transfer their uncle's ashes. This petition purported to be filed pursuant to section 7526, 7527, Health and Safety Code. At the hearing of the peti-

Appeal from Superior Court, San Mateo County; Andrew R. Schottky, Judge.

tion Babette M. Levingston appeared and opposed the granting of the petition. The court denied the petition upon the ground, among others, that the court was without jurisdiction of the subject matter under sec. 7528, Health and Safety Code. From this order the petitioners have appealed and that appeal is numbered herein 12,884.

[1] The order so appealed from must be affirmed since the court's determination of want of jurisdiction of the subject matter was correct. Sec. 7528 provides in part: "This article does not apply to * * * the removal of any remains from one plot to another in the same cemetery * * *." Sections 7526 and 7527 under which the proceedings were attempted is a part of the same article.

After the denial of this petition the same parties filed a suit in equity naming the Cypress Lawn Cemetery Association as defendant in which they prayed for a decree adjudicating their right to transfer the ashes of Frederick Keck from one niche to the other. Babette M. Levingston was granted leave to intervene in opposition to the complaint and after a trial the court entered its decree in favor of plaintiffs. From this order the intervener has appealed. No. 13,069.

Respondents in the latter appeal have moved its dismissal on the ground that appellant has no legal interest in the subject matter of the suit and no legal right to object to the removal of the ashes of Frederick Keck and is not a party aggrieved by the judgment appealed from. The appellant, Mrs. Levingston, is not related to the decedent but testified that she was a close friend of his during his lifetime.

[2, 3] In a proceeding for authority to remove the bodies of parents from one cemetery to another the court in *Re Winters*, 165 Misc. 226, 300 N.Y.S. 853, 855 quoting from *Yome v. Gorman*, 242 N.Y. 395, 152 N.E. 126, 47 A.L.R. 1165, said that in such cases the court will give "due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association." Giving due regard to the rights and feelings of appellant by reason of her close asso-

ciation with decedent we prefer not to dismiss her appeal, although there may be some doubt as to her legal right to maintain it.

[4, 5] In the order denying the petition first filed is found a recital "that the reason given for the removal is not a sufficient reason in the opinion of the court," and it is urged that this was *res judicata* in the second action. The court, as we have held, had no jurisdiction of the subject matter in the first proceeding. Having no jurisdiction it could not validly adjudicate any fact other than its lack of jurisdiction (*In re Estate of Palmieri*, 120 Cal. App. 698, 700-702, 8 P.2d 152; 21 C.J.S., Courts, § 118, p. 179) and the attempted adjudication of the merits of the petition was void (15 Cal.Jur., Judgments, sec. 141, p. 52). It cannot, therefore, be *res judicata* of any issue in the second action.

We are cited by appellant Levingston and amicus curiae to many cases from other jurisdictions which they claim support the rule that the remains of a decedent, especially at the instance of remote kindred, are not to be disturbed except for the gravest reasons. Our Supreme Court in *O'Donnell v. Slack*, 123 Cal. 285, 289, 55 P. 906, 907, 43 L.R.A. 388, said:

"The whole question is learnedly considered in *Ruggles' Report*, 4 Bradf.Sur. 503. The conclusions there reached are those which have been generally adopted by the courts of the land. One of those conclusions is 'that the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect.' Another is that 'such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.' And another, that 'the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.'"

It may be conceded that the statement about changing the place of sepulture is dictum since the question before the court in that case was the right of original interment. The legislature has, however, indicated its intention to give to certain classes of relatives the uncontrolled right of re-

removal, by section 7525, Health and Safety Code. These privileged relatives are the surviving spouse, surviving children, surviving parents and surviving brothers and sisters. "If the required consent cannot be obtained, permission by the superior court of the county where the cemetery is situated is sufficient." Sec. 7526, Health and Safety Code. "This article does not apply to or prohibit the removal of any remains from one plot to another in the same cemetery * * *," Sec. 7528, Health and Safety Code.

It is not to be thought that by the last quoted provision the legislature intended to put greater restrictions upon the removal from plot to plot in the same cemetery, but rather that it intended to indicate that transfer from plot to plot of the same cemetery was a matter of less moment which could more readily be effected.

[6] We feel satisfied without entering into an exhaustive review of the authorities from other jurisdictions that in the case of removal from one plot to another in the same cemetery if the next of kin can convince a court of equity that the second plot will furnish a more fitting resting place than the first an appellate court should not interfere with that determination where it finds substantial support in the evidence. The respondent Warren has bound himself by contract to purchase a perpetual floral tribute for the ashes of decedent Keck if they are removed from one niche to the other. The court has found that this perpetual service furnishes sufficient reason for authorizing the transfer. No disrespect is being shown to the ashes of the dead but instead a memorial of living flowers, periodically renewed, is being secured at the slight cost of moving his ashes the very short distance between one niche and its neighbor.

[7] It may be gathered from the cases that, while the courts have announced certain general principles governing the right to remove the bodies of the dead to new places of interment, "Each case must be

considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, the rights and feelings of those entitled to be heard by reason of relationship or association, the rights and principles of the religious body or other institution, which granted the right to inter the body at the first place of burial, and determining whether consent was given to the burial in the first place of interment." 15 Am.Jur. 844, quoted in *Cordts v. Cordts*, 154 Kan. 354, 118 P.2d 556, 558.

The court in that case adds:

"Not all of the authorities give the same order to the factors to be considered, and speaking generally, perhaps primary importance is given to the wishes of the deceased. With respect to reinterment, it has been said the same rules apply as to the original interment, but with a presumption against removal growing stronger with remoteness of connection with the decedent and reserving always the right of the court to require reasonable cause to be shown for it." Cf. *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 A. 878, 64 L.R.A. 179, 99 Am.St.Rep. 795; *Lavigne v. Wilkinson*, 80 N.H. 221, 116 A. 32; *Moore v. Sheaffer*, 282 Pa. 360, 127 A. 784; *Rivers v. Greenwood Cemetery*, 194 Ga. 524, 22 S.E.2d 134; *In re Winters*, supra, 165 Misc. 226, 300 N.Y.S. 853.

[8] Here neither the wishes of the decedent, religious principles, nor any rule of the cemetery association is involved and the primary considerations would seem to be the public policy requiring a proper respect for the bodies of the dead and the feelings and desires of those entitled to be heard by reason of relationship and association. The trial court has weighed those considerations and decided in favor of the propriety of the proposed removal.

Motion to dismiss appeal denied. Order and judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

JOHN P. MILLS ORGANIZATION, Inc., v.
SHAWMUT CORPORATION et al.

MILLS v. CUNNINGHAM.

Civ. 15197.

District Court of Appeal, Second District,
Division 1, California.

Aug. 16, 1946.

Hearing Granted Oct. 14, 1946.

1. Judgment ⇨1, 833

A judgment is "property", and like other property is subject to ownership, sale, transfer, and assignment. Civ.Code, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

2. Judgment ⇨ 1

Absolute ownership of a judgment carries with it the right of use, enjoyment, and management by the owner to the exclusion of all others. Civ.Code, § 14.

3. Constitutional law ⇨277(1)

A judgment being property, its ownership is protected by constitutional guaranty that no person shall be deprived of property without due process of law. Civ. Code, § 14; U.S.C.A.Const. Amend. 5.

4. Statutes ⇨190

The statute providing for enforcement of a judgment by leave of court after the lapse of five years from date of its entry being unambiguous is not open to construction. Code Civ.Proc. § 685.

5. Execution ⇨73

Whether the grounds for denial of a motion for execution more than five years after entry of judgment are sufficient is a matter of discretion with trial court. Code Civ.Proc. § 685.

6. Judgment ⇨855(1)

All intendments, as indicated by legislation relating to enforcement of judgments, are in favor of the judgment creditor and the advantage of the judgment. Code Civ.Proc. §§ 681 et seq., 685, 688.1.

7. Execution ⇨73

Since judgment debtor is free to satisfy judgment at any time, he cannot com-

plain of delay of judgment creditor in obtaining a writ of execution as ground for denying a motion for such writ after lapse of five years from entry of judgment. Civ. Code, § 3515; Code Civ.Proc. § 685.

8. Execution ⇨73

The statute providing for enforcement of judgment by leave of court more than five years after entry of judgment imposes no limitation on time within which motion for execution must be made and laches constitutes no defense to such motion. Code Civ.Proc. § 685.

9. Execution ⇨73

The statute making failure to state sufficient reasons for not obtaining execution within five years after entry of judgment a ground for denying motion for execution thereafter leaves the question of what such reasons may be to the judgment of trial court. Code Civ.Proc. §§ 685, 1858.

10. Constitutional law ⇨70(1)

Courts have no jurisdiction to read into statutes by interpretation anything that tends to extend, restrict, or modify the law. Code Civ.Proc. § 1858.

11. Execution ⇨73

Judgment debtor's affidavit, in opposition to motion for execution more than five years after entry of judgment against him and others, alleging that an officer or agent of judgment creditor assured him no effort would be made to enforce judgment against him, that no demand had been made upon him for payment of judgment, that he had never been examined in supplementary proceedings, that he had not attempted to conceal assets, and that judgment creditor was lacking in diligence, was unavailing to prevent issuance of execution. Code Civ. Proc. § 685; Civ.Code, § 3533.

12. Execution ⇨73

Where judgment creditor in support of motion for execution more than five years after entry of judgment presents honest, sensible, and logical explanation of failure to obtain execution within five-year period, court must issue the writ and failure to do so constitutes, as a matter of law, abuse of discretion. Code Civ.Proc. § 685.

13. Execution

Affidavit, in support of judgment creditor's motion for execution more than five years after entry of judgment alleging diligent, regular, and persistent investigation in effort to locate assets of judgment debtors and use by judgment debtor of dummies and trickery to cover his financial transactions, showed sufficient reason for failure to obtain execution within five years after entry of judgment, and hence denial of motion was an abuse of discretion. Code Civ.Proc. § 685.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action on promissory notes by John P. Mills Organization, Inc., against Shawmut Corporation and others, wherein final judgment was entered against defendant corporation and a number of its stockholders. From an order denying plaintiff's motion for writ of execution against George Cunningham, one of defendant stockholders, more than five years after entry of the judgment, John P. Mills appeals.

Order reversed with direction to grant plaintiff's motion.

A. G. Reily and W. R. Law, both of Los Angeles, for appellant.

I. Henry Harris, Jr., of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order denying plaintiff's motion authorized by section 685 of the Code of Civil Procedure.

Section 681 of the same code provides that a writ of execution for the enforcement of the judgment may issue within five years. Section 685 provides for the writ of execution after the five year period, "by leave of the court."

The within action was reduced to final judgment in 1927. It was an action on promissory notes against the corporation and a large number of its stockholders. Respondent herein was one of the stockholders. In May 1945, appellant obtained an order to show cause why an execution should not issue; a restraining order also

issued. After a hearing, the motion was denied; the restraining order remains in effect.

John P. Mills, as president of the corporation that obtained the judgment against defendant Shawmut Corporation and its stockholders, including respondent, filed the following affidavit in support of the motion:

"That he is acquainted with all the facts as regards the judgment heretofore entered herein and that, as president of the plaintiff corporation, and its general manager, he assigned the task of following the judgments and the investigation hereof to Wells A. Rathbun, secretary-treasurer of plaintiff corporation, with instructions to investigate and report to affiant at regular intervals of six months after entry of judgment.

"That as president of plaintiff corporation, affiant directed that full and detailed reports from the secretary-treasurer and from W. I. Gilbert, plaintiff's attorney, be presented semi-annually to the Board of Directors of plaintiff corporation, showing the financial condition of the judgment debtors herein, and particularly the details of the investigation made of each judgment debtor within the six-months period preceding each regular report; that members of the office staff of W. I. Gilbert, Mr. Gilbert, himself, Mr. Wells A. Rathbun and various private investigators over the period of years since entry of judgment, made the regular and diligent investigation of the judgment debtors as required of them by affiant for the purposes of said regular reports to the plaintiff's Board of Directors; that affiant has personal knowledge of the foregoing facts and personally presented said regular reports at meetings of said Board of Directors.

"That upon the death of W. I. Gilbert and Wells A. Rathbun, affiant personally continued said investigation of the judgment debtors herein and faithfully and diligently continued said investigations each six-month period as before; that in each instance said investigation revealed no assets subject to levy, although many new addresses, positions and possibilities were discovered; that each of the judgment

debtors is an experienced and astute business man, each having been stockholders in defendant corporation, and each clever and learned in the art of covering assets to defeat the judgment herein; that process for examination of the judgment debtors would have, in the opinion of this affiant and according to advice of plaintiff's attorney, W. I. Gilbert, informed said judgment debtors that regular investigations of them were under way and served as notice upon them that their actions of evasion, be more guarded, intense and complicated; on this opinion and advice such examinations were discarded in favor of the regular investigations herein mentioned.

"That such investigation and discreet inquiry have now met with success in the location of certain assets belonging to the judgment debtor, George Cunningham; that the information leading to the discovery of said assets has developed over a period of years and could not have been developed without regular and diligent inquiry; that at no time has plaintiff, its agents or servants been dilatory, negligent or haphazard in the conduct of regular inquiry, investigation and surveillance of the judgment debtors herein; that on the contrary, plaintiff, its agents and servants have been persistent, extremely diligent, regular and unceasing in their efforts to locate assets of the judgment debtors, since the date of entry of judgment to date hereof;

"Wherefore, affiant prays that execution be issued as to the defendant, George Cunningham whose assets have now been located."

The motion was also supported by the affidavit of one J. F. Taylor, which is as follows:

"J. F. Taylor, being duly sworn, deposes and says:

"That he is an investigator in the employ of A. G. Reily, attorney for creditor herein; that he has made a thorough examination of the financial transactions of the defendant, George Cunningham; that since the entry of the judgment herein, the defendant George Cunningham has used a 'dummy' to cover his major financial transactions in an attempt to defraud the credi-

tor herein; that during the lifetime of his wife, the said George Cunningham frequently 'used' her as his 'dummy' for the purpose of banking his monies and covering assets which in truth and in fact were his own.

"That more recently he used as a 'dummy' his friend, one William Welker Selby for the purpose of defrauding the creditor herein by covering his assets in the name of said Selby, when in truth and in fact said assets were the sole property of the defendant and judgment creditor herein, George Cunningham.

"That on or about October 1, 1943, the defendant George Cunningham was the rightful owner of premises located at 2027 Victoria Avenue in the City of Los Angeles and that he 'used' William Welker Selby as 'dummy' to cover his ownership of the said property described as Lot 14, Block 2, Tract 2072; that on or about October 4, 1943, one Mable G. Blanche and/or Catherine R. Ruppe, opened and entered into an escrow with the said Selby and George Cunningham himself, who signed the escrow instructions under an alleged 'power of attorney' for Selby; that the escrow was handled by the Bank of America, 54th & Crenshaw Branch, being Escrow #2245; that Cunningham represented himself as the 'true' owner of said property to said buyer and to the escrow manager, Mrs. Jacobson; that Cunningham received the proceeds from the sale of said property, all as evidenced by Bank of America Cashier's Check #3122949, dated December 17, 1943, for the sum of \$6,619.00; that said check was made payable to William Welker Selby, the 'dummy' of Cunningham and endorsed over to Cunningham who then placed the same to his credit by either cashing or depositing same at the Security-First National Bank, Fifth & Spring Office, on January 27, 1944; that a photostatic copy of said Cashier's Check, both sides thereof, is attached to this original affidavit and is made a part hereof.

"Affiant has also checked other transactions of said George Cunningham and found that he used a 'dummy', particularly one certain escrow transaction in the City of Alhambra; that affiant is informed and

believed, and therefore alleges that ever since the entry of judgment herein, said Cunningham has 'covered' his assets by the use of 'dummies', trickery, ruse and fraud." A photocopy of the check referred to appears as part of the affidavit.

Respondent's affidavit in opposition to the motion set forth a history of the litigation that resulted in the judgment. The following also appears in said affidavit:

"However, after the rendition of the judgment against this defendant, your affiant, and other defendants named therein, the said Captain Manaires, an officer or agent of the plaintiff corporation, assured your affiant and C. E. Kenyon, one of the codefendants, that no effort would be made to collect the judgment against them. In reliance upon such statement and the further fact that no demand or request has ever been made to pay the judgment from the date of its entry until the date of service of this Motion, and your affiant has never been examined in supplementary proceedings, your affiant has never considered and does not now consider that he is liable for said judgment, or any sum or sums due thereunder." Any attempt to conceal assets is denied and laches as well as a lack of diligence, are also averred.

The trial court denied plaintiff's motion; and it is contended on appeal that such denial was an abuse of discretion. Respondent contends to the contrary and urges in support of such contention that, inasmuch as there was no showing of "due diligence", the motion was properly denied. Respondent relies on *Butcher v. Brouwer*, *Beccuti v. Colombo Baking Co.*, and *Hatch v. Calkins*, hereinafter referred to.

The following cases are concerned with writs of execution authorized under section 685 of the Code of Civil Procedure. *Mohr v. Ricconi*, 14 Cal.App.2d 416, 58 P.2d 659; *Corcoran v. Duffy*, 18 Cal.App.2d 658, 64 P.2d 735; *Peers v. Stoll*, 32 Cal.App.2d 511, 90 P.2d 119; see also *Troendle v. Clinch*, 74 Cal.App.2d 480, 169 P.2d 55, and three decisions by the Supreme Court, namely, *Butcher v. Brouwer*, 21 Cal.2d 354, 132 P.2d 205; *Beccuti v. Colombo Baking Co.*, 21 Cal.2d 360, 132 P.2d 207; *Hatch v. Calkins*, 21 Cal.2d 364, 132 P.2d 210.

The pertinent parts of sections 681 and 685, herein considered are as follows:

"§ 681. The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

"§ 685. In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, *upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.*" (Italics added.)

That portion of section 685 in italics was added by amendment in 1933 and all of the cases cited above are particularly concerned with section 685 as amended in 1933. *Peers v. Stoll*, [32 Cal.App.2d 511, 90 P.2d 121] contains a brief history of the legislation here considered and sets forth the 1933 amendment of section 685 in italics. It is then pointed out that, "The portion not italicized should be construed as the law since 1895 and the portion italicized should be construed as stating the law since August 21, 1933." Thus, the opinion not only shows that the law was in fact changed in 1933, but also shows the change. The opinion continues, "under the statute as enacted in 1895 there is a long line of decisions to the effect that said statute did not provide a time limit." And, with regard to the subject of "time limit," concludes that, "A comparison of the enactment in 1933 with the enactment in 1895 shows no change of *intention* on the part of the legislature." (Italics added.) Apparently, Mr. Justice Sturtevant, the author of the opinion, referred to the subject of discretion and meant that the legislature, notwithstanding the 1933 amendment, left the discretionary power of the court undisturbed. However, the Supreme Court in *Butcher v. Brouwer*, *supra*, 21 Cal.2d at page 358, 132 P.2d 206, commented on the *Peers v. Stoll* case, *supra*, as follows:

"On three occasions the District Courts of Appeal have passed upon the effect of the 1933 amendment. In *Peers v. Stoll*, 32 Cal.App.2d 511, 90 P.2d 119, the court held that the Legislature intended no change in the law under the amendment. That case is therefore disapproved."

In *Mohr v. Riccomi*, supra [14 Cal.App. 2d 416, 58 P.2d 660], the court, referring to the 1933 amendment, used the following language:

"We see nothing in the amendment that in any manner changes the character of discretion to be exercised in passing upon such motions after the matter has been properly presented."

And, the court in *Corcoran v. Duffy*, supra, reached the same conclusion, quoting the above language from the *Riccomi* case. The Supreme Court, in *Butcher v. Brouwer* commented on the last two above-mentioned cases as follows:

"*Corcoran v. Duffy*, 18 Cal.App.2d 658, 64 P.2d 735, presented for review an order in favor of the creditor after a writ of execution was issued within the five-year period and returned unsatisfied. And the decision in *Mohr v. Riccomi*, 14 Cal.App.2d 416, 58 P.2d 659, included express approval of the superior court's conclusion that the issuance of execution within the five years following judgment would have been futile. The affirmance of the orders directing execution to issue in the latter two cases therefore may be justified upon the ground that the appellant showed no abuse of discretion by the superior court and that the judgment creditors had exercised due diligence, although the opinion in each of them contains dictum to the effect that the 1933 amendment to section 685 did not change the character of the discretion to be exercised."

In *Demens v. Huene*, 89 Cal.App. 748, 265 P. 389, 391, the court comments on the purpose and effect of section 685 as follows:

"It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate

that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute, section 685 of the Code of Civil Procedure. As was said in *Hovey v. Bradbury*, 112 Cal. 620, at page 625, 44 P. 1077, 1078: 'Nor, when we come to view plaintiff's conduct generally, can there be seen any act or omission upon his part which would justify so stern a treatment of his claim as its rejection under the doctrine of laches. That doctrine, as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent.'"

[1,2] In connection with a consideration of the question here presented and in particular with regard to the interpretation to be given to section 685 as amended in 1933, it should be remembered that a *judgment is property* (sec. 14, Civil Code), and like all property it is subject to ownership, sale, transfer and assignment. The ownership of the judgment herein referred to is absolute. Accompanying such ownership is the right of use, enjoyment and management by the owner to the exclusion of all others. In *Curtin v. Kowalsky*, 145 Cal. 431, at page 434, 78 P. 962, at page 963, the Supreme Court declared:

"Prior to the adoption of the Codes it was held that, inasmuch as a judgment was not assignable at common law, the effect of such assignment was to transfer an equitable title only, but that such title vested in the assignee all the beneficial interest in the judgment, and gave him the right to enforce it by process in the name of the judgment plaintiff. *Wright v. Levy*, 12 Cal. [257], 262, 263. It was said to be property, however, which could be purchased, the same as any other species of

property. Id. Under the Code there is no limitation upon the power to assign choses in action, including judgments, and it is clear from its provisions that such an assignment carries the legal title to the judgment, and that the transfer of that title does not depend upon the fact of there being a valuable consideration. It is provided that 'property of any kind may be transferred, except as otherwise provided by this article' (Civ.Code, § 1044), and the only exception made in the article is that of a possibility not coupled with an interest. A judgment is therefore property which can be transferred."

[3] Moreover, a judgment, being property, its ownership is secured by the fifth amendment of the Constitution of the United States: no person shall be deprived of property without due process of law.

[4] The language of section 635, as amended, is clear, plain and unambiguous, hence, is not open to construction. The rule has been noted in other words as follows, "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, *the legislature should be intended to mean what they have plainly expressed*, and consequently no room is left for construction." *Tape v. Hurley*, 66 Cal. 473, at page 474, 6 P. 129, at page 130.

[5,6] Before the 1933 amendment to section 685, only a motion was required to obtain the writ of execution, "by leave of the court." To grant or refuse such a motion was purely discretionary. The 1933 amendment contains three changes or additions: 1, due notice, 2, the production and presentation of the affidavits described in the amendment, and 3, providing grounds for the denial of such motion. It should be emphasized that, although grounds for denying the motion are provided, nevertheless, whether such grounds are sufficient, remains a matter of discretion. The amendment places no limitation on the freedom to decide, as the judgment of the court dictates. There is nothing in the provision, as amended, from which judgment debtors can derive any particular satisfaction. Sentiment and sympathy for them is not involved. It is conceivable in that regard, that there are, or could be, crafty and de-

signing judgment debtors who would seek to avoid the satisfaction of a valid judgment, in any event. And there is nothing in the language of the section, as amended, tending to indicate that the legislature intended to cast its lot with such judgment debtors at the expense of honest and deserving judgment creditors. Indeed, so far as legislative intent is concerned, all indications are to the contrary, as an examination of Chapter I of Title IX of the Code of Civil Procedure will reveal. It is there plainly indicated that all intendments are in favor of the judgment creditor and the advantage of the judgment. The law even anticipates possibilities in that regard, for section 688.1 provides that, "Upon motion of a judgment creditor of a plaintiff or plaintiffs in an action or special proceeding made in the court in which the action or proceeding is pending, upon written notice to all parties, the court, judge or justice thereof may, in his discretion, order that the judgment creditor be granted a lien upon the cause of action and upon any judgment subsequently procured in such action * * *."

It is also noteworthy that inasmuch as a judgment for money earns seven percent interest, the owner thereof, with full knowledge of the judgment debtor's ability to satisfy the judgment, may choose in the management of his property, to regard the judgment as an investment and postpone its collection indefinitely. Such conduct on the part of the owner of the judgment could be a valid reason for a "failure to proceed in compliance with the provisions of section 681".

[7] And inasmuch as the judgment debtor, meanwhile, is free to pay the debt and satisfy the judgment at any time, such a situation, in the circumstances, is no grounds for complaint. Moreover, when the ability of the judgment debtor to pay the debt and satisfy the judgment is shown to have existed at any time following the five-year period, and, in particular at the time the motion is made by the owner of the judgment under and by virtue of section 685, then and in that event, the judgment debtor cannot be heard to complain about the delay on the part of the judgment credi-

tor in obtaining a writ of execution. Satisfaction of the judgment would avoid the delay and the failure to satisfy the judgment in such circumstances, is the equivalent of consent to such delay. And, "He who consents to an act is not wronged by it." Civil Code, sec. 3515.

[8] The motion authorized by section 685 is not required to be made within any specified time; its provisions are merely procedural and not designed to penalize the owner of the judgment for delay, hence, laches is beside the issue and may not be urged by the judgment debtor to defeat the motion. Indeed, there is nothing in the language of the law that suggests directly, or by implication, a revival of any rights in the judgment debtor whatsoever. So far as the latter is concerned, the action has long since become final and, with the exception of an action in equity in appropriate circumstances, no means are provided by law as an aid to circumvent and thus defeat the satisfaction of the judgment. Section 685 is not to be deemed the equivalent of the statute of limitations. The law clearly recognizes a distinction between a judgment and a mere debt and, for obvious reasons, requires action on the latter if contemplated, within a specific time. But once these steps have been taken and the debt reduced to a final judgment, its status under the law is fixed and all rights incident to the judgment are vested in the owner thereof.

[9, 10] What the "reasons" may be for "failure to proceed in compliance with the provisions of section 681," the legislature did not specify. What they may be is left to the judgment and discretion of the trial court. It is elementary that the court is without power, in such circumstances, to read into the provisions, by interpretation, anything that tends to extend, restrict, or modify the law, and for the court therefore to attempt to read into the law what conduct shall amount to the "reasons" referred to, would be an unwarranted invasion of the functions of the legislature. Section 1858

of the Code of Civil Procedure provides as follows:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

The reference herein, in substance that the judgment creditor may regard the judgment as an investment which could be a reason contemplated by section 685, obviously, is dictum; it serves merely as an example that may be adopted or rejected by the trial court. The reference to, "due diligence," in the *Butcher v. Brouwer* case, supra, must, for the same reason, be understood to be in such category, for in the final analysis, the decision thereof was based on the question of "abuse of discretion"; the last sentence of the opinion being as follows: "As the record discloses no abuse of discretion by the trial court, the order is affirmed."

[11-13] In the light of the foregoing, respondent Cunningham's affidavit is unavailing, indeed it is trifling, and "the law disregards trifles." Civil Code, sec. 3533. When reasons are presented that amount to an honest, sensible and logical explanation of plaintiff's failure to obtain an execution within the five-year period, then it clearly is the court's duty to aid in its processes and to issue the writ. The failure to do so in such circumstances is, as a matter of law, an abuse of discretion. Appellant's affidavits amounted not only to a sufficient showing in this regard but a generous one and the court's refusal to grant the motion was therefore an abuse of discretion.

For the foregoing reasons the judgment is reversed with directions to grant plaintiff's motion.

YORK, P. J., and WHITE, J., concur.

75 Cal.App.2d 872

McCRACKEN v. McCRACKEN et al.

Civ. 15295.

District Court of Appeal, Second District,
Division 3, California.

Aug. 29, 1946.

Partition §13, 63(2)

Whether joint tenants of realty were married was immaterial as respects right of either to have the realty partitioned, even though deed conveying realty to them as joint tenants described grantees as husband and wife, and hence testimony in denial of marriage was properly excluded.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Partition suit by Irene A. McCracken against Roy McCracken and another. From a judgment in favor of plaintiff, named defendant appeals.

Judgment affirmed.

Morris C. Schrager, of Los Angeles, for appellant.

George Finucane, of Santa Maria, for respondent.

DESMOND, Presiding Justice.

From a judgment in favor of plaintiff in a partition suit, defendant appeals. He feels aggrieved because the court sustained objections to various questions which his counsel propounded, based upon allegations in his answer. Since these questions all related to immaterial matters, we find no merit in the appeal.

Plaintiff in her complaint alleged that she and the defendant were the owners, as joint tenants, of Lot 13, Block B, Tract No. 11734, in the county of Los Angeles; that their estate in the property consisted, as to each, of an undivided one-half interest; that the premises were subject to an encumbrance in the form of a trust deed securing a note upon which the sum of \$2,169.66 was due; that she had employed an attorney to file the suit which was for the common benefit of all parties; that a title report upon the real estate had been secured

and was available for examination. She prayed for a partition of the premises according to the respective rights of the parties, or if partition could not be had without material injury to those rights, then for a sale of the premises, payment of the encumbrance to be made and then division of the remaining proceeds between the parties according to their rights after payment of costs and attorney's fees.

The defendant answering admitted that he lived in Los Angeles County; that the property, as described, was located therein, but denied generally all the other allegations of the complaint. Further answering, he alleged that all payments upon the property had been made by him and the interest therein purchased was intended to be his sole and separate property and he believed the records would show this intent and effect, but if not, he requested that a hearing be had and "if these facts be so ascertained, then the said property and all of it and all interests therein shall be so decreed to be in him solely and the property to be his sole and separate property." Continuing, he stated that he and the plaintiff had not been married, were not husband and wife, that there was no community property relationship existing between them, and any property acquired by either was separate property; that therefore the court was without jurisdiction to order a partition, division or sale of the property, "and the defendant hereby Demurs to that part of the complaint, concurrently with the answer that presumes to state a cause of action and particularly which requests and demands a partition, division or sale." This pleading closed with a prayer that all equity in the real estate be declared the sole and separate property of the defendant and that the plaintiff take nothing.

At the opening of the trial the court heard testimony which established the trust deed as a first lien on the property. Plaintiff then introduced a grant deed dated September 25, 1939, by which grantors, Van Aalst and Hunsaker conveyed "to Roy McCracken and Irene A. McCracken, husband and wife as joint tenants the real property * * * described as Lot 13, Block B, Tract 11734." Plaintiff then rested. De-

defendant took the witness stand and his counsel (not now appearing for him) undertook to inquire about his relationship to the plaintiff, saying, "In your answer, Mr. McCracken, you deny that you were married to the plaintiff?" Opposing counsel objected to this line of inquiry and the court sustained the objection, saying, "What difference does that make? The property is deeded to them as joint tenants. It doesn't matter whether they are married or not. You and I could have a piece of property as joint tenants." Then, "There is only one issue in the case, and that is whether the property should be divided. I mean up to the present time, I don't know what evidence counsel may have in mind, but up to the present time, he has shown that here is a piece of property deeded to two people as joint tenants, and either one has a right therefore, to ask for a partition. * * * That is all there is to this case, as far as I can see." Plaintiff's counsel then interposed, "I have only this, your Honor, to submit. We have in the answer that the parties are not married and that hasn't been barred out as an issue." To which the court replied, "Counsel doesn't have to demur to an answer. The Court can always determine the relevancy of matters in the pleadings." Counsel then asked defendant the specific question: "I ask you now, Mr. McCracken, if at any time you were ever married to Irene McCracken?", to which objection was made and sustained on the time-honored grounds that the inquiry was incompetent, irrelevant and immaterial, and did not tend to prove any of the issues involved in the case.

Other inquiries, no more pertinent than that cited, were ruled out by the court on the same grounds, and no additional evidence being offered the trial judge ordered a partition, "and it appearing to the court that the property is a single lot and that it cannot be physically divided * * * it will be ordered sold," proceeds to go first to the payment of the encumbrance, the balance after payment of \$100 attorney's fees and costs to be divided equally between the parties.

No motion was made by defendant's counsel to amend the answer which he had

filed, nor was any offer of proof tendered. It may be that in his opinion the facts of the case did not warrant further action. The attorney who succeeded him presents in his brief this statement: "It was error to refuse the appellant the opportunity of presenting testimony on his defense *as alleged in his answer* to the effect that the plaintiff acquired her interest in the property by fraud and misrepresentation." (Italics ours.)

This surprising passage does not rise to the dignity of an argument, although it is so called, for the reason that there is not a single suggestion or allegation in the pleadings that any fraud or misrepresentation was practised upon the defendant by the plaintiff. It is true that the defendant, "Further Answering * * * says and admits that both the plaintiff and defendant lived and cohabited together without benefit of a marriage ceremony, which is the law of this state [sic]; and that notwithstanding such fact, there was not in fact or in law a legal marriage existing between the parties; that, therefore, they were not husband and wife. * * *" etc., but even if the allegations of the lamentable conditions recited were true, the most that could be said of them was that they constituted a statement that the parties were not married.

Whether they were or not was immaterial, as stated by the trial judge, and by the court in *McWhorter v. McWhorter*, 1929, 99 Cal.App. 293, 295, 278 P. 454, 455. The language in that case is appropriate here. "We are of the opinion that it is entirely immaterial, so far as the determination of this appeal is concerned, whether they lived together in good faith as husband and wife, or otherwise. The evidence is ample to support the finding that they acquired and held the property as joint tenants. The deed to the real property expressly conveyed it to them as joint tenants. It is true that the deed did run to 'Michael McWhorter and Hattie McWhorter, his wife, as joint tenants,' and that plaintiff was not in fact the lawful wife of the defendant, nor was her name really McWhorter. The term 'his wife,' which was used in the deed, was merely descriptive and surplusage. The

identity of the grantee Hattie McWhorter not being questioned, although the name was assumed without warrant, it was nevertheless a good and valid conveyance. [Citing cases.]”

Since in the instant case the trial judge disposed correctly of all business properly before him the judgment is affirmed.

SHINN and WOOD, JJ., concur.



In re KAY'S GUARDIANSHIP.

KAY v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13231.

District Court of Appeal, First District,
Division 2, California.

Aug. 23, 1946.

Hearing Granted Oct. 21, 1946.

1. Insane persons ☞71

Confirmation of guardian's sale of home property of alleged incompetent after he had been discharged from mental hospital as fully recovered and had no other place to live constituted an "excess of jurisdiction" subject to review by certiorari, where income of estate under guardianship was sufficient to support ward and family and pay his debts, there was no evidence that sale was for best interests of estate, and appeal would not lie from order of confirmation and ward had no plain, speedy and adequate remedy. Probate Code, §§ 785, 1530; Code Civ.Proc. § 1068.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess of Jurisdiction".

2. Certiorari ☞28(2)

Where court's jurisdiction is special and limited by terms of the statutory grant, a failure to follow the procedure prescribed is an "excess of jurisdiction" subject to

review by certiorari where no other remedy exists. Code Civ.Proc. § 1068.

3. Insane persons ☞71

Order confirming guardian's sale of home property of alleged incompetent after he had been discharged from mental hospital as fully recovered and had no other place to live should be annulled on certiorari, where income of estate under guardianship was sufficient to support ward and family and pay his debts and there was no evidence that sale was for best interests of estate. Probate Code, § 785, 1530; Code Civ.Proc. § 1068.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the estate of Willard E. Kay, alias, an alleged incompetent, on the petition of Willard E. Kay, by his guardian ad litem, William O. Kay, against the Superior Court of the State of California, in and for the City and County of San Francisco, and others for a writ of certiorari to annul an order confirming the sale of alleged incompetent's home property by the Anglo California National Bank of San Francisco, a national banking association, as guardian of the estate of the alleged incompetent.

Order annulled.

Henry J. Rogers and Elden C. Friel, both of San Francisco, for petitioner.

Cushing & Cushing, Cullinan, Trowbridge & Gorrill, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In this proceeding for a writ of certiorari the petitioner seeks an annulment of an order of confirmation of the guardian's sale of his home property.

Prior to 1940 petitioner, his wife and two children lived at 2600 Broadway street in San Francisco in the family home which petitioner constructed about 1937. In 1940 petitioner's wife was adjudged mentally incompetent and is still confined in a mental institution. In December, 1945, petitioner was adjudged mentally incompetent and committed to the Napa State Hospital from

which in March, 1946, he was transferred to the United States Veterans Administration at Palo Alto. The Anglo California Bank was duly appointed guardian of both incompetents. In March, 1946, the guardian, after due notice, sold the home property, exclusive of the furniture, for \$40,000 and the hearing for confirmation of the sale was duly noticed and set for May 3, 1946. In the meantime the petitioner was paroled from the mental institution; he appeared in person and by an attorney in the confirmation proceedings and requested continuances until he was able to procure a full discharge and an order of restoration to mental capacity. Short continuances were granted until May 16th, when the order of confirmation was entered. On May 13th the petitioner was discharged from the mental hospital as fully cured. On June 7th, in another department of the superior court, the petitioner was duly adjudged competent and capable of taking care of his affairs, the order appointing the guardian was set aside, the letters of guardianship were revoked, and the guardian was ordered to restore to the petitioner all the estate in its possession. No appeal was taken from this order and the time for an appeal has expired.

This proceeding presents the two questions whether certiorari is the proper remedy to review the order of confirmation, and whether the order should be annulled as in excess of the power and jurisdiction of the respondent court. We will consider the questions in the inverse order of their presentation. A related question, which is not argued in the briefs, is this: Since the judgment of June 7th is now final, and the order here under review has not become final, is the question of the validity of the order under review a moot one since the final judgment removed the guardian and ordered him to restore the property to the owner? We do not decide this question since it has not been argued, but we refer to it as an important consideration in relation to the equities involved because since one judgment orders the guardian to restore the property to the owner and another orders the guardian to execute a deed of the same property to another there would be a confusion of title which would impel us to

seek some remedy in order that substantial justice may be done.

On the question of jurisdiction or power of the court to confirm the sale the applicable statute is section 1530 of the Probate Code, which reads:

"If the income of an estate under guardianship is insufficient for the support, maintenance and education of the ward or of such members of his family as he is legally obligated to support and maintain, including his care, treatment and support, if confined in a State hospital for the insane, *or if* the personal estate and the income from the real estate is insufficient to pay his debts, *or if* it is for the advantage, benefit, and best interests of the estate or ward or of such members of his family as he is legally bound to support and maintain, his guardian may sell any of his real or personal property, or mortgage or give a deed of trust upon any of his real property for any of such purposes, subject to authorization, confirmation or direction by the court as hereinafter provided."

Section 785 of the Probate Code provides: "Upon the hearing the court *must examine* into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; and *if it* appears to the court that good reason existed for the sale * * * the court shall make an order confirming the sale and directing conveyances to be executed; *otherwise* it shall vacate the sale and direct another to be had * * *." (The emphasis of both sections is ours.)

Thus a sale may be made "if" the income is insufficient to support the ward and his family or to pay his debts, or the sale is for the benefit *and* best interest of the ward or his family. But unless it appears at the hearing that these reasons exist the court "shall" vacate the sale.

[1] At the hearing for confirmation of the sale it appeared that the petitioner had been discharged as fully recovered, that he was then of sound mind and capable of managing his own affairs, that the home property was the only place where he had to live, and that to deprive him of his home

might cause him other mental disturbance. It is alleged in the petition and not denied that he was possessed of stocks of the fair market value of \$15,000, of cash in excess of \$4,000, and of a monthly income of \$500; that his wife and children were well cared for and the sale was not necessary for their support and maintenance. All this evidence and all these allegations stand uncontradicted. The guardian testified at the hearing that if he had known that petitioner was about to be restored to capacity he would not have made any effort to sell the property. No evidence was offered tending to show that it was for the best interest of the estate to make the sale. The guardian's "belief" was not supported by any facts. The case then comes to this court on the undisputed showing that (1) the income was *not* insufficient to support the ward and his family, (2) that it was *not* insufficient to pay his debts, and (3) that the sale was *not* for the best interests of the ward or his family. On the case so made the order of confirmation was plainly in excess of the power and jurisdiction of the court and this is not seriously controverted by respondents. Their position is, as already stated, that certiorari does not lie. If this be true then it must follow that the petitioner is,—according to respondents—wholly without remedy.

If the proceedings were in probate certiorari would not lie because the right of appeal from such orders is expressly granted in section 1630 of the Probate Code. But such right is denied to an aggrieved party in guardianship proceedings. Guardianship of Reser, 57 Cal.App.2d 935, 135 P.2d 709. Hence this is a case where "there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." Sec. 1068, C.C.P.

[2] A great amount of language has found its way into the books on the question when a writ of certiorari will lie and when not. Granting that the power and jurisdiction of the superior court in guardianship proceedings, like that of the probate court in relation to estates of decedents, is special and limited by the terms of the statutory grant, it is settled that a failure to follow the procedure prescribed is an excess of jurisdiction subject to re-

view by certiorari when no other remedy exists. *Olcese v. Superior Court*, 210 Cal. 566, 292 P. 964. This principle is plainly stated in *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 291, 109 P.2d 942, 948, 132 A.L.R. 715, as follows: "Speaking generally, any acts which exceed *the defined power* of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, *in so far as* that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." (Emphasis ours.) In *Rodman v. Superior Court*, 13 Cal.2d 262, 269, 89 P.2d 109, 112, with like clarity, the court said: "* * * some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess."

In simple language the recent decisions follow the express language of section 1068 of the Code of Civil Procedure granting a "review" where there is no appeal and no other adequate remedy to relieve the petitioner from an order which deprives him of a substantial legal right. In the ordinary case such an adverse judgment or order may be corrected on appeal. On certiorari, though mere error is insufficient, error which has denied to the petitioner the procedure prescribed by law is deemed an excess of jurisdiction subject to correction, or annulment, on review.

[3] Here, if the statute permitted an appeal from the order of confirmation a reviewing court could not escape the conclusion that the order was a breach of discretion. It would then reverse the order on that ground. We arrive at the same conclusion in this proceeding.

The order is annulled.

GOODELL and DOOLING, JJ., concur.

Hearing granted; EDMONDS, J., absent.

75 Cal.App.2d 903

COMBS v. COMBS.

Civ. 13126.

District Court of Appeal, First District,
Division 2, California.

Sept. 4, 1946.

Rehearing Denied Oct. 4, 1946.

Hearing Denied Oct. 31, 1946

1. Deeds ⇨72(5)

Wife would be entitled to have deed by which she conveyed joint interest in apartment building to husband set aside upon proof that she accompanied husband to notary and executed deed prepared at instance of husband in order to prevent separation threatened by husband unless she did so.

2. Deeds ⇨196(3)

Conveyance of joint interest in realty by wife to husband without valuable consideration raised a presumption that conveyance was the result of undue influence and husband had the burden of proving otherwise.

3. Deeds ⇨196(3)

Testimony that wife voluntarily took husband to notary, had notary prepare a deed conveying a joint interest in apartment building to husband, executed deed freely, and accompanied husband to recorder's office and had deed recorded, was sufficient, without proof that wife had benefit of independent advice, to rebut presumption of undue influence arising from execution of such deed without valuable consideration.

4. Appeal and error ⇨1012(1)

The determination of the effect of impeaching evidence and the weighing of all of the testimony are for the trier of the facts.

5. Deeds ⇨211(3, 4)

Conflicting evidence as to whether wife voluntarily gave husband a joint interest in apartment building, or whether conveyance to husband was obtained by fraud or undue influence, supported judgment refusing to set aside the conveyance.

6. Husband and wife ⇨48(1)

Mere improvidence or misplaced confidence in the future afforded no grounds

for relief in wife's action to set aside deed by which she conveyed joint interest in apartment building to husband without valuable consideration, in absence of a finding of fraud or undue influence.

Appeal from Superior Court, City and County of San Francisco; Sylvain Lazarus, Judge.

Action by Catharine Dederich Combs, sometimes known as Catherine Combs, against Granville P. Combs to set aside a deed and to quiet plaintiff's title to the property. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

Walter H. Duane, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff and defendant were married in 1938 and plaintiff secured an interlocutory decree of divorce from defendant on November 3, 1944. At the time of their marriage the plaintiff owned an apartment building in San Francisco and on September 27, 1938 she executed and delivered a deed in consideration of love and affection conveying this property to herself and defendant as joint tenants. After the interlocutory decree of divorce was entered plaintiff commenced this action to have the joint tenancy deed set aside and to quiet her title to the property. Judgment went for defendant and plaintiff appeals.

[1] Plaintiff testified that before their marriage and afterwards until the deed was executed defendant evinced an interest in this property, suggested that she convey a joint tenancy interest in it to him so that he could help her manage it and finally threatened to leave her unless she did so; that defendant had the deed prepared and she went with him to a notary and executed it because she loved him and wanted to prevent the threatened separation. Her testimony if believed by the court would have compelled a decree in her favor. *Ross v. Conway*, 92 Cal. 632, 28 P. 785; *Hilton v.*

Hilton, 54 Cal.App. 142, 201 P. 337; In re Estate of Cover, 188 Cal. 133, 204 P. 583. The defendant denied, however, that he suggested to plaintiff that she make the conveyance to him, denied that he threatened to leave her if she did not do so, denied that he had the deed prepared and testified that the plaintiff voluntarily took him to the notary, had the notary prepare the deed, executed it freely and went with him to the recorder's office and had it recorded.

[2,3] It is true that the presumption arose on the execution of a deed without valuable consideration from wife to husband that it was the result of undue influence and the burden was cast upon defendant to prove otherwise (*Cox v. Schnerr*, 172 Cal. 371, 156 P. 509 and cases cited *supra*), but that burden was met if the trial judge, as he did, chose to believe the defendant's testimony. *Taylor v. Taylor*, 66 Cal.App.2d 390, 396, 397, 152 P.2d 480. The statement in some of the earlier cases that the confidential relation being proved the presumption of undue influence can only be rebutted by showing that the grantor had the benefit of independent advice is not the present rule. *Brown v. Canadian Industrial Alcohol Co.*, 209 Cal. 596, 599, 289 P. 613; *Smith v. Lombard*, 201 Cal. 518, 524, 258 P. 55.

On the witness stand in the divorce action the defendant had testified that before their marriage plaintiff had agreed to convey an interest in her property to him "and she tried to renege on it afterwards, and so I said, 'No contract, no go.'"

[4] Confronted with this testimony defendant's explanation was: "I remember talk of that kind of what I thought after the divorce, and I took it as fun. There was a lot of laughter there when this was being said. I didn't think it was part of the divorce." However unconvincing this explanation may appear, the determination of the effect of the impeaching evidence and the weighing of all of the testimony were matters entrusted to the discretion of the trier of the facts.

[5,6] Harsh as the result to the plaintiff may appear and whatever we may think

of a divorced husband who insists upon the benefit of his former wife's improvident act of generosity done at a time when she must have believed that they would continue to live together harmoniously as husband and wife, the judgment finds support in the evidence, which the trial court chose to believe, that without any pressure or fraud being exerted upon her she voluntarily gave her husband one-half of this valuable property. Mere improvidence or misplaced confidence in the future affords no ground for relief in the absence of a finding of fraud or undue influence.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.



75 Cal.App.2d 862

PEOPLE v. BLEDSOE.

Cr. 2404.

District Court of Appeal, First District,
Division 2, California.

Aug. 29, 1946.

1. Poisons ☞9

State failed to establish, as an essential element of offense of unlawful possession of marihuana, defendant's knowledge of presence of marihuana cigarettes in his automobile where police officer found them, where automobile had been used the night before by another in perpetrating a robbery in another city and had not been used by defendant since its return, and others besides defendant had occupied the automobile immediately before the cigarettes were found. Health and Safety Code, § 11160.

2. Poisons ☞4

"Knowledge" of the presence of the object as embraced within the concept of physical control with intent to exercise such control is an essential element of the

offense of unlawful possession of a narcotic. Health and Safety Code, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Knowledge".

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

George Bledsoe was convicted of the unlawful possession of a preparation of marihuana, and he appeals.

Judgment reversed and cause remanded for a new trial.

Gladstein, Andersen, Resner, Sawyer & Edises, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Elton Lawless, Asst. Dist. Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant was tried to the court sitting without a jury upon an information filed under section 11160 of the Health and Safety Code charging that he "feloniously had in his possession a preparation of marihuana." He was convicted and given the minimum sentence of ninety days in the county jail.

The defendant was employed as leader of a small band at a restaurant located at 1650 Post Street, which is in what is known as the negro district of San Francisco. His time of employment was from 6 P.M. to midnight with rehearsals from 2 to 6 P.M. He customarily parked his automobile in front of the restaurant. At about 6 P.M. of July 3, 1945, his car was missing and he reported to a near-by police station. He was told to do nothing further as the car might have been taken by a friend. Early the following morning he found the car parked near where he had left it and went to his room to sleep. The following afternoon he reported for work and while seated in the car with a friend in front of the restaurant two police officers approached him and inquired about the ownership of the car and the

circumstances of a robbery in Oakland the previous night in which a car similar to his had been used. He was directed to wait and two other officers were called. One of the latter ordered him to drive his car to a garage and rode with him all the way. What became of the "friend" does not appear. The defendant was handcuffed and while the other officers had some difficulty in adjusting or removing the handcuffs the officer who had ridden with defendant searched his car. He found a package of marihuana cigarettes on the right hand side of the front seat stuffed down alongside the cushion. He said to the defendant, "Look what I found," and the defendant answered, "Whatever it is, it doesn't belong to me."

The police officer who rode with defendant to the garage was the only witness called by the State. The defendant was the only witness testifying for the defense. The evidence as a whole is incomplete and far from convincing. The officer testified on direct examination that when he first approached the car it was locked. Then he testified that he thought it was locked. The defendant testified that when the two officers first drove up he and a friend were seated in the car. These officers were both in court but were not called as witnesses. The State did not deny that the defendant and a friend were sitting in the car when the first two officers apprehended the defendant, or that one of the officers rode in the car with defendant to the garage. It did not deny that the defendant had reported the theft of the car on the night preceding the arrest, and admitted that another party who had been convicted of a robbery in Oakland had testified that he had used the defendant's car in that and other robberies.

The appellant grounds his appeal on the failure of the State to prove knowledge and possession. The respondent rests the case upon the failure of the appellant to call other witnesses to substantiate his testimony, and upon the inference, which in this case is a mere suspicion, that, because the appellant had in his possession the key to the car, he must have had "possession" of the narcotic.

[1] It may be conceded that the story of the appellant seems highly fantastic, but the State had the witnesses and the records to disprove the essential parts of the story and failed to do so. This is not, however, a case where the finding of the trial court is conclusive because of conflicting evidence, but it is one of a failure of the State to prove the essential elements of the crime. Since the undisputed evidence shows that the car in which the drug was found had been used by another in the perpetration of a robbery in another city, that appellant had not used it since it had been returned, that others beside appellant had occupied the car at the time of and immediately following the arrest, the evidence wholly fails to show appellant's knowledge "of the presence" of the drug to justify a finding of "knowledge" to satisfy the terms of the statute.

[2] The case is controlled by *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433, where, in an exhaustive opinion, the previous cases on the question of possession and knowledge are carefully reviewed. It would serve no purpose to add to the discussion here. It is sufficient to quote that part of the opinion reading (28 Cal.2d at page 455, 170 P.2d at page 436):

"The distinction which must be drawn, from a reading of the foregoing authorities, is the distinction between (1) *knowledge of the character of the object and the unlawfulness of possession thereof* as embraced within the concept of a specific intent to violate the law, and (2) *knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute. It is 'knowledge' in the first sense which is mentioned in the authorities as being immaterial but 'knowledge' in the second sense is the essence of the offense."

All the authorities upon which respondent relies, and which are reviewed in the *Gory* case, contained some evidence from which the inference could be "fairly" drawn that the defendant had knowledge of the "existence" of the drug at the place where it was found. Here there is

no such evidence, and though the suspicion may be great, the evidence fails to prove the essential element of knowledge mentioned in the *Gory* case.

The judgment is reversed and the cause remanded for a new trial.

GOODELL and DOOLING, JJ., concur.



75 Cal.App.2d 832

PEOPLE v. REZNICK.

Cr. 2407.

District Court of Appeal, First District,

Division 1, California.

Aug. 26, 1946.

1. Criminal law ⇨1170½(1)

Witnesses ⇨386

In prosecution of hotel clerk for contributing to delinquency of a minor by permitting her to be registered and spend the night in hotel with a sailor, not her husband, where minor testified that she did not remember persons that evening getting keys from or leaving keys with defendant, exclusion of minor's testimony taken at preliminary hearing and offered for purpose of refreshing her recollection was not error where questions and answers at preliminary hearing and trial were substantially the same and in any event, if there were error, it was not prejudicial.

2. Criminal law ⇨338(4)

Evidence as to what hotel clerk, who was being prosecuted for contributing to delinquency of a minor by permitting her to be registered and spend the night with a sailor not her husband, did on other occasions in registering persons at hotel was properly excluded as immaterial.

3. Criminal law ⇨1144(10)

Where defendant's counsel in face of an adverse ruling was persistently urging the materiality of certain testimony, court's remark addressed to counsel in an apparent

effort to bring argument to a close by stating reasons for ruling could not be presumed to have been taken by jury as evidence in light of instruction that only evidence for them to consider was that which was admitted by the court.

4. Criminal law ⇨32

When a statute is enacted to protect public morals, ignorance or mistake of fact is no defense. Welfare and Institutions Code, §§ 700, 702.

5. Criminal law ⇨1166½(12)

Where evidence was uncontradicted that defendant registered 14 year old girl and a sailor, who was not her husband, at hotel as man and wife, in prosecution for contributing to delinquency of such girl, court's comments that it was immaterial how many proper registrations defendant made, that his ignorance of actual age of girl was no defense and that it was defendant's duty to know age of girl before registering her were merely statements of law applicable to the situation and not prejudicial. Welfare and Institutions Code, §§ 700, 702.

6. Infants ⇨13

In prosecution for contributing to the delinquency of a minor by committing an act or omission causing, tending to cause, or encouraging a person under the age of 21 years to lead an idle, dissolute, lewd or immoral life, if defendant commits such an act, it is immaterial whether or not he knew age of minor. Welfare and Institutions Code, §§ 700, 702.

7. Criminal law ⇨20

The statute providing that in every crime there must exist a union of act and intent does not mean that a positive, wilful intent to violate the law is an essential ingredient of every offense, and does not require proof of specific intent in order to justify a conviction if the specific intent is not made an ingredient of the statutory offense. Pen.Code, §§ 7, 20.

8. Criminal law ⇨22, 33

The intentional doing of an act expressly prohibited by statute constitutes the offense denounced by the law regardless of

good motive or ignorance of criminal character of the act. Pen.Code, §§ 7, 20.

9. Criminal law 824(1)

Ordinarily, in prosecutions for sex offenses, trial court has duty on its own motion to instruct that charge is easily made and difficult to disprove for which reason testimony of prosecuting witness should be examined with caution.

10. Criminal law ⇨1173(2)

In prosecution of hotel clerk for contributing to delinquency of a minor, where there was no conflict in evidence that minor was 14 years of age, that she was not wife of sailor, that defendant had allowed her to be registered in hotel as wife of sailor and that she had occupied room in hotel with sailor, failure of court to give cautionary instruction of its own motion, under the circumstances, was not prejudicial error. Welfare and Institutions Code, §§ 700, 702.

11. Criminal law ⇨863(2)

Where jury requested further enlightenment upon interpretation of the word "wilfully", reading to jury statutory definition and repeating several of the instructions previously given by way of background for interpretation of the word in order to clarify the matter for jury was not error, particularly where no expression was made by court as to any belief in guilt of defendant. Pen.Code, § 7.

12. Criminal law ⇨1036(1), 1044

Where defendant objected to appearance of witness on the ground that witness would undoubtedly testify to circumstances showing that defendant had committed more offenses than one charged in information, which objection was properly overruled because witness could properly testify to offense in issue, and defendant failed to object to question or move to strike answer which disclosed the commission of other offense, defendant could not complain thereof on appeal.

13. Criminal law ⇨700

Prosecutors should refrain from making statements that they might prove things derogatory to a defendant unless they are

able to make such proof and intend to do so.

14. Criminal law ⇨730(1)

District Attorney's statement that perhaps he could show that defendant had been warned by police of prior actions of the nature of the charge being tried, in light of his failure to follow up statement with proof or an offer to prove was improper but, in light of admonition to jury to consider only evidence before them to the exclusion of any suggestions or suspicions created by questions of counsel and in light of conclusive nature of evidence, was not prejudicial.

15. Criminal law ⇨713, 720(5), 722(2)

District attorney in arguing case to jury is entitled to argue questions of law and fact, he may assail credibility of defendant's witnesses and condemn or excuse their actions, and he may denounce any defense propounded and may comment upon defendants personally.

16. Infants ⇨20

Evidence authorized conviction of hotel clerk of contributing to the delinquency of a minor by permitting 14-year-old girl to be registered in hotel as the wife of a sailor who was not her husband and to spend the night with such sailor. Welfare and Institutions Code, §§ 700, 702.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Louis Reznick was convicted of contributing to the delinquency of a minor, and from the judgment and from an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Leslie C. Gillen and John R. Golden, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Carl W. Synkoop, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Bert W. Hirschberg, Asst. Dist. Atty., both of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Appellant was charged in the information with contributing to the delinquency of a

minor in violation of section 702 of the Welfare and Institutions Code, it being alleged that appellant did willfully, unlawfully and knowingly allow one Anita Vasquez, 14 years of age, to be registered in a hotel as the wife of a sailor, they not then being married. Appellant appeals from the judgment of conviction after trial by jury and from the order denying his motion for a new trial.

There is little dispute as to the facts shown by the record. The complaining witness, Anita Vasquez, at the time of the alleged crime was 14 years of age. On November 13, 1945, accompanied by two other girls, two marines and one sailor, she went to the Uptown Hotel on Fillmore Street in San Francisco where all six were registered by appellant, then on duty as clerk. The girls all stood at the desk while each of the boys registered. The appellant did not ask the ages of the girls but did ask the boys if the girls were their wives and was informed that they were. Each boy registered with one of the girls as Mr. and Mrs. The other two girls were aged 14 and 17 years, and the only baggage carried by these six persons, who were together at the time they registered, was one suitcase and one paper bag. The complaining witness, after being registered by appellant, was taken to a room where she remained all night with the sailor. The other two girls were likewise taken to rooms where each remained all night with one of the marines.

Appellant admitted that he was on duty at the hotel on the night in question and identified the registration of the complaining witness and her escort but testified that he had no recollection of having seen her before. He testified that he was very busy in performing his duties on the night in question and had registered 26 rooms and about 50 people. Upon objection made by the district attorney he was not permitted to testify as to what his usual practice was in handling registrations.

As grounds for a reversal of the judgment of conviction appellant urges the following: (1) erroneous rulings on the evidence; (2) prejudicial remarks by the court; (3) misdirection of the jury by the court; (4) prejudicial misconduct of the district attorney. We shall discuss these

contentions of appellant's in the order of their statement.

[1] The first contention of appellant relates to testimony given by the complaining witness at the preliminary hearing. At the trial, while the complaining witness was testifying, she was asked by appellant's counsel how many persons were in the lobby and she answered, "About two or four couples." Appellant's counsel then asked whether there were some other people who came in and out of the lobby and got their keys or left their keys with appellant. She answered that she did not remember. Counsel then continued to ask if she remembered that some people did put their keys on the desk or ask for their keys from the appellant, and she again answered that she did not remember. Counsel for appellant then confronted the witness with a portion of her testimony taken at the preliminary hearing. The purpose of counsel was to refresh the recollection of the witness as to whether she remembered persons that evening getting keys from or leaving keys with the appellant. The district attorney objected to these questions upon the ground that they did not call for refreshing of the witness' memory and the court sustained the objection. The questions and answers in both the preliminary hearing and the trial were substantially the same and there is no material contradiction between them. No error was committed in sustaining the objection. Furthermore, it is difficult to understand how, upon the record here, the ruling, even if erroneous, could be prejudicial.

[2] The second occasion assigned in the court's ruling on the evidence before the jury was to the effect that the court did not permit the appellant to show what he did on other occasions in registering persons at the hotel. The prosecution objected to the question upon the ground that it was incompetent, irrelevant and immaterial. The objection was sustained.

The defense has endeavored to show what the appellant did on other occasions while registering guests at the hotel to which the prosecution stated his objection which was sustained by the court. What had been done or was done by the appellant in regis-

tering other guests was not material to the issues at the trial.

To support his contention appellant has cited the case of *People v. Kepford*, 52 Cal.App. 508, 199 P. 64. This is not in point. The court in that case stated that the motive for the commission of a crime may be shown as a circumstance tending to show guilt and the absence of motive or reason for the commission of the alleged offense may be considered as a circumstance favorable to the accused. In other words, the evidence offered pertained to the crime which was then before the court and did not pertain to the conduct of the parties in other cases of similar nature. In this case on appeal the prosecution was attempting to show what the appellant had done on other occasions of similar character.

In *People v. Bond*, 13 Cal.App. 175, at page 191, 109 P. 150, at page 158, the court commented upon the question of previous actions and conduct of the appellant and stated: "One Anderson had been arrested by defendants on August 19th for violating the fish law, and by him appellant sought to show that he had been properly treated by the officers. The court rightly sustained an objection to the proffered testimony. So far as we are informed, the conduct of defendant upon a different occasion has never been held pertinent evidence to disprove the commission of a crime of which he is being tried."

[3] Appellant's next assignment of error is the following statement of the trial court: "The Court: It wouldn't make any difference if he did a thousand well if he makes a mistake in one of the registrations; his ignorance of the actual age of the girl is no defense. * * * Well, it is the duty of these people to know the ages of the girls they are registering there." Just prior to making these remarks the court had sustained the district attorney's objection to questions asked by appellant's counsel of appellant as to what his usual practice was in registering people, and appellant's counsel, in the face of the court's ruling, was persistently and insistently urging the materiality of such testimony. The court no

doubt was endeavoring to bring the argument to a close by stating the reasons for its ruling, and such comments were not addressed to the jury and cannot be presumed to have been taken by the jury as evidence, as the court instructed the jury that the only evidence for them to consider was that which was admitted by the court.

[4-6] Section 702 of the Welfare and Institutions Code provides in part as follows: "Any person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of the subdivisions of section 700 or which act or omission contributes thereto * * * is guilty of a misdemeanor * * *." Among the persons under twenty-one years of age enumerated in said section 700 as being within the jurisdiction of the juvenile court is one "Who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life." The evidence was uncontradicted that appellant registered the 14 year old complaining witness and a sailor who was not her husband at the Uptown Hotel as man and wife. Appellant admits that when a statute is enacted to protect public morals ignorance or mistake of fact is no defense. The comments of the trial judge complained of were merely statements of the law. The court made no comment as to whether appellant was guilty or innocent. There can be no doubt that if appellant committed the act it would be immaterial whether or not he knew the age of the minor.

[7,8] It is a familiar rule that to constitute crime there must be a union of act and intent, but section 7 of our Penal Code provides that "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage; * * *."

As was said by our Supreme Court in the very recent case of *People v. Gory*, 28 Cal. 2d 450, 170 P.2d 433, 435; "* * * sec-

tion 20 of the Penal Code provides that 'In every crime or public offense there must exist a union, or joint operation of act and intent * * *.' But this does not mean that a positive, wilful intent to violate the law is an essential ingredient of every offense. Sometimes an act is expressly prohibited by statute, in which case the intentional doing of the act, regardless of good motive or ignorance of its criminal character, constitutes the offense denounced by law. Instances illustrating this principle may be found in statutes enacted for the protection of public morals, public health, and the public peace and safety. *People v. McClenneen*, 195 Cal. 445, 469, 234 P. 91, and cases there cited. If a specific intent is not made an ingredient of the statutory offense, it is not necessary to prove such specific intent in order to justify a conviction. *People v. Dillon*, 199 Cal. 1, 11, 248 P. 230."

And as was said in *People v. O'Brien*, 96 Cal. 171, at page 176, 31 P. 45, at page 46: "It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course, it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit any one to gainsay. It is expected that the jury and the court, where it is shown that in fact the defendant was ignorant of the law, and innocent of any intention to violate the same, will give the defendant the benefit of the fact, and impose only a light penalty. 1 Bish. Crim. Law, § 2961; Whart. Neg. § 411. The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement. If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration. The plea would be universally made, and would lead to interminable questions, incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance the greater would be the exemption from liability."

[9,10] Appellant's next contention is that the court erred in omitting to give a cautionary instruction. Appellant offered no instructions except one on character witnesses, which the court gave. The offense charged was that appellant had allowed one Anita Vasquez, 14 years of age, to be registered in a hotel as the wife of a sailor, they not then being married. There was no conflict in the evidence as to the facts that Anita Vasquez was 14 years of age, that she was not the wife of the sailor, that appellant had allowed her to be registered in the hotel as the wife of the sailor, and that she had occupied a room in the hotel with said sailor. While it is the law that in prosecutions for sex offenses, it is the duty of the trial court on its own motion to give a cautionary instruction to the effect that the charge is easily made and difficult to disprove, for which reason the testimony of the prosecuting witness should be examined with caution (*People v. Putnam*, 20 Cal.2d 885, 129 P.2d 367), it is difficult to understand how such an instruction could be considered necessary in a case such as this. And even if it may have been proper to give such an instruction, the failure to give one could not constitute prejudicial error upon the record here. A reading of the instructions given by the court shows that the jury was fully and correctly instructed.

[11] Appellant's second assignment of error as to the misdirection of the jury pertains to the request of the jury for further enlightenment upon the interpretation of the word "willfully." Upon the jury's return for instructions the first time the court read from Penal Code, section 7 the definitions of the words "willfully" and "knowingly." A short time later the jury again returned and asked for a further interpretation of the word "willfully." In complying with this second request the court by way of background for its interpretation of the word "willfully" repeated several of the instructions that had been given in order to clarify the matter for the jury, but no expression was made by the court to the jury as to any belief in the guilt of the appellant. No error was committed by the court in giving to the jury the interpretation of the word "willfully."

Appellant next sets forth a number of contentions of claimed prejudicial misconduct on the part of the district attorney.

[12] The first of these relates to the prosecution's questioning of the witness Lillian Runyon as to whether she too had been "registered in" the hotel at the same time with Anita Vasquez. Prior to the beginning of the examination of this witness, and after the jury had been excluded, counsel for appellant objected to her being allowed to testify at all for the reason that she undoubtedly would testify that she too had been registered by appellant and that thereby appellant would be shown to have committed more offenses than the one charged in the information. The court overruled the objection. Lillian Runyon took the stand, and toward the end of her direct testimony the actual question was put to the witness. No objection was made and her answer was given, and no motion to strike out her testimony was made. In view of the fact that the first objection of appellant was to the appearance of the witness upon the stand, which objection was properly overruled because it was certainly proper for the witness to testify as to the registration of Anita Vasquez, it would appear to us that inasmuch as appellant neither objected to the specific question, when asked, nor made any motion to strike out the answer, he is not now entitled to raise that issue.

The second assignment of misconduct that we shall discuss concerns a statement of the district attorney that maybe he could show that appellant had been warned by the police for prior actions of the nature of the charge being tried. Counsel for appellant had asked him if he had ever been warned by the police regarding his "conduct in the matter of registering people in that hotel," to which appellant answered "No, Sir." The district attorney made a general objection after that answer was given but the court overruled the district attorney's objection by saying, "I will let the answer stand." The record then shows the following: "Mr. Hirschberg: Let the answer stand, your Honor? Then may the District Attorney's office have an opportunity to show the opposite tendency or—Mr. Gillen: This man? Mr. Hirschberg: That

is impossible. Mr. Gillen: Not, it is not possible and don't be unfair; you can't show anything. Mr. Hirschberg: Maybe we can, Mr. Gillen. Mr. Gillen: All right, but don't make a threat that you can't carry out. I think you may cross-examine." Neither in the cross-examination of appellant which followed, nor at any other stage of the trial did the district attorney attempt to show any warning by the police concerning appellant's registration of servicemen and females.

[13, 14] We believe that prosecutors should refrain from making statements that they might be able to prove things derogatory to a defendant unless they are able to make such proof and intend to do so. The prosecutor in this case should not have made the statement complained of without following it up with proof or an offer to prove it. However, the court gave to the jury a very complete instruction admonishing them that they were the exclusive judges of the facts and they were to consider only the evidence properly before them to the exclusion of any suggestions or suspicions created by questions of counsel. Since that admonition was given to the jury, and taking the record as a whole, we do not believe that the remarks of the district attorney, even if improper, constitute reversible error in this case.

[15] Appellant claims that a number of improper and prejudicial remarks were made by the district attorney in his argument to the jury. These relate primarily to observations and opinions of the district attorney in presenting his argument to the jury. In such argument the district attorney is entitled to argue questions of law and fact; he may assail the credibility of appellant's witnesses and he may condemn or excuse their actions. He may denounce

any defense propounded and may comment upon the appellant personally. See *People v. Piazza*, 84 Cal.App. 58, 257 P. 592; 8 Cal.Jur. p. 263, § 326; *People v. Bose*, 28 Cal.App. 743, 153 P. 965. In the instant case the court on a number of occasions during the argument instructed the jury that the statements of counsel in their arguments are not evidence in the case, and that they were to disregard them. We do not believe that it can be held that any of the remarks of the district attorney in his argument to the jury were outside of the range of legitimate argument, or that they constituted prejudicial misconduct.

[16] It appears from the record in this case that appellant, as clerk of the Uptown Hotel, permitted Anita Vasquez, a girl of 14, to be registered as the wife of a sailor and at the same time permitted two other girls, aged 14 and 17, to be registered as the wives of two marines. The six came into the hotel at the same time and had only one suit case and a paper bag. Appellant merely asked the men if the girls were their wives but made no other effort to ascertain the ages of the girls or whether they were in fact the wives of the men. Appellant was a hotel clerk of many years experience and the circumstances shown by the record should have created in his mind a strong suspicion that Anita Vasquez was not the wife of the sailor, and a very slight inquiry would no doubt have convinced him that she was not. There can be no doubt as to the sufficiency of the evidence to sustain the judgment of conviction. As hereinbefore pointed out, no prejudicial error occurred in the trial of the case.

In view of the foregoing the judgment and order are affirmed.

PETERS, P. J., and WARD, J., concur.

75 Cal.App.2d 814

CROFTON et al. v. PAPPAS et al.

Civ. 3610.

District Court of Appeal, Fourth District,
California.

Aug. 23, 1946.

1. Admiralty ⚓

A proceeding in rem against a vessel, treating the boat itself as the debtor and seizing it and impleading it as the defendant, is within the exclusive jurisdiction of the federal courts, but actions which are not of that character, but which are in fact personal actions, may be maintained in the state courts, notwithstanding the fact that there may be a concurrent attachment which is levied upon a vessel.

2. Courts ⚓

Allegations that plaintiff purchased supplies and equipment for defendants' vessel, and that labor and materials on the vessel were furnished by plaintiffs at defendants' special instance and request, set up a personal cause of action and not one in rem, and could be maintained in state court notwithstanding a concurrent attachment levied upon the vessel. Code Civ. Proc. §§ 537 et seq., 813, 817, 819.

3. Shipping ⚓

In action in state court to recover reasonable value of repairs, materials, and supplies furnished for a vessel, evidence sustained finding that labor, materials, and supplies were furnished at request of defendant either himself or acting through his agent, as against defendant's contention that although he owned the vessel he was allowing another to use it without himself sharing in the profits or connected with vessel's operation by agency between himself and the operator.

4. Maritime liens ⚓

In action in state court to recover reasonable value of repairs, materials, and supplies furnished for a vessel, the lien conferred in such cases by statute which is foreclosable only in Federal Courts did not bar plaintiffs' right to a writ of attachment by virtue of the general law relating to at-

tachment. Code Civ. Proc. §§ 537 et seq., 813, 817, 819.

5. Admiralty ⚓

Actions in personam involving supplies furnished an ocean-going boat, with ancillary attachment proceeding upon the vessel, may be brought in the state court.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by William B. Crofton and Richard W. Simmons, copartners doing business under the name and style of Crofton Diesel Engine Company, against Jim Pappas, J. P. Martikas, and others to recover reasonable value of certain repairs, materials, and supplies. From adverse judgment, J. P. Martikas appeals.

Affirmed.

Ruel Liggett, of San Diego, for appellant.

Harrison G. Sloane, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to recover the reasonable value of certain repairs, materials and supplies. The complaint alleged that the defendants Pappas and Martikas were the owners of the fishing boat TOM BOY, and that they had purchased from plaintiffs' assignor supplies and equipment therefor of the reasonable value of \$297.92, for which they had refused to pay. A second count covered repairs and equipment for this boat, worth \$2491.45, alleged to have been furnished by plaintiffs at the special instance and request of Pappas and Martikas. The prayer was for judgment against these defendants "and against said fishing vessel TOM BOY" for these sums, with costs.

No demurrer was filed and Pappas filed no answer. Martikas, in his answer, admitted that he is the record owner of this boat, but denied that he had ever purchased any supplies or equipment from plaintiffs' assignor, and denied any knowledge that any such goods were ever furnished for said vessel. With respect to the second count he denied that such repairs

and equipment were of the reasonable value of \$2491.45, and alleged that the equipment was never properly installed. As a special defense to this count he alleged that it had been specifically agreed between the plaintiffs and himself and Pappas that the engine and other equipment would be properly installed and the boat put in first class condition, and that the cost thereof would not exceed \$1900; that the work was defectively done; and that no part of the amount claimed has been earned.

At the trial, it developed that Martikas owned the boat and that, under some arrangement between them, Pappas was operating it for fishing purposes. The plaintiffs then dismissed the action as against Pappas and also insofar as any proceeding against the boat itself was concerned. Martikas admitted that he had agreed to pay the plaintiffs for a new engine installed by them, but insisted that he had nothing to do with any other repairs, supplies or equipment ordered by Pappas for the boat. Prior to judgment Martikas moved to dissolve an attachment which had been levied on the boat, on the ground that the plaintiffs had another lien. After judgment, he moved to eliminate all costs connected with the attachment from the cost bill filed. Both of these motions were denied.

So far as material here the court found that supplies of the reasonable value of \$297.92 had been furnished for this boat by plaintiffs' assignor at the special instance and request of Martikas, acting through his agent Pappas; that the repairs and equipment involved in the second count had been furnished by the plaintiffs at the special instance and request of Martikas, acting through his agent Pappas; that all such work and material was furnished upon the implied contract of Martikas to pay the reasonable value thereof; that the reasonable value as found remained unpaid, after demand, to the extent of \$2491.45; that no agreement had been made that the cost of installing an engine and certain equipment should not exceed any specified amount; and that the work and materials so furnished were neither defective nor poorly installed. Judgment was entered

against Martikas for \$2789.37, with costs. He has appealed from the judgment, from the order denying his motion to dissolve the attachment, and from the order denying his motion to eliminate all attachment costs.

[1] The appellant first contends that this is an action in rem to foreclose a lien on this boat given by section 813 of the Code of Civil Procedure (all section references herein are to that Code); that such a lien is maritime in nature and any foreclosure thereof must be in the federal courts; and that the complaint is insufficient to support a personal judgment against him. It is well settled that a proceeding in rem against a vessel, treating the boat itself as the debtor and seizing it and impleading it as the defendant, is within the exclusive jurisdiction of the federal courts. *Rounds v. Cloverport Foundry & M. Co.*, 237 U.S. 303, 35 S.Ct. 596, 59 L.Ed. 966. As was pointed out in that case, however, actions which are not of that character but which are in fact personal actions may be maintained in the state courts, notwithstanding the fact that there may be a concurrent attachment which is levied upon a vessel.

[2] The complaint here named two individuals as defendants, and nothing was said therein about a lien or any foreclosure of the same. While the prayer asked for a judgment also against the boat, there was no allegation which would justify such a prayer. While a cause of action in rem was not sufficiently alleged, the allegations are sufficient to set up a personal cause of action against the two named defendants, it being alleged that they purchased the supplies and equipment in question, and, in the other count, that the labor and materials were furnished at their special instance and request. The surplusage, and any possible discrepancy, were eliminated, by dismissal, before judgment was entered.

[3] It is next contended that, except for the new engine installed, the evidence is not sufficient to support the findings to the effect that the labor, materials and supplies here in question were furnished at the request of the appellant, either himself or acting through his agent Pappas. It is argued

that while the appellant owned the boat he was allowing Pappas to use it and operate it as a fishing vessel, that he was not sharing in the profits from the fishing, that he had nothing to do with the operation and use of the boat, and that there is no evidence of the existence of any sort of agency between Pappas and himself. While some of the appellant's testimony was to that effect other portions of his testimony, and considerable other evidence, point to and justify a different conclusion.

It appears from the evidence that about a month before these materials and supplies were furnished the appellant bought the boat at Newport, that he sent Pappas up to bring the boat to San Diego, and that Pappas ordered all the work and supplies in question, except the new engine which was ordered by Martikas. The appellant testified that Pappas "had been after me for a couple of years," that he furnished the boat to Pappas "more as a favor to help him out," and that he had no written agreement with Pappas to repay him. The respondent Crofton testified that when he was making these repairs prior to the installation of the new engine Pappas told him that Martikas owned the boat and would pay the bills; that he then talked to Martikas; that Martikas told him that he would pay any bills for the boat that were incurred by Pappas, but that large items like the charge for the engine should be talked over with him (Martikas); that if they were not large charges they need not be talked over with him; that Pappas told him that Martikas owned the boat and "I am fishing the boat"; and that after the new engine was installed Martikas called him up and complained that "the engine was not working right for his fisherman." Martikas testified that when he made the first payment on the new engine Crofton did not ask for more money; that "There was no other money for me to pay again. He advised us to take care of it out of the fishing"; that he knew just how many trips Pappas was making; that Pappas kept complaining to him that he was having trouble with the boat and could not go out; and that when Pappas made a second payment on the account he told him (Martikas) that he had done so. In addition to this evidence it was stipulat-

ed at the trial that any material and supplies referred to in both causes of action as having been furnished to the vessel TOM BOY "were ordered for the vessel upon authorization of the owner, J. P. Martikas." It was further stipulated that this stipulation should not be construed as an admission that any particular amount was due, but that the question of value and price should be expressly reserved for determination by the court in accordance with the evidence. The findings in question are fully supported by this stipulation and by the evidence to which we have referred, with the reasonable inferences therefrom.

[4,5] Finally, it is contended that the attachment proceeding herein was void and that the court erred in refusing to eliminate the attachment costs from the cost bill and judgment. It is argued that the respondent was not entitled to an attachment under section 817 because that is a part of the foreclosure proceedings provided for the lien given by section 813, which is foreclosable only in the federal courts, and because the attachment herein was not in the form required by sections 817 and 819. It is then argued that no valid attachment could have been issued in this case under section 537 et seq., the form of which was here followed, because section 537 does not permit an attachment where the claim is secured by a lien upon personal property, which the respondent had by virtue of section 813.

The question thus presented has been more or less considered in several cases in this state. In *Graham v. Annis*, 28 Cal.App. 754, 153 P. 981, 984, where the facts were quite similar to those here involved, the court said that for certain reasons which are there stated the lien provided for in section 813 is not "of such fixed and determinate character as to take from the plaintiff, in an action such as this, the right to a writ of attachment against the property of the defendant, whether or not the property attached be the vessel on which the repairs were made." It was there also said, with respect to this lien, that "unless fixed and determined by action brought, it is but a floating right; and we do not think the law relating to vessels is or was intended to be exclusive of all remedies afforded for the enforcement of payment for the

labor performed or materials furnished in the building or repair of such vessels. Plaintiff had a right of action independent of this special statute, and was not barred from availing himself of the general law relating to attachments on the assumption that the debt was 'secured by mortgage or lien upon real or personal property, or pledge of personal property.'” This case was cited in *United States of Mexico v. Rask*, 118 Cal.App. 21, 4 P.2d 981, to the effect that the remedies given by section 813 et seq. are not exclusive of other remedies given by the statutes of this state. In *Porter v. Brooks*, 35 Cal. 199, in referring to the kind of lien which will defeat the right to an attachment, the court said: “But it must be a lien of a fixed, determinate character, capable of being enforced with certainty, and depending on no conditions.” In *Harbor Supply Co. v. Motor Boat Astorian*, 116 Cal.App. 563, 2 P.2d 1004, 1005, it is said: “Actions in persona involving supplies furnished an ocean-going boat, with ancillary attachment proceedings upon the vessel, may be brought in the state courts.” In *Stephens v. Weyl-Zuckerman & Co.*, 34 Cal.App. 210, 167 P. 171, 172, in speaking of the act of Congress giving jurisdiction to the federal courts in proceedings in rem to enforce such a lien, it is stated that this was intended to apply to in rem proceedings only, and that this “was not thereby intended as an obstacle to the maintenance of suits in state courts against the owners of vessels for repairs thereof and the attachment of such vessels as a means of enforcing judgments obtained in such suits.”

Not only would it seem that the lien provided for in section 813 is not such a definite lien as was intended to be covered by the excluding provision of section 537, but there is another reason why the lien thus provided for should not prevent the issuance of an attachment. Even if such a lien could be considered as one which would otherwise come within the provisions of section 537, the statutes creating this lien, section 813 et seq., specifically provide that there may be an attachment in spite of any such fact. In any view of the matter, this should be construed as constituting an exception to the provision of section 537

which forbids an attachment where a lien exists. It follows that the attachment proceeding herein was not void and no error appears in the court's rulings with respect thereto.

The judgment and orders appealed from are affirmed.

GRIFFIN, J., concurs.



75 Cal.App.2d 842

**LAS VEGAS DEVELOPMENT CO. v.
NEIGHBORS.**

Civ. 3619.

District Court of Appeal, Fourth District,
California.

Aug. 27, 1946.

1. Contracts ⚡322(4)

In action on contract by defendant to install concrete curbs on a tract upon which plaintiff was building houses, which work was to be done under supervision of city engineer and according to city's specifications, evidence sustained findings that concrete mixture used was of character required by contract and mixing of materials and installation were done under supervision of and approved by city engineer, and that deterioration in the cement work resulting in its condemnation some five months after installation was due to negligence of plaintiff and not to any fault of defendant.

2. Contracts ⚡322(4)

Evidence sustained finding that defendant contractor was justified in failing to install curbs on remainder of tract upon which plaintiff was building houses.

3. Contracts ⚡303(5)

Where defendants contracted to install concrete curbs on tract upon which plaintiff was building houses and plaintiff was to grade the streets and get them ready for installation of the curbs, but there was no time mentioned in the contract for the work, it

was incumbent upon plaintiff to get ready for and accept defendant's services within a reasonable time.

4. Contracts 322(4)

Corporations 432(12)

In action on contract under which plaintiff was to grade and prepare streets, and defendant was to install concrete curbs, wherein no time was mentioned in contract so that plaintiff was required to accept defendant's services within a reasonable time, evidence sustained finding that plaintiff had not been ready for defendant's services within a reasonable time, and that instrument written by manager of plaintiff corporation which released defendant from liability for work done was executed with full authority of the corporation.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action on a contract by Las Vegas Development Company, a corporation, against John Neighbors, for damages. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Ruel Liggett, of San Diego, for appellant.

Benjamin Franklin Tyler, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages. Under a contract dated September 23, 1943, the defendant agreed to install the concrete curbs on a certain tract in Las Vegas, Nevada, upon which the plaintiff was engaged in building houses. It was provided that the work should be done under the supervision of the city engineer and according to city specifications, but nothing was said as to when it should be done. The contract was entered into at San Diego, where the defendant and the officers and managers of the plaintiff resided.

The plaintiff was to grade the streets and get them ready for installation of the curbs. It proceeded with the building of houses but delayed this preparation of the streets. Finally, in May, 1943, it notified the defendant that it was ready for his work. After taking his men from San Diego to Las

Vegas he found that the streets were not ready but after a short delay some of them were made ready. He installed curbs on such streets as were ready, this work being completed about June 1, 1943, and was paid \$1250 on account. About five months later the work he had done was condemned by the city engineer, and this action followed.

The complaint alleged that these curbs were so poorly constructed that it was necessary to replace them; that the work was condemned "by the proper inspectors overseeing said work," and had to be torn out at a cost of \$976; that the plaintiff was compelled to expend, for "reinstalling and rebuilding said concrete work," \$1942.60 more than the contract price therefor; and that in tearing out and replacing this work, including the delay thus caused, the plaintiff suffered other amounts of damages.

The court found in favor of the defendant, and the plaintiff has appealed from the judgment upon a clerk's transcript and a settled statement.

[1] It is first contended that the evidence is insufficient to support the findings to the effect that the completed portion of the work was properly performed, in accordance with the terms of the contract, and that the subsequent condemnation of this work was not chargeable to the respondent. The court found that the concrete mixture used was of the character required by the contract, and that the mixing of the materials and the installation of the curbs was done under the supervision of and approved by the city engineer. It was further found that any deterioration in the cement work, resulting in its condemnation some five months after it was installed, was due to the negligence of the appellant and not to any fault on the part of the respondent.

There was evidence that the respondent consulted the city engineer before beginning the work; that the city engineer agreed to and did assign one of his deputies to watch the work during its progress to see that it was done according to specifications; that this deputy was present each day while the work was being done; that he approved the mixture being used and expressed approval of the work; and that no objection of any kind was voiced until months later.

There was also evidence that the appellant failed to put in a back-fill and do other work which it was required to do, by reason of which failure the cement work could not be kept wet until properly hardened and which caused it to be improperly exposed to the elements before it was ready; that the respondent requested the appellant to remedy this situation, which it promised but failed to do; and that trucks and other equipment were driven over this cement work, in connection with the building operations, before the necessary grading, filling and other work was done. This evidence was not contradicted, and there is no evidence that any defect in the work appeared, or that any criticism was made, until three months after the work was completed. About two months after the first criticism was voiced, and on November 3, 1943, the city engineer wrote to the appellant stating that the curbs failed to meet the specifications required in the permit but offering to allow them to remain until the paving was completed "with the understanding that if the curb survive the construction without showing signs of failure" he would approve them. However, for some reason the city engineer again wrote to the appellant on November 15, 1943, stating that the concrete in the curbs was not of sufficient strength and that they must be replaced. The evidence is sufficient to support the findings in this regard.

[2-4] It is next urged that the evidence is not sufficient to support the court's finding that the respondent was justified in failing and refusing to install the curbs on the remainder of this tract and that, in any event, the appellant was entitled to the difference between the cost and the contract price for that portion of the work.

The failure to complete the rest of the contract was not pleaded, it being merely alleged in the complaint that since the work which had been done was deficient the appellant was compelled to, and did, pay another contractor a higher price "for re-installing and rebuilding said concrete work properly." Assuming, however, that the case was tried on the theory that this element of damage was in issue, it may first be observed that the appellant failed to

prove certain facts which are essential for any recovery in this regard. Moreover, the evidence is sufficient to support the finding in question. No time being mentioned in the contract it was incumbent upon the appellant to get ready for and accept respondent's services within a reasonable time. Under the circumstances, where the respondent had to take his men from San Diego to Las Vegas, it cannot reasonably be held that the appellant was entitled to demand that this work be done in dribbles or at such indefinite times in the future as it might suit its convenience. Not only was there an unreasonable delay after the respondent was notified in May that the appellant was ready for his work, but between that time and the middle of July the respondent insisted that the appellant get ready for the completion of the work in order to allow him to proceed with other work. This was not done but on September 1, 1943, appellant's manager, Margolis, asked the respondent to give them a release from the contract and permit them to have the remaining work done by another contractor. The respondent agreed to this and Margolis wrote out a release, which is in evidence, and which the respondent signed. This release gives the appellant permission to let the remainder of the work elsewhere "notwithstanding our contract for this work to the contrary," and provides that there will be no obligation to the respondent "for this portion of the contract if let to another contractor." Both the respondent and Margolis testified that this release was given at the request of Margolis, and the respondent testified that at the time it was signed he did not know that there had been any disapproval of his previous work. The appellant argues that this instrument was merely an offer on respondent's part to give up his contract without further obligation to him, and that there is no evidence that this offer was accepted by the appellant. The respondent testified that this release was asked for and written by Margolis, and that after he signed it Margolis kept it. Margolis confirmed this, and further testified that he was vice president of the appellant corporation and that he was "actively managing" that corporation's affairs. Moreover, Margolis negotiated the original

contract and signed it for the corporation. His authority to act for the appellant sufficiently appears, and the evidence amply supports the finding.

The judgment is affirmed.

GRIFFIN, J., concurs.



COPE v. DAVISON.

Civ. 13070.

District Court of Appeal, First District,
Division 2, California.

Sept. 4, 1946.

Rehearing Denied Oct. 5, 1946.

Hearing Granted Oct. 31, 1946.

1. Automobiles ⇨181(1)

"Willful misconduct", within automobile guest statute, is the intentional doing of something with a knowledge that serious injury is a probable as distinguished from a possible result, or is the intentional doing of an act with a wanton and reckless disregard of its possible result. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Automobiles ⇨244(20)

Evidence that motorist, sued for injuries sustained by guest, intentionally and deliberately drove automobile on a wet day, with knowledge that road might be slippery and cause automobile to skid, toward curve at 45-mile per hour speed with knowledge of presence of curve, and that on a dry day the curve was dangerous unless approached very slowly, was sufficient to show willful misconduct of motorist. Vehicle Code, § 403.

3. Automobiles ⇨181(1)

A motorist sued for injuries sustained by guest must have had actual or implied knowledge that probable consequence of his intentional conduct would be an injury to guest in order to be guilty of "willful mis-

conduct" within guest statute. Vehicle Code, § 403.

4. Trial ⇨260(8)

In action against motorist for injuries sustained by guest, failure to instruct that jury, in determining whether motorist had implied knowledge of probable injury to guest, should apply the external standard of what would be apparent to a person of ordinary prudence, was prejudicial error which was not cured by instruction that motorist's actual knowledge could be proved by circumstantial evidence. Vehicle Code, § 403.

5. Automobiles ⇨181(1)

While intent to injure is not a necessary element of "willful misconduct" within automobile guest statute, the state of mind of motorist is a material factor. Vehicle Code, § 403.

6. Appeal and error ⇨1050(1)

In action against motorist for injuries sustained by guest, admitting motorist's testimony that he did not intend to have an accident or to injure the guest was not prejudicial error, notwithstanding that intent to injure is not a necessary element of "willful misconduct" within automobile guest statute, since the state of mind of the driver is a material factor. Vehicle Code, § 403.

GOODELL, J., dissenting.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for damages for personal injuries sustained in an automobile accident by J. Hallam Cope against Warren W. Davison. From a judgment for the defendant, the plaintiff appeals.

Reversed.

John Paul Jones, of Oakland, for appellant.

Hoge, Pelton & Gunther and Hauerken, Ames & St. Clair, all of San Francisco, for respondent.

DOOLING, Justice.

The plaintiff appeals from a judgment for the defendant entered upon the verdict

of a jury. The action was one for personal injuries brought under the guest statute (Vehicle Code, § 403) and counted on wilful misconduct.

Respondent argues that there was no evidence produced which would have supported a judgment for the plaintiff. The evidence was conflicting but if the jury believed the evidence favorable to the plaintiff's case we are satisfied that a verdict for the plaintiff would find ample support. The parties and defendant's wife were going on a hunting trip in an automobile driven by defendant. They stopped in Woodland and left Woodland, going north, at about 11 p.m. A light rain was falling. A few miles north of Woodland there is a rather sharp turn in the road which is almost level, hardly banked at all. About 500 feet south of this turn there is a sign indicating the approaching curve and warning motorists to slow down to 25 miles per hour. Defendant had been over the road many times, was familiar with the curve, saw the sign that night and knew that the curve was ahead. According to plaintiff's testimony defendant proceeded toward this curve at a speed of 45 miles per hour and at no time slackened his speed until the casualty occurred. About 60 to 80 feet from the curve the car skidded slightly, defendant decided that he could not make the turn, drove the car straight ahead through a fence and the front end dropped into a ditch on the other side. This was one of the season's first rains. Defendant testified that he knew that farmers in the vicinity were in the habit of driving their equipment across the highway leaving dirt thereon, that oil was also deposited on the highway by motor vehicles, and that an early rain would make the highway slippery where either dirt or oil had been deposited. Defendant also gave the following testimony:

"Q. Well, you knew as you approached the turn that night that even when the streets were dry, it was a very dangerous turn unless you drive around the turn very slowly, did you not? A. That is correct.

"Q. And you knew that from having been over that road these hundreds of times? A. That is correct."

This evidence would support the conclusion that defendant on a wet road, with the knowledge that it might be slippery and cause his car to skid, intentionally and deliberately drove his car toward the curve at 45 miles per hour, knowing that the curve was there and knowing that even on a dry pavement it was a dangerous curve unless approached very slowly.

"There are conflicting statements in the decisions which undertake to define 'wilful misconduct.' But on consideration of the cases on the subject, and reconciling them as far as possible, we find them to divide 'wilful misconduct' into two distinct lines of action, either of which will render a driver liable to his guest for its results, as follows: first, 'the intentional doing of something * * * with a knowledge that serious injury is a *probable* (as distinguished from a possible) result'; and, second, 'the intentional doing of an act with a wanton and reckless disregard of its possible result.' Both of these statements are quoted from *Howard v. Howard*, 1933, 132 Cal.App. 124, 129, 22 P.2d 279, 281 (emphasis by the court there), and have been approved in the many later cases reviewed in *People v. Nowell*, 45 Cal.App.2d Supp. [811], at pages 815 and 816 (114 P.2d 81)." *Van Fleet v. Heyler*, 51 Cal.App.2d 719, 727, 125 P.2d 586, 590.

[1,2] Under this definition which has become standardized in this state by repeated decisions the evidence above summarized was ample to support a finding of wilful misconduct.

Appellant proposed an instruction that:

"If you believe under the evidence in this case that the defendant Warren W. Davison intentionally did something or omitted to do something, in the operation of his automobile on the night in question, with knowledge express or implied, that injury to plaintiff was a *probable* consequence of his intentional act or failure to act, then I instruct you that defendant was guilty of wilful misconduct.

"I instruct you that in determining whether the said intentional act or omissions of said defendant, if such you find them to be, are sufficient to disclose implied knowledge of such probability of in-

jury to plaintiff guest, an external standard is applied, and applying the 'external standard' the defendant Warren W. Davison is charged with knowledge of the probable consequences of his conduct, such consequence being apparent to any person of ordinary prudence of which you ladies and gentlemen of the jury are the exclusive judge."

The court was also asked to give several instructions qualifying the necessary knowledge of probable injury to the guest by the participial adjectives "express or implied" and the words "express or implied" were stricken by the court. Another proposed instruction contained this language:

"It is enough if at the time and place of the happening of this accident that he knew, or should have known, of circumstances which would bring home to the realization of the ordinary reasonable man the highly dangerous character of his conduct * * *."

This instruction the court also refused to give.

[3] As a result, by the instructions given to them, the jury was informed that in order to find defendant guilty of wilful misconduct they must find that he had actual knowledge that the probable consequence of his intentional conduct would be an injury to plaintiff.

This is contrary to the law as it has been developed by the decisions. This court in *Rawlins v. Lory*, 44 Cal.App.2d 20, 24, 25, 111 P.2d 973, 975, said:

"It is not necessary that there be a deliberate intention on the part of the driver to injure the guest, but it is essential that there be an intentional act or omission on his part under circumstances disclosing the requisite knowledge, express or implied, of the probability of injury to the guest. In determining whether the circumstances are sufficient to disclose implied knowledge of such probability, an external standard is applied. In *Stacey v. Hayes*, 31 Cal.App.2d 422, 88 P.2d 165, one of the authorities relied on by defendants, the court said at page 426, of 31 Cal.App. 2d, at page 167 of 88 P.2d, 'The probability of injury to the guest from such act or omission must have been an apparent con-

sequence to a man of ordinary prudence and intelligence.' * * * The probability of injury to a guest from such conduct is an apparent consequence to any person of ordinary prudence and, applying the external standard above mentioned, any driver engaging in such conduct is charged with implied knowledge of the probability of such injury."

The question was considered again and the authorities exhaustively reviewed in *Van Fleet v. Heyler*, supra, 51 Cal.App.2d 719, 125 P.2d 586. We quote from 51 Cal. App.2d pages 727-729, 125 P.2d at page 591:

"The first alternative stated in *Howard v. Howard*, supra, doing an act with knowledge of its probable results, etc., is qualified by the cases to this extent, that the knowledge may be either express or implied. *Turner v. Standard Oil Co.*, 1933, 134 Cal.App. 622, 626, 25 P.2d 988. This case is approved on this point in many later cases, including *Meek v. Fowler*, 1935, 3 Cal.2d 420, 425, 45 P.2d 194; *Weber v. Pinyan*, 1937, 9 Cal.2d 226, 233, 70 P.2d 183, 112 A.L.R. 407; *Robertson v. Brown*, 1940, 37 Cal.App.2d 189, 194, 99 P.2d 288; *Stacey v. Hayes*, 1939, 31 Cal.App.2d 422, 426, 88 P.2d 165; *Francesconi v. Beluomini*, 1938, 28 Cal.App.2d 701, 703, 83 P. 2d 298; *Gimenez v. Rissen*, 1936, 12 Cal. App.2d 152, 157, 55 P.2d 292; *Hagglund v. Nelson*, 1937, 23 Cal.App.2d 348, 352, 73 P.2d 265; *Haas v. Jones*, 1938, 29 Cal.App. 2d 650, 652, 85 P.2d 579; and *Rawlins v. Lory* [1941, 44 Cal.App.2d 20, 24, 111 P.2d 973]. The same rule has been expressed by use of the words 'actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge.' *Parsons v. Fuller*, 1937, 8 Cal.2d 463, 468, 66 P.2d 430, 433; *Porter v. Hofman*, 1938, 12 Cal. 2d 445, 448, 85 P.2d 447; *Stacey v. Hayes*, supra; *Howard v. Howard*, supra; and other cases referred to in those last cited. In *Stacey v. Hayes*, supra * * *, this thought is amplified by the statement that 'The probability of injury to the guest from such act or omission must have been an apparent consequence to a man of ordinary prudence and intelligence.' This language was quoted in *Rawlins v. Lory*, supra, with the further comment that 'In de-

termining whether the circumstances are sufficient to disclose implied knowledge of such probability, an external standard is applied' and it was held by applying this 'external standard' that the defendant there was charged with knowledge of the probable consequences of his conduct, such consequences being apparent to any person of ordinary prudence. This standard was applied in *Jones v. Hathway*, 1937, 22 Cal. App.2d 316, 320, 70 P.2d 681, 683, where the court said that 'as a presumably reasonable man, had he exercised due care, defendant must have known, or must have been conscious of and appreciated the fact that to drive * * * (as he did) was likely to result in injury to plaintiff.' The same view is set forth in the Restatement of the Law of Torts, in comment c. appended to section 500, as follows: 'In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.' (p. 1295.)

"Our attention has been particularly called to the following quotation from *Porter v. Hofman*, 1938, 12 Cal.2d 445 [448], 85 P.2d [447], a misconduct case: 'Before liability arises there must be shown actual knowledge, or its equivalent, on the part of the defendant of peril to be apprehended coupled with a conscious failure to act to the end of averting injury.' The latter part of this sentence cannot have been intended to take away the effect of the previous reference to the 'equivalent' of actual knowledge, for in the next preceding paragraph we find the same reference, and also an approving quotation from another case * * * of this expression of the same thought; 'that which in the law is esteemed to be the equivalent of actual knowledge.' In other words, even if some logical inconsistency can be found between the two parts of the sentence first quoted, the latter part of it, when consid-

ered with all the other parts of the opinion, does not carry with it the implication that actual knowledge by the driver of impending danger is necessary to constitute wilful misconduct. It means no more than this statement from *Stacey v. Hayes*, 1939 [31 Cal.App.2d 422, 426, 88 P.2d 165], (in which a hearing was denied by the Supreme Court a few months after the decision of the *Porter* case): 'Though there need be no actual conscious intent to injure the guest, the act done or the omission made must be intentional. The probability of injury to the guest from such act or omission must have been an apparent consequence to a man of ordinary prudence and intelligence.' In the case at bar the jury could have found that when the defendant failed to slow down as he approached the pack station, as well as when he increased his speed just before that time, he acted consciously and intentionally and that the probability of injury to his guests under the then existing circumstances must have been apparent to a man of ordinary prudence and intelligence."

On page 730 of the same opinion in 51 Cal.App.2d, on page 59, of 125 P.2d, the court held an instruction given by the court to be erroneous, using the following language:

"Plaintiff contends that many of the instructions on the subject of wilful misconduct are erroneous. We find that several of them are not entirely consistent with the foregoing discussion of that term, but since a new trial must be had, at which the instructions can be made to conform to the law on this point as above stated, it is not necessary to discuss in detail all those complained of. One of them, given at defendant's request, reads as follows: 'There can be no wilful misconduct unless the defendant himself realized that there was a probability, as distinguished from a mere possibility, of injury to the occupants of his car from his conduct. Even proof of such probability of injury will not alone establish such realization on his part. There must be a conscious disregard of probable consequences. You may, however, consider all of the surrounding circumstances in ascertaining such realization.' This instruction was er-

roneous in at least two respects. By making it a condition of liability that defendant himself 'realized' the probable consequences of his conduct, it withdrew from the consideration of the jury 'implied knowledge' on defendant's part, that is, the possible inference that a man of ordinary prudence and intelligence would have realized those probable consequences, even though defendant himself did not, and thus ran counter to the first branch of the definition of wilful misconduct, as above stated; and by excluding from consideration the possibility of injury to a guest, and defendant's reaction thereto, it contravened the second branch of that definition."

The supreme court denied a hearing in this case and its correctness has not been questioned in any later decision. It was cited and followed in *Hastings v. Serleto*, 61 Cal.App.2d 672, 681 and on pages 687, 688, 143 P.2d 956, on page 963 the court in the *Serleto* case approved an instruction that "a driver is charged with knowledge of the probable consequences of his conduct, if such consequences would have been apparent to any person of ordinary prudence and intelligence."

[4] The jury's verdict was reached by a vote of 9 to 3. It is obvious that the jurors who voted for the defendant may have concluded that defendant intentionally approached this dangerous curve at 45 miles per hour but without the conscious realization or actual knowledge of the probability of injury to his guest. It is equally obvious under the facts that if properly instructed the same jurors might have found that such probability of injury would have been apparent to any person of ordinary prudence. The failure to instruct them that in determining whether defendant had implied knowledge of probable injury to his guest they should apply the external standard of what would be apparent to a person of ordinary prudence must be held to be prejudicial error.

This error was not cured by the giving of the following instruction:

"When there is a question whether a vehicle driver conducted himself with knowledge that serious injury to a guest

probably would result from the conduct, proof of such knowledge does not have to be by direct evidence. The jury has a right to infer that the driver had such knowledge, if such an inference may reasonably be drawn from facts in evidence, and if the judgment of the jury so directs."

To instruct the jury that defendant must have actual knowledge is an instruction on a substantive fact which they are told must be proved to establish plaintiff's right to recover. To further instruct them that this actual knowledge may be proved by circumstantial evidence does not change the fact that under the instructions they must still find actual knowledge, and is not in any sense the same thing as telling them that they need not find that the defendant had actual knowledge if they do find that a person of ordinary prudence would have had such knowledge.

A similar instruction in *Van Fleet v. Heyler*, *supra* ("You may, however, consider all of the surrounding circumstances in ascertaining such realization"), was not considered by the court in that case to cure the error of the instruction that actual knowledge of probable injury must be proved.

[5,6] Over plaintiff's objection defendant was permitted to testify that he did not intend to have an accident, did not intend to injure his wife and did not intend to injure his friend, the plaintiff. Although intent to injure is not a necessary element of wilful misconduct, the state of mind of the driver is a material factor, and we are not prepared to hold that the giving of this testimony was prejudicial error. But it did have the effect of impressing on the jury the *actual*, as distinguished from the *implied*, state of the defendant's mind. The jury might reasonably conclude that one who did not intend to have an accident or injure his passengers would not intentionally do an act with actual knowledge that an accident and injuries would probably follow. If instructed on the external standard of what would be apparent to the ordinarily prudent person they might have reasonably concluded that although defendant had no actual knowledge of the prob-

able consequence of his acts, any person of ordinary prudence would have had such knowledge.

Judgment reversed.

NOURSE, P. J., concurs.

GOODELL, Justice (dissenting).

I dissent because I believe the instructions were sufficient.

The definition of wilful misconduct approved in *Meek v. Fowler*, 3 Cal.2d 420, 425, 45 P.2d 194, 197, speaks of the driver's "knowledge, express or to be implied, that an injury to a guest will be a probable result" of his conduct. The instructions which were given omit the words "express or to be implied," but the instruction quoted near the end of the prevailing opinion, in my view, not only completely bridged the gap left by the omission of those words, but conveyed the same meaning even better than the omitted words could have conveyed it. It read: "When there is a question whether a vehicle driver conducted himself with knowledge that serious injury to a guest probably would result from the conduct, proof of such knowledge *does not have to be by direct evidence. The jury has a right to infer that the driver had such knowledge*, if such an inference may reasonably be drawn from facts in evidence, and if the judgment of the jury so directs." (Emphasis mine).

The prevailing opinion says: "To instruct the jury that defendant must have actual knowledge is an instruction on a substantive fact * * *." Nowhere does this instruction, nor do any of the others, say *actual* knowledge. When this instruction told the jury that proof of knowledge *does not have to be by direct evidence, but can be inferred*, it told them (in almost so many words) that the driver's knowledge can be *implied*. If it can be implied, then of course it need not be *actual* knowledge. Hence I can not agree with the statement that "To further instruct them that this actual knowledge may be proved by circumstantial evidence does not change the fact that under the instructions they must still find actual knowledge * * *." Nothing in any of the instructions, I sub-

mit, had the effect of telling the jury "they must still find actual knowledge." When the instruction told them they could find that the defendant had knowledge of probable injury by *inference*, it certainly meant *entirely* by inference "if the judgment of the jury so directs." In *State v. Millain*, 3 Nev. 409, 450 (also reported in Vol. 3-4, Nev., Hawley, 371, 405) the court, speaking through Chief Justice Beatty, said: "There is nothing wrong in the definition of murder in the first degree, as given by the Court to the jury—at least nothing to mislead the jury. There is no real distinction in the meaning between the word 'inferred,' as used by the Court, and 'implied,' as used in the statute."

It is of no consequence that this instruction states a rule of evidence rather than of substantive law, for the judge performs his duty when he states *the law*, however it may be catalogued or classified by lawyers, and the jury could not be concerned with such legal refinements so long as they are given a *rule* to guide them.

In a case involving the phrase "malice, express or implied" as used in sec. 3294, Civ.Code, dealing with exemplary damages, the court in *Davis v. Hearst*, 160 Cal. 143, 162, 116 P. 530, 539, said: "It should be apparent that the malice, and the only malice, contemplated by section 3294 is malice in fact, and that the phrase 'express or implied' has reference only to the evidence by which that malice is established; 'express malice' thus meaning that the malice is established by express or direct evidence going to prove the actual existence of the hatred and ill will; 'implied malice' referring to the indirect evidence from which the jury may infer the existence of this malice in fact."

The court thus treats "express" as synonymous with "direct" and "implied" as synonymous with "inferred."

A number of later cases defining wilful misconduct, in speaking of knowledge, entirely omit the modification *express* or *implied*. In 1942 the Supreme Court in *People v. Young*, 20 Cal.2d 832, 836, 129 P.2d 353, 355, said that: "The most acceptable definition of wilful misconduct is stated in *Howard v. Howard*, 132 Cal.App. 124,

129, 22 P.2d 279, 281, as follows: 'But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.' In *Porter v. Hofman*, 12 Cal.2d 445, 448, 85 P.2d 447, 448, the court says: "To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril * * *." This last definition is held in *Van Fleet v. Heyler*, 51 Cal.App.2d 719, 728, 125 P.2d 586, to be simply an expression of the same rule as that contained in the phrase "knowledge, express or to be implied."

With respect to the claimed failure to instruct on the so-called "external standard," the instruction discussed above told the jury in substance and effect that they could draw their own inferences, and could charge the driver with knowledge "if the judgment of the jury so directs." That gave them plenty of lee-way. If the jury inferred from the facts that he *should have known* of the peril, they would, in reaching this conclusion, be simply drawing on their own experience, observation and common sense as twelve ordinarily prudent men and women. The opinion in *Van Fleet v. Heyler* recognizes this. In its criticism of an instruction which said, *inter alia*, that "There can be no wilful misconduct unless the defendant himself realized that there was a probability, as distinguished from a mere possibility, of injury," the court said (at page 730 of 51 Cal.App.2d, at page 592 of 125 P.2d), "By making it a condition of liability that defendant himself 'realized' the probable consequences of his conduct, it withdrew from the consideration of the jury 'implied knowledge' on defendant's part, that is, the possible inference that a man of ordinary prudence and intelligence would have realized those probable consequences, even though defendant himself did not, and thus ran counter to the first branch of the definition * * *." The jury in

the case at bar was, I repeat, fairly instructed on *implied knowledge*, and on these other subjects as well, by and through this instruction as to their right to draw inferences.



74 Cal.App.2d 332

PORTER, Price Administrator, v. FISKE-
Civ. 15234.

District Court of Appeal, Second District,
Division 2, California.

May 1, 1946.

1. Trial ⇐109

Where it was clear that defendant's counsel had undertaken to state all of the facts which he expected to prove, and it was plainly evident that the facts sought to be proved would not constitute a defense, the trial court could properly enter judgment for plaintiff on the opening statement.

2. Contracts ⇐103

Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law.

3. Contracts ⇐105

The question of violation of a statute is not always determined with reference to private rights of parties to transaction, and the result will not turn on skill with which the parties have manipulated their transactions, but on the significance of their acts in terms of provisions of the statute itself and of the public policy declared thereby.

4. War ⇐4

Where landlord received \$210 from tenants upon signing an agreement not to sell property for six months before executing lease renting premises to tenants for such period at maximum allowable rent under rent regulation, the sum of \$210, though paid as part of a separate transaction, was a condition to renting of premises to tenants and constituted an overcharge in violation of rent regulation. Emergency Price

Control Act 1942, §§ 2(b), 4(a), 50 U.S.C.A. Appendix §§ 902(b), 904(a).

5. War ☞4

The violation of Emergency Price Control Act by defendant in charging rent for house in violation of rent regulation promulgated pursuant to the act furnished good cause for issuance of an injunction upon Price Administrator's application, and it was not necessary for Administrator to allege or prove existence of usual equitable grounds for issuance of an injunction or to allege a threatened repetition of the acts. Emergency Price Control Act 1942, § 205 (a, e), 50 U.S.C.A. Appendix § 925(a, e).

6. Evidence ☞5(2)

The court will take judicial notice of the national emergency and of the creation thereby of an irreparable injury to the nation and to its people occasioned by a violation of the Emergency Price Control Act. Emergency Price Control Act 1942, § 1 et seq. 50 U.S.C.A. Appendix § 901 et seq.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Paul A. Porter, Administrator, Office of Price Administration, against Syrel Taxey Fiske, to recover treble damages for charge in excess of maximum lawful rental, together with an injunction restraining defendant from further violations of rent regulation for housing. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Helgoe & Hart, of Los Angeles, and Robert E. Ford, of Hollywood, for appellant.

Towson MacLaren, William U. Handy, and Warren L. Shobert, all of Los Angeles, Herbert H. Bent and Jacob Chaitkin, both of San Francisco, and Cecil F. Poole, of Oakland, for respondent.

WILSON, Justice.

This case presents another of the many stratagems and subterfuges more or less ingeniously devised to evade the rent restrictions and regulations imposed by the Office

of Price Administration. The complaint alleges that appellant owns a dwelling house in the Los Angeles Defense-Rental Area, the maximum legal rental of which was fixed in accordance with law by the Office of Price Administration at \$40 per month; that in November, 1944, she leased the dwelling to tenants for six months at the maximum lawful rental, and at the same time demanded and received the additional sum of \$210 from them. The tenants not having instituted an action on account of said overcharge within 30 days after said sum was paid, plaintiff brought this action by the authority of section 205(e) of the Emergency Price Control Act, as amended, 50 U.S.C.A. Appendix § 925(e), to recover treble said amount and in addition sought an injunction restraining appellant from further violations of Rent Regulation for Housing. 9 Fed.Reg. 11335. By her answer appellant denied receiving any excess rental.

When the cause came on for trial appellant's counsel made an opening statement of the facts which he expected to prove. He stated that appellant had received said sum of \$210 but denied that it was demanded or received as additional rental. He asserted that the property in question was vacant and was on the market for sale; that the tenants offered to pay appellant \$210 if she would agree not to sell the property for six months and would give them a lease for said period; that said sum was paid before the lease was executed. He claimed that there were two separate transactions: (1) An agreement by the prospective tenants to pay said sum if appellant would agree not to sell for six months and would lease the property to them; and (2) the execution of the lease. In response to an inquiry by the court counsel for the appellant stated that his opening statement contained all facts expected to be proved in support of the defense to plaintiff's complaint. Respondent's motion for a judgment in his favor on said opening statement was granted. The court found that the facts alleged in the complaint were true; that the payment of said sum by the tenants, and the promise of appellant made in connection therewith, was a transaction separate from the execution of the lease,

but that it was also true that said sum was demanded by appellant as a condition to the renting of the premises to them. Judgment was rendered in favor of plaintiff for the sum of \$630 and appellant was permanently enjoined from demanding or receiving rents for said property in excess of the maximum legal rental and from otherwise violating said rent regulation.

[1] 1. *The decision of the court on counsel's opening statement.* There was nothing unique in the method adopted by the court in the trial of the case. Appellant's answer admitted all of the allegations of the complaint with one exception, to wit, she denied that the sum of \$210 which she admitted having received was for the rental of the premises. Whether the payment of said amount was on account of rent or was a wholly separate and independent transaction was the only question presented to the court for determination. After a brief prefatory statement by one of respondent's attorneys, counsel for appellant made the statement hereinbefore outlined, followed by a colloquy between counsel and the court in which it was made certain that all facts relied on by appellant had been fully stated. The introduction of evidence by her under oath would have added nothing to the statement. The facts were before the court for its consideration. Respondent's attorney accepted the statement in lieu of evidence and was satisfied to submit the case thereon. The court also accepted it, giving it the same effect as if all matter related therein had been under oath. The only complaint that can be urged by appellant is that the court reached a conclusion upon the facts different from that which had been urged by her counsel.

"* * * where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense" the court is authorized to accept the statements of counsel and to render such judgment as is required thereby. *Bias v. Reed*, 169 Cal. 33, 37, 145 P. 516, 518. The facts contained in the opening statement made on behalf of appellant, if proved, would not have authorized a judg-

ment in her favor and it was therefore not error for the court to render judgment for plaintiff. (*Id.* 169 Cal. at page 45, 145 at page 517.)

2. *The violation of the statute by appellant.* Section 2(b) of the Emergency Price Control Act, 50 U.S.C.A. Appendix § 902 (b), authorizes the Price Administrator to stabilize rents for housing accommodations within defense-rental areas, and to establish such maximum rents for said accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of the act. Section 4(a), 50 U.S.C.A. Appendix § 904(a), provides: "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to * * * demand or receive any rent for any defense-area housing accommodations * * * in violation of any regulation or order" authorized by the statute.

Pursuant to the authority granted by the statute the Price Administrator adopted and promulgated Rent Regulation for Housing, covering various portions of the United States, including Los Angeles County. 9 Fed.Reg. 11335. Section 2(a) thereof provides as follows: "Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation * * *." Section 13(a) provides: "When used in this regulation the term: * * * (10) 'Rent' means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or the transfer of a lease of such accommodations."

[2,3] The terminology adopted by the parties in reaching their agreement did not operate to relieve appellant of the amercement provided by the statute. "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a

course of conduct forbidden by law." United States v. City and County of San Francisco, 310 U.S. 16, 28, 60 S.Ct. 749, 756, 84 L.Ed. 1050. The question of the violation of a statute is not always determined with reference to the private rights of the parties to a transaction, and the result will not turn on the skill with which the parties have manipulated their transaction but on the significance of their acts in the terms of the provisions of the statute itself and of the public policy declared thereby. United States v. Masonite Corporation, 316 U.S. 265, 280, 62 S.Ct. 1070, 86 L.Ed. 1461.

[4] Without the lease there was no consideration moving to the tenants for the sum paid by them in excess of the lawful rental. They would not have been benefited by and were not interested in the mere removal of the property from the market or by the refusal of appellant to sell for a period of six months. They wanted a lease and were willing to pay for it but common sense rejects the belief that they would have paid any amount whatsoever for appellant's naked promise not to sell.

The honesty and good faith of appellant are not in question. Though she may have been endowed with those attributes and believed that she had conceived a plan that was not in violation of the law or of the regulation, and though she may possibly have acted on what she deemed to be competent legal advice, she cannot escape the penalty for having received, in violation of the regulation, a bonus or benefit as a part of the consideration for the lease.

Appellant does not question the validity or the reasonableness of the Rent Regulation adopted by the Administrator nor does she claim that the maximum rent established for her property was too low.

Schemes and devices of every character in evasion of the rent regulation have been condemned. The following are examples: Supplying equipment in an apartment in addition to what was supplied on the rental freeze date and charging an increased rental therefor (Thierry v. Gilbert, 1 Cir., 147 F.2d 603, 604); the inclusion of appurtenant land in the lease of a house at a rental

in excess of that previously received for the house alone, there being no apportionment of rent between house and land (Scheide v. Porstmann, Dist.Ct.Md., 66 F. Supp. 483; a requirement that prospective tenants purchase furniture as a condition of receiving a lease on an apartment, Bowles v. Betts, Dist.Ct.E.D.Mo.,¹ the operation of a club by a landlord wherein members paid a fee and were allowed to occupy apartments without the payment of rental, the club fees being in excess of the maximum legal rental (Bowles v. Monks, Dist.Ct.Mass.,¹ the exaction by the landlord's managing agent of a commission from tenants as a condition for their obtaining a lease on an apartment where it had been the custom prior to the maximum rent date established by the Office of Price Administration for the landlord to pay the commission. Cha-Kir Realty Corporation v. Sanchez, 183 Misc. 427, 52 N.Y.Supp.2d 482, 484; 2 O.P.A. Opin. & Dec. 5154.

3. *The findings are supported by appellant's statement of facts.* The only inference to be drawn from the facts as stated is that the tenants paid the sum of \$210 in addition to the lawful rental in order to obtain a lease and that appellant would not have leased the property to them save for said payment. The tenants did not pay and would not have paid said sum for the purpose of postponing the sale of the property but they paid for the privilege of occupying a dwelling for a period of six months. Nor would appellant have expected them to pay solely for a postponement of the sale. There was only one transaction, and not two, as asserted by appellant. The tenants offered to pay if the property were not sold and if they could obtain a lease.

[5,6] 4. *The injunction.* Appellant assigns as error that portion of the judgment enjoining her from directly or indirectly demanding or receiving rents for or in connection with the housing or occupancy of her said premises, or for or in connection with the use or occupancy of the premises here involved or of any other housing properties owned or operated by her in excess of the maximum rents permitted by said Rent Regulation for Hous-

¹ No opinion for publication.

ing or from otherwise violating said Rent Regulation.

Section 205(e) of the statute, 50 U.S.C.A. Appendix § 925(e), provides among other things: "For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity * * *." Section 205(a), 50 U.S.C.A. Appendix § 925(a), provides that whenever in the judgment of the Administrator any person has engaged in any acts or practices constituting a violation of any provision of section 4 of the act (the applicable portion is hereinbefore quoted) he may make application to the appropriate court for an order enjoining such acts or practices and a permanent or temporary injunction or restraining order shall be granted without bond. The injunction was authorized by statute and the violation of the act by appellant furnishes good and sufficient cause therefor.

It was not necessary for respondent to allege or prove the existence of the usual equitable grounds for the issuance of an injunction nor to allege a threatened repetition of the acts. "Where an injunction is

authorized by statute it is enough that the statutory conditions are satisfied." *Henderson v. Burd*, 2 Cir., 133 F.2d 515, 517, 146 A.L.R. 714; *Bowles v. Swift & Co.*, D.C., 56 F.Supp. 679; *United States v. Adler's Creamery*, 2 Cir., 110 F.2d 482, certiorari denied 311 U.S. 657, 61 S. Ct. 12, 85 L.Ed. 421. We were at war when the transaction complained of occurred. The statute was adopted to meet an emergency occasioned by the scarcity of housing accommodations in areas where war supplies were being produced. The court will take judicial notice of the national emergency and of the creation thereby of an irreparable injury to the nation and to its people occasioned by a violation of the statute. *Brown v. Kramer*, D.C., 49 F. Supp. 359, 363; *Brown v. Bernstein*, D.C., 49 F.Supp. 497, 498; *Bowles v. W. W. Elzea, Inc.*, D.C., 59 F.Supp. 1012, 1021. Appellant cannot complain of an injunction restraining her from violating the law.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, J., concurs in the judgment.

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28 Cal.2d 756

**LOCKHEED AIRCRAFT CORPORATION
et al. v. INDUSTRIAL ACCIDENT
COMMISSION et al.**

L. A. 19633.

Supreme Court of California, in Bank.
Aug. 23, 1946.

1. Workmen's compensation ⇨1939

Whether employee has embarked on an errand entirely personal to himself, without any relation to his service to his employer, is for Industrial Accident Commission unless court should say as a matter of law that such a deviation has occurred.

2. Workmen's compensation ⇨661

Where employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer.

3. Workmen's compensation ⇨667, 768

Where employee, who used his motorcycle to travel between two of employer's plants, was injured when motorcycle collided with a streetcar while employee, who had missed a turn on prescribed route of travel, was returning to prescribed route and at the same time looking for a place to eat lunch in light of fact that employer allowed him to take time out for lunch in course of trip, employee's injuries arose in "course of employment" and were compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

4. Workmen's compensation ⇨617

An injury is compensable if received while employee is doing those reasonable

things which his contract of employment expressly or impliedly authorizes him to do.

5. Workmen's compensation ⇨1939

Where employee was injured while off his prescribed route between employer's two plants, whether general contract of employment authorized employee to step off regular route to find an eating place, or whether his deviation from regular route was unintentional, were questions for Industrial Accident Commission to determine as an element to be considered in determining whether injuries arose in the course of employment so as to be compensable.

6. Workmen's compensation ⇨1939

A court on review of a compensation case has no general concern with the credibility of a witness.

7. Workmen's compensation ⇨1939

Before reviewing court may reject statements of a witness who has been believed by Industrial Accident Commission, there must exist either a physical impossibility that statements are true, or their falsity must be apparent without resort to inferences or deductions, conflicts, or justifiable suspicion being insufficient.

8. Workmen's compensation ⇨1939

Reviewing court in compensation case is not permitted to weigh the evidence.

9. Workmen's compensation ⇨1939

The question of good faith and honesty on part of applicant for compensation is one of fact for Industrial Accident Commission and, when commission has determined question under circumstances which would admit of a finding either way, court may not substitute its conclusion as to credibility of witness.

Proceeding under the Workmen's Compensation Act by Lockheed Aircraft Corporation, employer, and Associated Indemnity Corporation, insurer, to review an award of the Industrial Accident Commission granting compensation to Richard Janda, employee.

Award affirmed.

Prior opinion 163 P.2d 911.

Sybil S. Tipton, of Los Angeles, for petitioners.

R. C. McKellips and Edward A. Sarkisian, both of San Francisco, for respondents.

SHENK, Justice.

The petitioners, Lockheed Aircraft Corporation and Associated Indemnity Corporation, respectively the employer and its insurance carrier, seek annulment of an award of compensation to the employee, Richard Janda.

Janda, about 34 years of age, was and had been in the employ of Lockheed in Los Angeles County since 1940 as a material conservation analyst whose duty it was to check materials for reclamation. In the discharge of this duty he was required to travel between his general headquarters at Plant No. 2 at Seventh Street and Santa Fe Avenue in Los Angeles and Plant No. 4 in Maywood. He made frequent trips between these plants either in the company automobile, or on his own motorcycle for the use of which he received an allowance as "mileage." It was understood that in going between the plants he was to travel over certain approved routes.

Janda's hours of employment were from 4 p. m. to 12:30 a. m. His lunch period was generally from 8 to 8:30 p. m. for which time he received no compensation. Because of the nature of his employment he had discretion to stop for his lunch while en route between the plants.

On January 25, 1945, Janda completed an errand at Plant No. 4 in Maywood and shortly before 8 o'clock started back to plant No. 2 on his motorcycle. He decided to get his lunch on the return trip and in order to find a suitable eating place he chose an alternative approved route over

Slauson Avenue and Alameda Street which, however, he had not travelled in the past. He turned west on Slauson Avenue with the intention of going north on Alameda Street. Because he was watching for a lunch room and due to his unfamiliarity with the route, he missed Alameda Street without realizing that fact until he arrived at Vermont Avenue. He then proceeded north on Vermont Avenue with the intention of turning east toward Alameda Street, thence back to the plant. At the intersection of Vernon and Vermont Avenues he was struck by a streetcar and received the injuries for which he sought compensation.

The commission's award of compensation was based on its findings and determination that Janda's injuries arose out of and occurred in the course of his employment. The petitioners contend that the findings and determination are without support in the facts and the law. They rely on the going and coming rule and on the cases which hold that when an employee has deviated from the path of his employment on an errand personal to himself and while not performing any service for his employer, injuries received by him or by a third person due to his negligence may not be said to be in the course of his employment. See *California C. I. Exch. v. Industrial Acc. Comm.*, 190 Cal. 433, 213 P. 257; *Peccolo v. City of Los Angeles*, 8 Cal.2d 532, 535, 66 P.2d 651; *Gordoy v. Flaherty*, 9 Cal.2d 716, 72 P.2d 538; *California Highway Comm. v. Industrial Acc. Comm.*, 61 Cal.App. 284, 287, 214 P. 658; *Martinelli v. Stabnau*, 11 Cal.App.2d 38, 40, 52 P.2d 956; *Carnes v. Pacific Gas & Elec. Co.*, 21 Cal. App.2d 568, 69 P.2d 998, 70 P.2d 717.

[1,2] It is a question for the commission to determine whether the employee has embarked on an errand entirely personal to himself without any relation to his service to his employer, unless the court should say as a matter of law that such a deviation has occurred. The facts of the present case do not fall, as a matter of law, within the rule relied on by the petitioners. The limits of Janda's working district were fixed by his employer. He did not cease to be acting in the course of his employment

when he started on the return trip. Had his injuries occurred while he was returning to Plant No. 2 over a regular and approved route, no question of the propriety of the award could properly have arisen, even though at the time he was also looking for a place to eat. The established rule was repeated in *Ryan v. Farrell*, 208 Cal. 200, 204, 280 P. 945, viz.: That where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer. See, also, *Tingey v. Industrial Acc. Comm.*, 22 Cal.2d 636, 640, 140 P.2d 410; *Loper v. Morrison*, 23 Cal.2d 600, 606, 145 P.2d 1; *Broecker v. Moxley*, 136 Cal.App. 248, 256, 28 P.2d 409.

In *Makins v. Industrial Acc. Comm.*, 198 Cal. 698, 247 P. 202, 49 A.L.R. 411, the employee was obliged to go outside of the established district to return to the initial point because otherwise he would be subjected to arrest and imprisonment for a traffic violation. He was held to be serving his employer although he deviated from the prescribed route. In *Tingey v. Industrial Acc. Comm.*, supra, 22 Cal.2d 636, 140 P.2d 410, the employee was injured while returning from lunch. But it was shown that, with the implied consent of his employer, he was conferring at luncheon with the manager of one of the branch stores relative to plans for a new branch. The conclusion that his injury occurred in the course of his employment was upheld.

A case somewhat similar on its facts to the present is *Loper v. Morrison*, supra, 23 Cal.2d 600, 145 P.2d 1. The employee's duties were to deliver milk along a prescribed route and collect milk accounts. About 4 o'clock on an afternoon he stopped to collect a delinquent account at the home of one Hanson, but found no one there. From experience he knew that the Hansons would be home around 5:30, so he decided to return. Inasmuch as he had not eaten since breakfast he went about two miles off the milk route for lunch and to take to his home one Dolan, a fellow employee who had accompanied him. An accident

occurred while he was proceeding from Dolan's home on the way back to the Hanson place and while he was still off the regular route. A judgment for the plaintiff, who was injured in the accident, was affirmed on the ground that the facts as a matter of law did not show a complete abandonment of the employment. As the court pointed out, the result was the same as though the employee had decided to wait in front of the Hanson home. He was still acting in the service of his employer. In such cases detours or deviations do not necessarily constitute an abandonment. See additional cases cited in *Loper v. Morrison*, 23 Cal.2d at page 606, 145 P.2d 1.

[3-9] In the present case the employee was unfamiliar with the alternative approved route on which he had chosen to return to the plant. While so returning he was serving his employer. His intention to eat his lunch on his way back did not effect an abandonment of his general purpose nor of his service to his employer. In the *Loper* case the deviation was intentional, but it was held that there was support for the conclusion that the path of employment had not been abandoned. It should not be said therefore that an unintentional or accidental deviation from the approved route would compel a different result in the present case. Furthermore, the employee was permitted to eat his lunch on his trips between plants, and there was no showing that he could not step off the approved route for the purpose if that was a matter reasonably to be contemplated. As stated in *Employers' etc. Corporation v. Industrial Acc. Comm.*, 37 Cal. App.2d 567, at page 573, 99 P.2d 1089, with citation of cases, the rule is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do. In the present case whether the general contract of employment authorized the employee to step off the regular route to find an eating place or whether his deviation from the regular route was unintentional and accidental as he testified, were questions for the commission to determine. The petitioners assert that the testimony

of the employee that his deviation was unintentional is unworthy of belief. But a court on review has no general concern with the credibility of a witness. It was observed in *People v. Huston*, 21 Cal.2d 690, at page 693, 134 P.2d 758, that before the reviewing court may reject statements of a witness who has been believed by the fact-finding body, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resort to inferences or deductions. Conflicts or justifiable suspicion are not sufficient. In *Quigley v. Industrial Acc. Comm.*, 3 Cal. 2d 46, at page 51, 43 P.2d 289, this court reminded litigants and counsel that it was not permitted to weigh the evidence. Also in *Pacific Indemnity Co. v. Industrial Acc. Comm.*, 202 Cal. 521, at page 525, 261 P. 937, it was said that the question of good faith and honesty on the part of the applicant is one of fact for the commission and that when the commission had determined the question under circumstances which would admit of a finding either way, the court might not substitute its conclusion as to the credibility of the witness.

It follows from the foregoing that the award should be and it is hereby affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



28 Cal.2d 790

**CALIFORNIA PHYSICIANS' SERVICE v.
GARRISON, Insurance Commis-
sioner.
S. F. 17006.**

Supreme Court of California, in Bank.
Aug. 27, 1946.

1. Action ⇐6

A declaratory judgment against a political subdivision of the state is sanctioned by statute. Code Civ.Proc. § 1060.

2. Action ⇐6

A procedural statute such as the declaratory judgment statute does not interfere with the rights of sovereignty of a government body which is subject to suit. Code Civ.Proc. § 1060

3. Action ⇐6

Action for declaratory relief was a proper form of action against insurance commissioner to determine whether activities of nonprofit physicians' service corporation subjected it to regulation under the insurance laws. Insurance Code, § 1037(f); Gen. Laws, Act 5233, § 19 et seq.; Pol.Code, § 4003; Code Civ.Proc. § 1060.

4. Action ⇐6

Whether a determination by way of declaratory relief is necessary and proper is within discretion of trial court, and in absence of a clear showing of abuse of that discretion, its decision will not be disturbed upon appeal. Code Civ.Proc. §§ 1060-1062.

5. Evidence ⇐5(2)

It is common knowledge that there is a great social need for adequate medical benefits at a cost which the average wage earner can afford to pay.

6. Physicians and surgeons ⇐4

The statute relating to health service corporations authorizes the organization of corporations such as the California Physicians' Service. Civ.Code, § 593a.

7. Constitutional law ⇐70(3)

The state's social policy in regard to the corporate practice of medicine has been determined by the statute relating to health service corporations, to the limited extent specified, and the courts are bound thereby. Civ.Code, § 593a.

8. Constitutional law ⇐205(6)

Physicians and surgeons ⇐2

The statute authorizing health service corporations does not violate constitutional prohibition against granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity. Civ.Code, § 593a; Const. art. 4, § 25, subd. 19.

9. Constitutional law ⇨70(1)

Propriety of classification in a statute is generally for the Legislature, determined in light of its knowledge of all the circumstances and requirements, and its discretion will not be overthrown unless palpably arbitrary.

10. Constitutional law ⇨48

In determining reasonableness of classification in statute, it will be presumed that Legislature inquired whether there were evils to be remedied and that classification was based upon result of such inquiry.

11. Constitutional law ⇨208(6)

The Legislature may classify organizations rendering medical services under the same general principles as those which allow it to license numerous occupations and professions, and public policy permits restriction of the right to assume the cost of such services to such organizations as meet reasonable and definite standards, the legislative classification being justified by the interest of the state in the health of its citizens. Civ.Code, § 593a; Const. art. 4, § 25, subd. 19.

12. Insurance ⇨2

"Insurance" generally may be defined as an agreement by which one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss, or injury of someone or something by specified perils. Insurance Code, §§ 22, 106, 10272; Civ.Code, §§ 2527, 2772.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurance".

13. Insurance ⇨2

Absence or presence of assumption of risk, and service rather than indemnity as principal object, are tests to be applied in determining whether nonprofit physicians' service corporation is engaged in the business of insurance within regulatory statutes. Civ.Code, §§ 593-605e, 593a; Insurance Code, § 10810 et seq., 11491 et seq.

14. Insurance ⇨10

Provision in statute relating to health service corporations for limited regulation by the attorney general and the particular

professional board, expresses legislative intent that such organization should be exempt from regulation by the insurance commissioner. Civ.Code, §§ 593-605e, 593a; Insurance Code, § 10810 et seq., 11491 et seq.

15. Constitutional law ⇨48

It would be presumed that Legislature weighed the evil of laymen control of medical activities against possible exploitation of the public and concluded that limited regulation provided by statute relating to health service corporations was sufficient. Civ.Code, § 593a.

16. Insurance ⇨2

The extensive insurance regulations primarily are designed to protect the insured, or the public, from the insurer and are not intended to apply where no risk is assumed and no default can exist. Insurance Code, § 10810 et seq., 11491 et seq.

17. Insurance ⇨2

A nonprofit physicians' service corporation which assumed no risk and made no promise to provide any medical care to beneficiary members and which acted merely as agent of physicians who furnished the medical services, who assumed all risks, and who looked solely to monthly dues of beneficiaries for compensation on a pro rata basis, was not engaged in the "insurance business" within regulatory statutes, notwithstanding incidental features of reimbursement for drugs and limited hospitalization for rural members. Civ.Code, §§ 593-605e, 593a; Insurance Code, §§ 22, 106, 1037(f), 10272, 10810 et seq., 11491 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurance Business".

Appeal from Superior Court, City and County of San Francisco; C. J. Goodeil, Judge.

Action by the California Physicians' Service, a nonprofit corporation, against Maynard Garrison, as Insurance Commissioner of the State of California, for a declaratory judgment that plaintiff's business and operations do not constitute in-

surance under supervision of the Commissioner of Insurance nor the corporate practice of medicine and surgery. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, see 155 P.2d 885.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr., and Harold B. Haas, Deputy Attys. Gen., for appellant.

Hartley F. Peart and Howard Hassard, both of San Francisco, for respondent.

Musick, Burrell & Pinney, Howard Burrell, and Anson B. Jackson, Jr., all of Los Angeles, as amici curiae on behalf of respondent.

EDMONDS, Justice.

California Physicians' Service, a non-profit corporation (Civ.Code, §§ 593-605e), sued to obtain a declaratory judgment that it is not engaged in the business of insurance within the meaning of the regulatory statutes of this state. The Insurance Commissioner has appealed from a determination adverse to his contentions, and the principal question for decision concerns the organization's right to operate, without his supervision, for the purpose of defraying the expense of medical care incurred by its dues-paying members.

The stipulation by which the evidence in the case was presented to the trial court shows the following facts:

The corporation was organized by the medical profession in 1939 to meet the need of persons in the lower income groups for medical care and surgical service. It holds a certificate of compliance with the provisions of section 593a of the Civil Code, relating to health service corporations, issued by the State Board of Medical Examiners. The incorporators were all officers and councilors of the California Medical Association, an association comprising over 5,000 doctors of medicine practicing in the State of California and constituting a component state unit of the American Medical Association. The service is a pioneer attempt by the physicians and surgeons of California to make available medical care for those who desire it and, because of financial limitations, find the cost of sickness a burden not easy to bear.

The articles of incorporation state that the organization was formed "after more than ten years of continuous investigation and study." As a summary of policies and purposes, it is said "that the duties and obligations of the profession are not only leadership in the maintenance of high standards of medical service but also in the means of distribution of that service so that all who need it may receive it; that the very advances made by modern science have greatly increased the cost of good medical service and hospital care and will continue to increase that cost as new methods and equipment for diagnosis and treatment are discovered and perfected * * * that a method which only the medical profession can most effectively provide is necessary properly to distribute this cost of medical service so as to relieve the intolerable financial burden heretofore falling on the unfortunate few in any given period of time; that the establishment by the profession of a voluntary medical service plan, participated in by all doctors of medicine desiring to do so, will enable the people of the State of California to obtain prompt and adequate medical attention and hospital care whenever needed on a periodic budgeting basis without injury to the standards of medical service, without disruption of the proper physician-patient relation and without profit to any agency, and will assure that all payments made by patients, except administrative costs, will be utilized for medical service and hospital care and not otherwise; that such a plan will create an efficient public and civic service without commercial exploitation of the patients or the profession or any restriction of an individual's fundamental right freely to select, when his need arises, the doctor of medicine and hospital desired by him; and finally, such a coordinated organized service can, upon the same fundamental basis, be the means which governmental agencies—federal, state, and local—may use to provide, at the lowest possible cost to the taxpayer, good medical service and hospital care for the indigent, needy or handicapped residents of California. * * *

To make effective these broad objectives, the by-laws declare that every resident doctor of medicine who holds "a valid and un-

revoked physician's and surgeon's certificate issued to him by the Board of Medical Examiners of the State of California shall be invited by the board of trustees to become a professional member * * * it being one of the fundamental purposes of this corporation that professional membership * * * shall embrace all legally licensed Doctors of Medicine. * * *

The professional members select, on a basis of state-wide representation, the administrative members, limited to 75, each of whom must be an active member in good standing of the California Medical Association. The voting rights in the corporation are vested in the administrative members exclusively. They elect the trustees.

The persons who are to receive medical attention from the professional members "on a periodic budgeting basis" are termed beneficiary members. They are individually enrolled pursuant to a contract entered into by the service on behalf of the professional members with a lodge, professional organization, social club, or other group having a means of collecting monthly dues required to be paid for each person desiring to be included in the corporation's plan for beneficiary membership, or with an employer who will agree to deduct membership fees from the payroll. A basic requirement for each contract is that a specified minimum percentage of the group, or of the employees, enroll as members and agree to pay the monthly membership dues. Only persons whose compensation is less than \$3,000 per annum may enroll. In April, 1941, the service had 25,378 beneficiary members and in June of the same year, the enrollment of new beneficiary members was increasing at the rate of approximately 1,500 members a month. Upon the basis of these figures, total membership now exceeds 100,000.

A registration fee is charged by the corporation at the time of application for a beneficiary membership and the association or employer agrees that it will pay, or cause to be paid to the service, if the agreement is for full coverage medical and surgical service only, the sum of \$1.70 per month for each male person and \$2.00 per month for each female person affiliated

with the group who has become a beneficiary member.

More specifically, the contract, known as the Group Medical Service Agreement, entered into between California Physicians' Service, using the abbreviation C.P.S., and various organizations, provides:

"It is understood that C.P.S. is acting as the agent of said group and of those of its members, associates or employees, as the case may be, who become and remain beneficiary members in C.P.S. (who are hereinafter referred to as the members) for the purpose of securing to said members medical services through professional members of C.P.S. It is understood that hospital care may be obtained through non-profit hospital service corporations operating pursuant to Chapters 9 or 11A of Part II, Division II, of the Insurance Code of the State of California. It is further understood that C.P.S. is not obligated to any of said members or to the group except as may be herein provided, and then only upon continued compliance by the group and said members with the conditions herein stipulated.

"Each beneficiary member of C.P.S. shall be entitled, during the times that he is such a beneficiary member, subject to the articles of incorporation, by-laws and rules and regulations of C.P.S. as now existing or as may be from time to time amended, to secure when needed and for a period of not to exceed one (1) year for any one illness or injury, medical and surgical services from those doctors of medicine in the State of California who are professional members of C.P.S. * * *

"The services which are offered to those persons in the group who become beneficiary members of C.P.S. are offered personally to said members by the professional members of C.P.S., and the right of said members to receive the same is not transferable.

"In presenting the various offers herein contained, C.P.S. acts only as the agent of its professional members and assumes no liability for the breach of any one or all of the obligations undertaken by its professional members. In no case is C.P.S.

an insurer against or liable for the negligence of any of its professional members or the negligence of any hospital or any hospital service corporation from which its beneficiary members may have obtained hospitalization or the negligence of any other person.

"The amounts to be paid by the group, as herein specified, are accepted by C.P.S. and its professional members as full payment and compensation for all medical and surgical services rendered during the immediately preceding dues period, and they and each of them agree to perform the services herein included, without other, further or additional charge of any kind whatsoever to those beneficiary members who are affiliated with the group and have an annual family net income (for state income tax purposes) of \$3000.00 or less. * * *

The Rural Health Service Agreement which the corporation made with the Farm Security Administration, an agency of the United States, contains substantially the same terms as those of the Group Medical Service Agreement, but there are additional provisions for hospitalization and reimbursement for drugs. Although the preamble of this agreement states that it is of an experimental nature and binding only for a specified period, the stipulation of facts recites that it "has been adopted by California Physicians' Service and is in use at the present time."

By this contract, families accepted by the Farm Security Administration and having an annual income of less than \$2,000 may be enrolled as beneficiary members upon payment of specified amounts, ranging from \$30 to \$60 per year. Medical care is made available only to those who are eligible for loans from the Farm Security Administration. A further requirement, subject to waiver by the service, is that the agreement shall be effective only if applications are made by at least 50 per cent of the borrowers from the agency in any one administrative area, with a minimum membership of 70 for such a territory.

The service, acting as agent for professional members and hospitals, "does not covenant to secure participating hospitals"

but agrees to "use its best efforts so to do." Each beneficiary member is entitled, upon the certification of the medical director of the service, to hospitalization for not more than ten days annually. Under specified conditions the cost of necessary drugs prescribed by a professional member will be paid by the corporation. No contract with a hospital is in evidence but the Rural Health Service Agreement, at least impliedly, defines a participating hospital as one which has agreed to accept payment, upon a unit basis, solely from the pool of membership dues.

Each professional member agrees, by written contract with the corporation, to render such needed medical attention to beneficiary members as may properly be requested of him and, for the payment of compensation for such services, to look solely to the available funds of the organization. But every physician "is free to exercise his individual right to refuse to accept any person as a patient." The amount to be paid to a physician is determined by what is known as a unit system, and each professional member agrees to accept as payment in full for his services rendered to beneficiary members during each month, a pro rata distribution of that portion of dues collected during such month.

The by-laws describe the unit system and its operation as follows: "By the term 'unit system' is meant a method of computing the compensation due to professional members rendering medical or surgical services whereby a proportional valuation is set upon each kind of service by counting each such service as a determined number of units by resolution of the board of trustees adopting a schedule or schedules of compensation. The total sum of money available for compensation of professional members is divided by the total number of units of service rendered during any given period to determine the monetary value of a single unit for the purpose of compensation earned by professional members and each professional member is paid according to the number of units of service he has rendered in said period. * * *

"In the event that during any period there is available for payment to profes-

sional members a sum in excess of the sum necessary to pay the full schedule or compensation established by the board of trustees, such excess sum shall be reserved by the board of trustees as a part of the reserve funds of the corporation, or, if the board of trustees so determines, it may be distributed on a unit system to those professional members who have in any prior period determined by the board received for their services less than the compensation schedule, provided no professional member shall thereby receive more than the full compensation schedule for any service rendered."

Upon this evidence the trial court decreed as follows:

"That rendition of medical and surgical services by the professional members of * * * California Physicians' Service, and the acceptance of payment for such services * * * from funds contributed by the beneficiary members" of the organization "does not constitute the transaction of an insurance business under the insurance laws" of this state. More generally the court declared that the "objects and purposes set forth in the articles of incorporation" of the service "are lawful objects and purposes and the performance or undertaking by plaintiff of any or all of said objects does not and will not violate any * * * laws of the State of California relating to the business of insurance." Concerning the medical attention which the members receive, the decree recites that "the rendition of medical and/or surgical services * * * does not constitute a violation of the principle that a corporation may not engage in or be licensed to practice one of the learned professions. * * *" But the court declared that the collection of money "to be used in the manner and for the purposes outlined in the articles of incorporation of the plaintiff" subjects it to regulation by the Attorney General of California in accordance with the provisions of section 605c of the Civil Code relating to nonprofit corporations.

As grounds for reversal of the judgment, the Insurance Commissioner declares that the courts should not place judicial approval upon a controversial type of new busi-

ness enterprise; also that, in the absence of specific statutory authority for declaratory relief against the state or an officer of the state, such an action cannot be maintained. The term "person" as used in section 1060 of the Code of Civil Procedure, it is urged, does not include the state or its officers because general words in a statute which might have the effect of restricting governmental powers are to be construed as not applying to the state, and declaratory relief is not available against political subdivisions of the state.

Another contention of the commissioner is that the service's activities constitute the unlawful practice of medicine by a corporation. Furthermore, he says, section 593a of the Civil Code specifying certain minimum requirements which a health service corporation must meet, and a statute authorizing political subdivisions of the state and public agencies to contract with a nonprofit membership corporation for medical service (Stats.1939, ch. 250, 2 Deering's Gen.Laws, Act 3725) are invalid. These enactments, it is claimed, make an unreasonable classification because the grant of the privilege of corporate practice, based upon the number of licensee members of the corporation, is not related to qualification or fitness. Also, the argument continues, no subsequent legislation has authorized the activities of the service.

The major ground for the attack upon the judgment is that the service is engaged in the business of transacting insurance and, therefore, is subject to the regulatory laws governing such corporations. All of the elements of insurance are present in the service's plan, says the commissioner. There is no real distinction between service and insurance, and by its contracts the corporation has obligated itself to furnish medical care. The service's plan of operation is not excepted by statute from the supervision of the insurance department, and the service is not a consumer cooperative, but a corporation organized for the profit of the professional members. The nature of the medical service, and of the contracts it offers, require the application of the insurance laws to its affairs in order to prevent exploitation of the public. Finally,

the commissioner asserts, the judgment goes beyond the stipulated facts in prospectively validating future acts not comprehended in the service's plan of operations as conducted at the time the decree was entered, and its method of doing business since the notice of appeal was filed shows the necessity for state insurance regulation.

In response to the contentions of the attorney general the service asserts that declaratory relief is a proper form of action against the Insurance Commissioner. Also, it replies, the service is not engaged in the corporate practice of medicine; if so, its functions are expressly permitted by statute.

Turning to the most important question, the service declares that it is not engaged in the insurance business but is rendering personal service, as distinguished from indemnity, compensation for which is limited to the resources of a pooled fund; that the professional members, not the service, assume any and all risk; and that it is actually a producer-consumer cooperative. Furthermore, the service concludes, as a matter of social policy the state, by statute, has declared that a nonprofit membership corporation may lawfully defray or assume the cost of medical and surgical services or render any such service. In that regard, the argument runs, the Legislature has necessarily determined that the rendition of medical and surgical services by a nonprofit membership corporation coming within the purview of section 593a of the Civil Code does not constitute that type of insurance, assuming it is insurance, which is subject to regulation by the Insurance Commissioner. In conclusion, the service maintains that the legislative classification under the applicable code provisions is constitutional.

[1,2] This court has recently held that section 1060 of the Code of Civil Procedure sanctions a declaratory judgment against a political subdivision of the state. Certainly, where a government body is subject to suit, such a procedural statute does not interfere with rights of sovereignty. *Hoyt v. Board of Civil Service Com'rs*, 21 Cal.2d 399, 403, 132 P.2d 804.

[3] The Insurance Commissioner is authorized to "prosecute and defend any and

all suits and other legal proceedings." Ins. Code, § 1037(f). There is no substantial difference between this language and the expression which is generally used in statutes waiving sovereign immunity as to cities and counties; the accepted declaration of such enactments is that they may "sue and be sued." *Deering's Gen.Laws* 1937, Act 5233, § 19 et seq.; *Pol.Code*, § 4003; and see the numerous municipal charters. And as stated in *Hoyt v. Board of Civil Service Com'rs*, supra, 21 Cal.2d at page 404, 132 P.2d at page 807, "there is no reason why the statute [empowering a political subdivision to sue or be sued] should not be interpreted so as to authorize the determination * * * by that [declaratory relief] procedure of any issue which might be determined * * * in an ordinary action at law or in equity." Tested by these principles, a determination as to whether the service's activities subject it to regulation under the insurance laws does not trench upon rights of sovereignty.

The present suit is also analogous to the situation presented in *County of Los Angeles v. Riley*, 20 Cal.2d 652, 128 P.2d 537, where the court said that an action to compel an officer to perform a duty expressly enjoined upon him by law, although considered a suit against the state, does not offend the sovereign immunity principle. See, also, *Brock v. Superior Court*, 11 Cal.2d 682, 81 P.2d 931; *City of Oakland v. Brock*, 8 Cal.2d 639, 67 P.2d 344; *U'Ren v. State Board of Control*, 31 Cal.App. 6, 159 P. 615; *Kingsbury v. Nye*, 9 Cal.App. 574, 99 P. 985; *Board of Directors of Woman's Relief Corps Home Ass'n v. Nye*, 8 Cal. App. 527, 97 P. 208; 23 Cal.Jur. 583. The decisions relied upon by the attorney general (*Balthasar v. Pacific Elec. R. Co.*, 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; *Bayshore Sanitary Dist. v. San Mateo County*, 48 Cal.App.2d 337, 119 P.2d 752; *Irvine v. Sacramento, etc., Drain Dist.*, 49 Cal.App. 2d 707, 122 P.2d 320; *Lossman v. City of Stockton*, 6 Cal.App.2d 324, 44 P.2d 397) holding that the term "person" as used in section 1060 of the Code of Civil Procedure does not include the state or any of its political subdivisions were expressly disapproved in the *Hoyt* case, supra.

[4] Other cases cited for the proposition that declaratory relief will not be used to give a controversial type of enterprise judicial approval (*Hayden Plan Co. v. Friedlander*, 97 Cal.App. 12, 275 P. 253; *Hayden Plan Co. v. Wood*, 97 Cal.App. 1, 275 P. 248) were decided upon the basis of an absence of a question of public interest, the lack of an actual controversy, and an adequate remedy under the general laws. In the present litigation, the stipulation of facts shows an actual controversy between the parties relating to their respective legal rights and duties, and the issue is of great public interest. Whether a determination is necessary and proper is a matter within the discretion of the trial court, and in the absence of a clear showing of abuse of that discretion, which does not appear here, its decision will not be disturbed upon appeal. Code Civ.Proc. § 1061; *Moss v. Moss*, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422; *Cutting v. Bryan*, 206 Cal. 254, 274 P. 326; *Simpson v. Security-First Nat. Bank*, 71 Cal.App.2d 154, 162 P.2d 494. Moreover, section 1062 of the Code of Civil Procedure expressly provides that the remedy through declaratory relief is cumulative and not restrictive of any other remedy provided by law. See *Gunn v. Giraudo*, 48 Cal.App.2d 622, 630, 120 P.2d 177; *Wollenberg v. Tonningsen*, 8 Cal. App.2d 722, 726, 48 P.2d 738.

[5] Considering the merits of the case, it is a matter of common knowledge that there is great social need for adequate medical benefits at a cost which the aver-

age wage earner can afford to pay. Unquestionably the distribution of these services has lagged far behind production. During the past several decades many plans have been devised to distribute the cost of medical care (see *People ex rel. State Board of Medical Examiners v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284; *Butterworth v. Boyd*, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; *Pacific Employers Ins. Co. v. Carpenter*, 10 Cal.App. 2d 592, 52 P.2d 992; 52 Harv.L.Rev. 809-817) and in 1917, the California Legislature adopted a constitutional amendment calling for the creation of a system of state medicine financed through taxation (Stats. 1917, p. 1948). This amendment was rejected by the people.

[6,7] In 1935, similar legislation met defeat. The medical profession then undertook the responsibility for providing medical service on an ability-to-pay-for basis, and it is obvious that the Legislature, by enacting section 593a of the Civil Code,¹ expressly authorized the organization of corporations such as California Physicians' Service. By this enactment, the state's social policy in regard to the corporate practice of medicine, to the limited extent specified, has been determined and the courts are bound thereby. See *People ex rel. State Board of Medical Examiners v. Pacific Health Corp.*, supra, 12 Cal.2d at page 161, 82 P.2d 429, 119 A.L.R. 1284; *Pacific Employers Ins. Co. v. Carpenter*, supra, 10 Cal.App.2d at page 602, 52 P.2d 992, 52 Harv.L.Rev. 809-817; 25 Cal.L.

¹ "Sec. 593a. (Health service corporations: Prerequisites to commencement of business: Supervision.) A nonprofit corporation may be formed under this article for the purposes of defraying or assuming the cost of professional services of licentiates under any chapter of Division 2 of the Business and Professions Code or of rendering any such services but it may not engage directly or indirectly in the performance of the corporate purposes or objects unless:

"(1) At least one-fourth of all licentiates of the particular profession become members;

"(2) Membership in the corporation and an opportunity to render professional services upon a uniform basis is available to all licensed members of the particular profession;

"(3) Voting by proxy and cumulative voting are prohibited; and

"(4) A certificate has been issued to the corporation by the particular professional board, whose licentiates have become members, finding compliance with the foregoing requirements.

"Any such nonprofit corporation shall be subject to supervision by the particular professional board under which its members are licensed and shall also be subject to the provisions of Section 605c of this code. This section, except as expressly permitted herein, does not authorize the formation of any corporation for the purpose of rendering the professional services regulated by Division 2 of the Business and Professions Code. (Added by Stats.1941, ch. 629, § 1.)"

Rev. 91-98; 53 Yale L.J. 162-182.) It is stipulated that the service has complied with the provisions of this statute and holds a certificate in the form authorized by its provisions.

[8-11] The statutory provisions authorizing the service's operations do not violate article IV, section 25, subdivision 19, of the California Constitution which prohibits "granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." As stated in *Livingston v. Robinson*, 10 Cal. 2d 730, 740, 76 P.2d 1192, 1196: "The question of classification is generally one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements, and its discretion will not be overthrown unless it is palpably arbitrary. *Wores v. Imperial Irr. Dist.*, 193 Cal. 609, 227 P. 181. It will be presumed that the legislature made inquiry to determine whether or not there were evils to be remedied and that the classification made was based upon the result of the inquiry." And in *People v. Western Fruit Growers*, 22 Cal.2d 494, 507, 140 P.2d 13, 20, it was said: "When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." See, also, *Gillum v. Johnson*, 7 Cal.2d 744, 759, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595; *State Bar of California v. Superior Court*, 207 Cal. 323, 332, 278 P. 432; *People v. Keith Ry. Equip. Co.*, 70 Cal.App.2d 339, 356, 357, 161 P.2d 244. The Legislature may classify organizations rendering medical services under the same general principles as those which allow it to license for numerous occupations and professions and public policy certainly permits restriction of the right to assume the cost of such services to such organizations as meet reasonable and definite standards. The interest of the state in the health of its citizens (see *Butterworth v. Boyd*, *supra*) fully justifies the legislative classification. The decision relied upon by the attorney general, *Van*

Camp Sea Food Co., Inc., v. Newbert, 76 Cal.App. 445, 244 P. 946, to support his conclusion is in accord with these general principles but is factually distinguishable.

[12] Considering the question as to the supervision which the state has imposed upon corporations such as the service, the Legislature has defined insurance as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." *Ins.Code*, § 22; *Civ.Code*, § 2527. Disability insurance "includes insurance appertaining to injury, disablement or death resulting to the insured from accidents, and appertaining to disablements resulting to the insured from sickness." *Ins.Code*, § 106. Under chapter 4 (§ 10272) of the Insurance Code, which deals with standard provisions in disability policies, "indemnity" is said to mean "benefits promised"; while in the Civil Code, section 2772, it is defined as "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." Otherwise stated, "insurance generally may be defined as an agreement by which one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss, or injury of someone or something by specified perils." (29 *Am. Jur.* 47.)

These definitions clearly state the basic concepts or elements which are a necessary prerequisite of a contract of insurance. "Whether the contract is one of insurance or of indemnity," said one court, "there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance and indemnity require these elements. Hazard is essential and equally so a shifting of its incidence. If there is no risk, or there being one it is not shifted to another or others, there can be neither insurance nor indemnity. Insurance also, by the better view, involves distribution of the risk, but distribution without assumption hardly can be held to be insurance."

Jordan v. Group Health Ass'n, 71 App.D.C. 38, 107 F.2d 239, 245; see, also, *Fageol Truck & Coach Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 117 P.2d 661; *Gregg v. Com'r of Corp. & Tax.*, 315 Mass. 704, 54 N.E.2d 169, 150 A.L.R. 1280; *Commissioner of Banking and Insurance v. Community Health Service, Inc.*, 129 N.J.L. 427, 30 A.2d 44; *Stern v. Rosenthal*, 71 Misc. 422, 128 N.Y.S. 711; *State ex rel. Fishback v. Universal Service Agency*, 87 Wash. 413, 151 P. 768, Ann.Cas.1916C 1017; 53 Yale L.J. 172; 23 Corn.L.Q. 188, 193; 119 A.L.R. 1241; *Meyer v. Building & Realty Service Co.*, 209 Ind. 125, 196 N.E. 250, 100 A.L.R. 1449; *Oklahoma S. W. Burial Ass'n of Ardmore v. State ex rel. Read*, 135 Okl. 151, 274 P. 642, 63 A.L.R. 711; *Vance, Insurance*, 2d Ed., p. 57. Although some authorities have held that to constitute insurance the so-called insured must be indemnified by the payment of money (*Jordan v. Group Health Ass'n*, supra, 71 App.D.C. 38, 107 F.2d at page 245, note 13; *Moresh v. O'Regan*, 120 N.J.Eq. 534, 187 A. 619; 5 Elliott, Contracts, § 4020), or that statutes regulating insurance were intended to apply only to concerns organized for profit and not to charitable or nonprofit associations (*Hall D'Ath v. Britist Provident Assoc.* (1932), 48 Times L.R. 240; *State v. Taylor*, 56 N.J.L. 49, 27 A. 797), there are more substantial reasons upon which to base a determination as to the status of the California organization.

[13] The business of the service lacks one essential element necessary to bring it within the scope of the insurance laws, for clearly it assumes no risk. Under the provisions of the contracts or group agreements, it is a mere agent or distributor of funds. It does not promise the beneficiary

members that it will provide medical care; on the contrary, "the services which are offered to * * * beneficiary members of C.P.S. are offered personally to said members by the professional members of C.P.S. * * *" See *Jordan v. Group Health Ass'n*, supra, 71 App.D.C. 38, 107 F.2d at page 246; *Phez Co. v. Salem Fruit Union*, 103 Ore. 514, 201 P. 222, 205 P. 970, 25 A.L.R. 1090. The professional member is compensated for his services solely from the fund created by the monthly dues of the beneficiary members. Payments from the fund are made to the physicians pro rata in accordance with an established schedule. Under that plan, the amount of compensation of the professional members is variable and may be high or low, depending upon the incidence of sickness and the number of beneficiary members paying dues. Stated in terms of insurance, all risk is assumed by the physicians, not by the corporation, hence the only effect of requiring compliance with regulatory statutes would be to compel the acquisition of reserves contrary to the established method of operation. See *Jordan v. Group Health Ass'n* supra, 71 App.D.C. 38, 107 F.2d at page 251.

This distinction has been recognized and applied by other courts which have considered the same question. In *Jordan v. Group Health Ass'n*, supra, the organization which distributed funds for medical care sought a declaration of its statute under the laws of the District of Columbia which define insurance in substantially the same terms as the California statutes.² The corporate purpose of the association³ and its method of doing business was similar to that of California Physicians' Service.⁴

The court held that the corporation had

² Sec. 653 of the code, D.C.Code 1929, tit. 5, sec. 179, provides: "Every corporation, joint-stock company, or association not exempt herein, transacting business in the District of Columbia, which collects premiums, dues, or assessments from its members or from holders of its certificates or policies, and which provides for the payment of indemnity on account of sickness or accident, or a benefit in case of death, shall be known as 'health, accident, and life insurance com-

panies or associations.'" (71 App.D.C. 38, 107 F.2d at page 244.)

³ The corporate purposes, summarized, were to provide, without profit to the corporation, medical services, preventive and curative, surgery, hospitalization and medical and surgical supplies to members of Group Health and their dependents. (71 App.D.C. 38, 107 F.2d at page 241.)

⁴ Members composed of civil service employees of the executive branch of the federal government were selected by

assumed no risk.⁵ This conclusion applies more exactly to the California organization because of the total lack of a promise by the corporation to the beneficiary members to render any medical care. Except for the limited hospitalization obtainable by rural

Board of Trustees, who in turn were elected by the members except two who were chosen by the Federal Home Loan Bank. Control and management of corporate affairs was vested in the trustees. Group Health issued no policies, formal certificates or contracts, but did give membership cards to its members for purposes of identification. Members' rights to services are fixed by the certificate of incorporation and the by-laws. In return for monthly dues, Group Health undertakes to arrange for hospital service and for medical and surgical services to be rendered by independent practitioners, who received fixed annual compensation paid in monthly installments. Both physician and hospitals looked solely to the corporation for their compensation.

The pertinent provisions of the by-laws of Group Health provided as follows: "The Board of Trustees shall contract for and in behalf of the members of this corporation, with physicians duly licensed to practice their profession in the District of Columbia, who shall render such service to the members as may be provided in said contract. * * * The Board of Trustees shall in no way regulate or supervise the practice of medicine by any physician with whom it contracts for the care of members. * * * The corporation does not guarantee that it will provide any or all of the services above specified and for which it will attempt to contract on behalf of its members and it shall not be liable to any member or his dependent in any manner whatever if it should for any reason, including lack of funds, be unable to procure any or all of said services when called upon to do so. The corporation does not guarantee that any physician or physicians with whom it may enter into a contract to render services to its members will perform such contract and its only obligation in the event of the breach of such contract by any physician shall be to use its best efforts to procure the needed services from another source. The corporation shall not be liable to its members or their dependents for any act of omission or commission on the part of physicians or other persons with whom it may contract for the rendition of services to its members and their dependents." (71 App.D.C. 38, 107 F.2d at page 243.)

⁵ The court in the Jordan case, *supra*, in discussing the problem of assumption of risk said:

"But what of the service to the sick or injured? Here certainly is risk, hazard which has descended. But has it shifted to or assumed by Group Health? On this question the exact nature of its obligation becomes important. Does it assume the risk, or contract to bear the member's loss when it falls? * * * Unless the by-laws are to be discarded and ignored entirely, there can be only one answer. The agreement is not to pay the member or to any one else the amount of loss which is caused to him. True, the physician receives his salaried compensation. But he receives no more and no less because of the falling of the loss. He is not a beneficiary * * * in an inaccurate nontechnical sense, he, rather than Group Health, is the one more nearly analogous to an insurer. If incidence of illness in the group is light, so is his work; if heavy, so is his labor up to the maximum of his contract. In either case the compensation is the same. Nor is the burden of Group Health increased normally by the falling of particular losses. Its obligation to the physician remains the same. That to particular members is not at all affected by the volume of illness in the group whether great or small. * * * In any event, whatever the emergency or the experience, it undertakes not to supply the service, or see or guarantee that it is supplied, or be responsible for the failure to supply it or to do so properly, but only to 'use its best efforts' to secure similar service from another source.

"Tested by the nature of the member's right of recourse against Group Health for breach of its contract with him, the matter becomes clear. Possibly he could succeed on showing no reasonable effort by it to contract with physicians or others to render the stated services; or that it was negligent in selecting incompetent ones; or that it did not 'use its best efforts' to make alternative arrangements. But barring some such showing, his attempt to recover would be in the teeth of his contract. This is not assumption of risk or hazard. It has not the sound or the sense, technically or in lay conception, of 'insurance' or of 'indemnity.' If it resembles anything, the analogy is rather to 'agency' or representative action, or to that of an intermediary of more independent status. Then the contract is, in fact, unique. It does not fit neatly into established categories of

members in connection with the Farm Security Administration contract, the service does not even promise to "use its best efforts to procure the needed services" as the District of Columbia corporation agreed to do, and does not obligate itself to pay the physicians a certain sum per month. The California physicians look solely to the monthly dues of the beneficiary members for compensation.

The case of *State ex rel. Fishback v. Universal Service Agency*, 87 Wash. 413, 151 P. 768, Ann.Cas. 1916C, 1017, relied upon in the *Jordan* case, supra, 71 App. D.C. 38, 107 F.2d at page 249, was an action by the Insurance Commissioner to forfeit the corporate franchise of the organization upon the ground that it was "doing an

insurance business without complying with the statutes regulating the doing of such business." The applicable definition of insurance was similar to, if not identical with, that of this state,⁶ and the method of doing business was the same as that of the California Physicians' Service,⁷ including the type of contract used.⁸ And again the want of assumption of any hazard or risk was the basis for holding that the corporation was not engaged in the insurance business.

In the case of *Commissioner of Banking and Insurance v. Community Health Service, Inc.*, 129 N.J.L. 427, 30 A.2d 44, the Insurance Commissioner sued the defendant corporation to recover a statutory penalty for conducting an unlicensed insur-

'agency,' 'guaranty,' 'insurance,' 'indemnity' and the like. As has been said, it bears some relation to a collective labor agreement. In a broad sense, such an agreement may be considered as one of 'indemnity' against unemployment or other hazards covered by its terms. Yet no one would contend that because the employer fails to live up to his contract with the union, it would be rendered liable to its members injured by his breach, or that the union, because it makes contracts to this extent on behalf of and for the benefit of its members, becomes as to them an 'insurer' or 'indemnifier' against the risk of such a contingency. * * * (71 App.D.C. 38, 107 F.2d at pages 246, 247.)

⁶ Wash.Ins.Code, sec. 1 (Laws 1911, c. 49) defines insurance as "a contract whereby one party called the 'insurer,' for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the 'insured,' or his 'beneficiary,' upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury." (151 P. at page 772.)

⁷ The Universal Service Agency, the corporation, made its agreements with members or "subscribers" and with physicians, pharmacists and others on elaborate forms drawn on an "agency" theory. The physician's compensation was a specified share of each member's payments, to be paid over to him within a a stated time following receipt by the Agency. (151 P. at pages 769-771.)

⁸ The contract or agreement between the corporation and the physician was in the following form:

"* * * the [corporation] proposes

to act as agent of various persons in securing for them certain privileges and benefits, and, among other things, desires to procure to said various persons reduced rates for medical services and to act as agent for certain physicians in collecting their fees: (151 P. at page 769.)

"* * * the [physician] agrees to contract directly with the holder to furnish the services herein specified; that the [corporation] has no interest therein except to secure acceptance of the offer herein made by the [physician] and to collect from such persons the fees herein specified for the use and benefit of [physician]. And the [corporation] assumes no liability for any negligence, lack of professional skill, or failure of attention to any or all persons accepting the offer herein contained, and that the [physician] does hereby assume all liability that may be incurred by any negligence or lack of professional skill to the holder of the contract herein offered." (151 P. at page 770.)

The pertinent provisions of the agreement between the purchaser of the service or beneficiary member and the corporation provided: "V. In presenting the various offers herein contained the Agency acts only as the agent of the parties and assumes no liability for the breach of any one or all of said contract. The Agency agrees, however, that in the event of a breach, it will use its best efforts to procure other persons or firms to offer the same or similar service.

"VI. * * * but in no case, is it an insurer against the negligence of any physician or pharmacist offering services or benefits herein." (151 P. at page 771.)

ance business. The corporation had made contracts with licensed physicians under which they agreed to render professional services for a certain stipulated compensation to those members of the general public who paid the corporation a specified sum each month. The physicians' services were engaged by the corporation for a period of one year, and from year to year thereafter, for a fixed consideration which varied with the number of contract holders but not with the amount of service rendered by the physician to any or all of the contract holders. The court, relying upon *State ex rel. Fishback v. Universal Service Agency*, supra, and *Stern v. Rosenthal*, 71 Misc. 422, 128 N.Y.S. 711, held that the corporation was not engaged in the business of insurance because, as between the corporation and the physician, nor between the physician and the subscriber, was the compensation or any other element of the arrangement between them affected by any contingency, hazard or risk which the corporation assumed and insured against. See, also, *Vredenburg v. Physicians' Defense Co.*, 126 Ill.App. 509; *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N.E. 567; 53 Yale L.J. 172.

In both the *Jordan* case, supra, and in *State ex rel. Fishback v. Universal Service Agency*, supra, as is true in the present case, reliance was placed upon *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N.W. 396, *Physicians' Defense Co. v. Cooper*, 9 Cir., 199 F. 576, 47 L.R.A.N.S. 290, and *State ex rel. Fishback v. Globe Casket & U. Co.*, 82 Wash. 124, 143 P. 878, L.R.A.1915B, 976. The *Physicians' Defense* cases involved contracts to supply legal service to physicians in malpractice suits; the latter one concerned an agreement for burial expense. But in each of those cases there was a contract providing indemnity against a hazard which might cause loss to the corporation and, for that reason, the decisions are not here in point.

There is another and more compelling reason for holding that the service is not engaged in the insurance business. Absence or presence of assumption of risk or peril is not the sole test to be applied in determining its status. The question, more

broadly, is whether, looking at the plan of operation as a whole, "service" rather than "indemnity" is its principal object and purpose. *Jordan v. Group Health Ass'n*, supra, 71 App.D.C. 38, 107 F.2d at pages 247 et seq.; see *Vredenburg v. Physicians' Defense Co.*, supra, 126 Ill.App. at page 513; *State ex rel. Physicians' Defense Co. v. Laylin*, supra, 73 Ohio St. at page 98, 76 N.E. 567; *Commonwealth v. Provident Bicycle Ass'n*, 178 Pa. 636, 642, 36 A. 197, 36 L.R.A. 589; *Sisters of Third Order of St. Francis v. Guillaume's Estate*, 222 Ill. App. 543; 3 Univ. of Pittsburgh L.Rev. 250; 52 Harv.L.Rev. 814, 815; 23 Corn. L.Q. 188; 29 Mich.L.Rev. 378; *Vance, Insurance*, p. 61. Certainly the objects and purposes of the corporation organized and maintained by the California physicians have a wide scope in the field of social service. Probably there is no more impelling need than that of adequate medical care on a voluntary, low-cost basis for persons of small income. The medical profession unitedly is endeavoring to meet that need. Unquestionably this is "service" of a high order and not "indemnity."

The fact that the rural Health Service Agreement provides for limited hospitalization does not make the business of the service that of insurance. So far as the record shows, a participating hospital may look only to the pooled fund of the service for payment for facilities furnished to a beneficiary member. Also, the additional features of hospitalization and reimbursement for drugs are not distinguishable from other medical care obtainable on the group basis, and they are merely incidental to the plan or scheme as a whole. See *Jordan v. Group Health Ass'n*, supra, 71 App.D.C. 38, 107 F.2d at page 244, note No. 10.

[14,15] Furthermore, the Legislature by the enactment of section 593a of the Civil Code, with its express provision for limited regulation of nonprofit organization of a professional character by the attorney general and the particular professional board, necessarily intended that such organization should be exempt from regulation by the Insurance Commissioner. (See 52 Harv.L.Rev. 816; 53 Yale L.J. 171 et

seq.) One of the reasons behind the declaration of the earlier cases that it was against public policy for a corporation to engage in the practice of medicine was because the control of its activities was placed in the hands of laymen. See *Pacific Employers Ins. Co. v. Carpenter*, supra; *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 296, 14 P.2d 67; 52 Harv.L.Rev. 811; 53 Yale L.J. 170. To allow the Insurance Commissioner to impose the extensive regulations provided for in the Insurance Code upon the activities of the service would result in the same evil. See Yale L.J. 171. Since section 593a of the Civil Code is applicable to the organization whose status is here under attack, it must be presumed that the Legislature weighed this evil against possible exploitation of the public and concluded that the limited regulation provided by the new statute was sufficient. Also, it may be noted, section 433.6 of the Political Code dealing with payroll deductions for state employees who join any group medical plan, makes a clear distinction between regular insurance companies and "nonprofit membership corporation[s] organized under the laws of this State, for the purpose of defraying the cost of medical services. * * *" See, also, Stats.1939, ch. 250, p. 1505; Stats. 1940, First Ex.Sess., ch. 45, § 6.7.

[16] This conclusion becomes more apparent when the purpose and nature of many of the legislative requirements are considered, particularly those relating to the maintenance of reserves and to the regulation of investments and financial operations. The extensive insurance regulations primarily are designed to protect the insured, or the public, from the insurer. (52 Harv.L.Rev. 815). Such regulations become important only if the insurer has assumed definite obligations. Conversely, it is evident that they are not intended to apply where no risk is assumed and no default can exist. Furthermore, by the very nature of its operations, the service could not accumulate vast reserves. The flow of funds from patient to physician primarily is on a monthly basis of pay-as-you-go and to require reserves would be a useless and uneconomic waste. *Jordan v. Group Health*

Ass'n, supra, 71 App.D.C. 38, 107 F.2d at page 251; see 53 Yale L.J. 171.

[17] For these reasons the respondent is not engaged in the business of insurance within the meaning of the regulatory statutes but is subject to the limited supervision provided by section 593a of the Civil Code. The judgment of the trial court in this regard is not too broad, for every decision is limited to the evidence upon which it is based.

The judgment is affirmed.

SHENK and CARTER, JJ., and PETERS and WARD, JJ. pro tem., concurred.

SCHAUER, J., concurred in the judgment.

GIBSON, Chief Justice.

I concur in the judgment solely on the ground that the Legislature, by the enactment of section 593a of the Civil Code, exempted organizations coming within its scope from regulation by the Insurance Commissioner. By providing for supervision by a professional board and by the attorney general (Civ.Code, §§ 593a, 605c), the Legislature has evidenced an intention to free such organizations from other regulation and from the necessity of complying with the various requirements, such as the maintenance of reserves, which are imposed on regular insurance companies. The need for regulation or supervision, the amount thereof and the persons, bodies or officers who should supervise or regulate are all matters which are confided to the Legislature, and it was within the legislative discretion to provide that a limited regulation of such nonprofit organizations was sufficient.

I cannot, however, concur in that portion of the opinion declaring that the plaintiff is exempted from regulation by the Insurance Commissioner because it is not engaged in the business of transacting insurance, but is merely agreeing to render service. The true test is not the character of the consideration agreed to be furnished, but whether or not the contract is aleatory

in nature. A contract still partakes of the nature of insurance, whether the consideration agreed to be furnished is money, property or services, if the agreement is aleatory and the duty to furnish such consideration is dependent upon chance or the happening of some fortuitous event. (See Rest., Contracts, § 291.) In the present case, the agreement is to make payments to member doctors for medical services to the beneficial members, and the duty to make such payments is obviously dependent upon chance or the happening of a fortuitous event, since the necessity for the services, and also for the agreed payment, is dependent upon the members' sickness or accidental injury.



28 Cal.2d 699

PEOPLE v. SIMMONS.

Cr. 4657.

Supreme Court of California, in Bank.

Aug. 16, 1946.

1. Criminal law ⇨304(2)

Judicial notice may be taken of the fact that an item of personal property has some value.

2. Robbery ⇨4

In robbery prosecution, the amount and value of an item of personal property is immaterial, since robbery does not depend upon the value of the property taken, and, the other elements being present, the crime is made out even though the property taken be of slight value.

3. Criminal law ⇨304(2)

In robbery prosecution, that there was no proof that package of cigarettes had any value was not ground for reversal, since court could take judicial notice that a package of cigarettes taken from the person of the victim had some value.

4. Homicide ⇨253(1), 257(1)

Robbery ⇨24(1)

Evidence sustained conviction on charges of murder, robbery, and assault

with a deadly weapon with intent to commit murder.

5. Homicide ⇨30(1)

Where a murder is committed by one of two robbers, each or both may be found guilty of murder in the first degree.

6. Criminal law ⇨1168(2)

In robbery and murder prosecution, where under the facts, which showed no extenuating circumstances, it was wholly improbable that the jury believing defendant to have been one of the pair who carried out the robbery and murder would have rendered any different verdict than one for conviction with death penalty if the transcript of the testimony taken on preliminary hearing which was allegedly favorable to defendant had been introduced, public defender's failure to introduce in evidence the transcript did not require reversal notwithstanding defendant's accomplice received a lesser sentence than defendant.

7. Criminal law ⇨419(1)

Accusatory statements read to accused by police are inadmissible as hearsay.

8. Criminal law ⇨407(2)

If accused responds to an accusatory statement read to him by police with a flat denial, there is no admission and hence nothing that may be received in evidence, but if, on the contrary, the truth of the statement is admitted, the statement may properly be introduced.

9. Criminal law ⇨407(2)

Where the accused stands mute in the face of an accusation or responds with an evasive or equivocal reply, both the statement and the fact of the accused's failure to deny are admissible under certain circumstances on a criminal trial as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt.

10. Criminal law ⇨407(2)

Where an accused responds to an accusation by silence, evasion or equivocation, it is for the trial court to determine in the first instance whether the accusation has been made under circumstances calling for a reply, whether the accused understood the

statement, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty conscience.

11. Criminal law ⚖️407(2)

Where the trial judge determines that an accused's conduct or response to an accusation was such as to give rise to an inference of acquiescence or guilty consciousness, the statement is admissible not as substantive evidence in proof of the facts asserted, but merely as a basis for showing the reaction of the accused to it.

12. Criminal law ⚖️407(2)

The fact of arrest, alone, is not sufficient to render inadmissible the fact of accused's failure to deny accusatory statements when made in his presence and hearing, but that fact deserves consideration as one of the circumstances under which the accusation was made in determining whether accused was afforded an opportunity to deny and whether he was naturally called on to do so.

13. Criminal law ⚖️407(2)

An accusation of crime calls for a reply even from a person under arrest.

14. Criminal law ⚖️407(2)

The practice among police officers of obtaining evidence by means of tacit admissions by reading detailed statements of the crime purportedly made by a codefendant or companion in the crime with a view toward eliciting either a complete confession or an admission by silence to be used against the defendant to whom the statement is read, is improper.

15. Criminal law ⚖️700

The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done and to that end he should not offer, as proof of a defendant's guilt, statements of the defendant while in custody, obtained by the setting of traps or by persuasion or duress, or by the power of the custodian's office, even though he does not himself participate in the procurement thereof, notwithstanding such evidence is legally admissible even though obtained by unlawful means.

16. Criminal law ⚖️406(3)

Statements of a defendant while in custody, obtained by the setting of traps or by persuasion or duress, or by the power of the custodian's office, are legally admissible, even though obtained by unlawful means.

17. Criminal law ⚖️407(2)

Where defendant who, when under arrest was shown accusatory statements and asked what he had to say about them, continually stated that he had told the officers all he was going to tell them, and that he had nothing more to say, there was no admission of the truth of the statements and no foundation was laid for their introduction into evidence.

18. Criminal law ⚖️1186(4)

Where jury could have arrived at no other conclusion than that of guilt of defendant, in prosecution for murder and robbery, improper admission in evidence of accusatory statements was not prejudicial. Const. art. 6, § 4½.

19. Criminal law ⚖️1137(5)

In prosecution for robbery and murder, wherein at defendant's insistence and with the acquiescence of the court, but against his own express better judgment, the public defender asked witness a question for purpose of impeaching testimony of witness, defendant could not complain on appeal that he was prejudiced by development of the matter which he thought was material to his defense.

20. Criminal law ⚖️1137(5)

In prosecution for robbery and murder, where on direct examination witness was asked to read portion of an accusatory statement and cautioned not to read other portions, and the defendant insisted that if any part of the document was placed in evidence then all should go in, but court stated that portion conceived to be admissible by district attorney should be read and that, if defendant so desired, he could put in the remainder later, and on cross-examination the witness was told at defendant's request to read the omitted part, if inclusion of such matter was erroneous, error was invited by defendant.

21. Criminal law ☞1137(7)

In prosecution for robbery and murder, defendant could not complain on appeal that testimony given by witness who was called at defendant's specific and insistent request was so full of contradictions as to be of no benefit to him.

22. Criminal law ☞780(1)

In prosecution for robbery and murder, there was no occasion for the giving of an instruction that the testimony of one who was allegedly an accomplice of the defendant was to be viewed with distrust where the witness was called on behalf of defendant.

23. Criminal law ☞1186(4)

In prosecution for robbery and murder, where court gave, with certain modifications, an instruction proposed by defendant bearing on the subject of accusatory statements for which there would have been no necessity if the court had properly denied the admission in evidence of the accusatory statement, but jury could have arrived at no other conclusion than that of guilt of defendant, the jury could not have been confused or misled by the charge and defendant suffered no prejudice from it. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Alger Simmons was convicted of first-degree robbery, first-degree murder, and assault with a deadly weapon with intent to commit murder, and he appeals.

Judgment affirmed.

Leola Buck Kellogg and Montgomery G. Rice, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

CARTER, Justice.

The questions presented by this appeal concern alleged errors in the presentation of evidence and in charging the jury.

By amended information defendant was charged with the commission of crimes committed on January 5th and January 22d,

1945, respectively. Counts 1 and 2 charged the robbery on January 5th of Mrs. Carrie Ellingson of \$639.87 and of Ray R. Byrnes of one package of cigarettes of the value of 15 cents. Counts 3, 4 and 5 charged the murder on January 22d of Virgil Marques, robbery of Leonard E. Brown of \$425, and assault upon said victim with a deadly weapon with intent to commit murder. A prior conviction of petty theft with prior petty theft, in June, 1942, was also alleged with respect to each count. One Theodore Bernard Webb was originally named as a codefendant, but pleaded guilty. Defendant pleaded not guilty, except that when the cause was called for trial he admitted the prior conviction.

At the close of the trial the jury returned verdicts finding defendant guilty of first degree robbery on counts 1, 2 and 4, of murder of the first degree on count 3, without recommendation as to punishment, and of assault with a deadly weapon, a lesser offense included in the offense charged in count 5. Motion for new trial was denied, and defendant was sentenced for the terms prescribed by law on counts 1, 2, 4 and 5, with the admitted prior, the sentences to run consecutively, and to death on count 3.

After arraignment on the original information, defendant substituted new counsel for the attorney who was then representing him and Webb. A week later the public defender was substituted as counsel and represented defendant up to the time of his appeal. New counsel were then again substituted.

At the time of commission of the crimes, defendant, a colored man, was about 30 years of age and had a criminal record. Webb, also colored, was about 23 years old, and claims that with the exception of some juvenile delinquency, he had not theretofore engaged in any wrongdoing. The evidence relating to the robberies charged in counts 1 and 2 shows the following:

The victim Byrnes was a salesman for a furniture company located on West Washington Boulevard, Los Angeles, and Mrs. Ellingson was bookkeeper and cashier for the concern. On Friday and Saturday the store was kept open until nine in the evening. It was well lighted and its eight large

display windows were decorated to portray separate rooms, each advertising a particular type of furniture. On Friday evening, January 5, 1945, between 8:30 and closing time, defendant entered the store, followed by Webb and a third man referred to as Jefferson. Defendant asked to see certain furniture and Byrnes led him toward the third display window. When the two were alone, defendant poked a gun at Byrnes and ordered him to walk to the cashier's office. Meanwhile Webb had asked Mrs. Ellingson about an account under the name of Jefferson, and when she told him there was no account listed under that name, he pulled a long dagger shaped knife from his pocket, and ordered her to walk into her office. A few minutes later Jefferson came in.

Knowing that the men wanted money, Mrs. Ellingson walked to the safe and opened the two general drawers. Webb was not satisfied with the amount he found there and later found the surplus money drawer. In all \$621.37 in currency and silver were taken. Mrs. Ellingson was pushed back of a little partition where there was a telephone and was gagged with a dirty handkerchief. Her hands were tied behind her back. Defendant brought Byrnes in. He was threatened and "frisked," and a package of cigarettes was taken from his person. He was then also pushed behind the partition, made to lie on the floor, and his hands were tied behind his back. From one of the drawers of the safe the robbers extracted a revolver which had been placed there by the store manager and which was identified by him on the trial as People's Exhibit 3. In all the robberies consumed about 12 minutes of time, and after the men left with their loot, Byrnes and Mrs. Ellingson soon freed themselves. On the trial both were positive in their identifications of defendant and Webb.

On January 9th defendant was arrested for the alleged robbery of a service station and for the above robberies, and his 1939 Pontiac car was impounded by the police, and turned over by them to a finance company. However, defendant gave bail and on the same day procured his release on writ of habeas corpus. Thereafter he recovered his car. While he was still at liberty the

crimes of January 22d, charged in counts 3, 4 and 5, were committed.

[1-4] On his appeal defendant does not question the sufficiency of the evidence to sustain his conviction under count 1 for robbery of Mrs. Ellingson, but with respect to the conviction under count 2 for robbery of Mr. Byrnes, he asserts that there was no proof that the package of cigarettes taken from the person of the victim had any value whatsoever, and that the court may not take judicial notice of value. Judicial notice may be taken, however, of the fact that an item of personal property has some value. The amount is immaterial for, as said in *People v. Thomas*, 45 Cal.App.2d 128, 135, 113 P.2d 706, 710, "* * * robbery does not depend upon the value of the property taken. The other elements being present, the crime is made out even though the property taken be of slight value (citing authorities); * * *." To the same effect see *People v. Stevens*, 141 Cal. 488, 489, 490, 75 P. 62, and cases there cited.

The evidence with reference to the crimes of January 22d, charged in counts 3, 4 and 5, shows the following: On January 22d Leonard E. Brown was operating a service station at 3100 West Sixth Street, Los Angeles. About seven in the evening Mr. Brown had turned off all of the electric lights in the store except the one in the office. As he was about to turn off this light defendant entered the door, followed by Webb who was holding in his hand a revolver similar in appearance to the one stolen from the furniture store, aforesaid Exhibit 3. Defendant grabbed Brown's hand, whereupon Brown seized defendant around the waist in an effort to throw him out. However, Brown was then hit above the eye and was dazed. He thinks the blow was by Webb with a gun. He was then pushed through the partition door into the storeroom by defendant and ordered to get down on his knees. When he hesitated defendant hit him twice with a tire iron, and when he was on the ground, hit him some more.

Defendant next ordered Brown to open the safe in the storeroom. When Brown said he did not know the combination, he was hit again with the tire iron. While he

was down looking at the floor, as ordered, he heard the cash register in front open and heard a man's voice say, "He will be out in a minute." The man with Brown ordered him to keep his head down, pushed his face to the floor, and started to tie his hands in back with a rope. This was not completed. Brown heard a shot, but because blood was obscuring his sight he did not see whether the man with him had at that time left the room. It is his belief that defendant was with him in the back room during the entire period, including the time the shot was fired. Four hundred dollars was taken from his hip pockets, gasoline ration coupons representing 882 gallons were taken from his pockets and the desk drawer, and \$40 in silver was taken from the cash register. This represented Saturday, Sunday and Monday business. After hearing the shot Brown got up, released himself from the rope, and made his way to the entrance door. All was quiet and as he went out he stumbled over the dead body of Virgil Marques lying in the front doorway. Brown may have been unconscious for part of the time while the men were inside his station. The cut over his eye required seven stitches; his jaw was fractured, both eyes were black; his face was bruised; and the hearing in his left ear impaired.

A service station diagonally across the street from Brown's was operated by a Mr. Frank Fusco. He heard a yell, looked toward the Brown station, and saw a colored man in the doorway. He heard another yell, went in the office next to his station, phoned the police, and then went into his home next door, and got his automatic revolver (Ex. 13), which was loaded but had a safety catch.

Virgil Marques rented and operated a repair shop in the rear of the Fusco garage. He was standing near a flower bed on the station property next to the Fusco home. As Fusco came by with his automatic, Marques grabbed it out of his hand, jumped into his repair truck, and drove across the street to Brown's station, stopping right in front of the door. Fusco walked across unarmed and stood at the corner of the office. He saw a colored man in the doorway and saw that Marques had the gun in

his back. Fusco called, "Give it to him," but the gun did not go off. Marques may not have known how to release the safety catch and throw a bullet into the chamber, or may have been afraid to fire. At any rate Fusco saw another colored man come from the rear and grab the hand of Marques. Both of these men grabbed at Marques and had his gun hand up in the air as he tried to pull it down. Then two shots were fired and Marques fell out of the doorway. Mr. Fusco was within 10 feet of the men and positively identified defendant as one of them. He did not see any gun other than that held by Marques.

After the firing of the shots the men came toward Mr. Fusco, and thinking that they were following him, he ran down the street and ducked into a driveway. Two shots were fired at him and he was hit in the stomach. It developed later that these shots were fired by the police, who saw Mr. Fusco running and thought he was the robber. Upon autopsy on the body of Marques, it was found to bear two bullet wounds, the fatal wound being made by a pellet fired from the revolver Exhibit 3.

The father of Webb testified that Webb and defendant left his home about 6 o'clock on the evening of January 22d, in defendant's 1939 Pontiac sedan, bearing license No. 18 W 831, which defendant had recovered from the finance company after January 9th. When the police arrived at the scene of the murder about 7:15, this car was parked just south of the gas station, with the radiator still warm. The police impounded the car. Keys fitting the car were found on the station pavement. One of the officers found the revolver, Exhibit 3, on the lawn of the premises, a few doors from the station. It contained four empty cartridges.

On the morning of the 23d a Mrs. Carter, who lived at the Sanmark Hotel, saw defendant in the room of Maxine Woods, who also lived there and from whom Mrs. Carter was seeking to borrow a broom. Defendant told Mrs. Carter to say he had been there in bed at 6 o'clock the evening before if anyone inquired about him, showed her newspaper pictures of the robbery, and told her that his car had been stolen. He took

\$200 or \$300 from his billfold and gave it to Maxine, saying: "Well, if they pick me up I don't want this on me." He spoke abusively to Mrs. Carter because she would not promise to lie for him, and later said to her boy friend, "I was in this little robbery last night."

On January 25th one of the police officers found the automatic pistol, Exhibit 13, near a signboard on Wilshire Boulevard, together with about \$45 and a number of gas stamps buried about 10 inches underground. A dollar bill, a glove, and a gas stamp were found above ground. Eight loaded shells were in the pistol, with the safety on, and the gun could not be fired. The mate to the glove was found in the vicinity.

On January 27th, defendant, who had been traveling around with Maxine Woods, seeking a hiding place, was arrested at a colored settlement at Fontana, San Bernardino County, known as the L & M Ranch. Defendant had observed the approach of the police and had hidden successively in the pigsty, the chicken coop, and above ground in a tree. He told the officers he feared arrest only because somebody had stolen his car and used it in a holdup, and because he had been charged with one crime and did not want to be mixed up in another. Maxine Woods was also apprehended and made a statement to the police in which she told about defendant's visit to her room after the crime and her travels with him to evade apprehension. Webb was arrested on January 30th. He too gave statements to the police.

Webb, who was originally charged as a codefendant with defendant, entered a plea of guilty, and prior to the trial of this cause his case was disposed of by the imposition of a sentence less than death. At the present trial, at the insistence of defendant, but contrary to the advice of his counsel, the public defender, Webb was called as the first witness for the defense. His testimony was replete with evasions, inconsistencies and contradictions. He repudiated his former statements, saying that they had been induced by abuse of the police officers. He told the unbelievable story that he borrowed defendant's car, ostensibly to help his girl friend move, that he then picked up a com-

panion whom he had met a week previously in a pool hall, and that after looking for a place to rob, they chose the Brown service station. Although Webb recalled clearly certain details of the crime, at one point in his direct examination he professed not to be able to remember whether he had the gun or whether his companion had it at the time Marques was shot. At another point on cross-examination, and after he had been repeatedly assured by the judge that his case had been disposed of and he would not incriminate himself by any statement, Webb testified that he was the one who had the gun, Exhibit 3, and that he himself fired the fatal shot. He claimed that defendant came by his house subsequent to the crime to retrieve his car and that he told defendant all that had happened; that his companion in the crime vanished, having expressed an intention of going to Mexico.

Later defendant took the stand in his own behalf and attempted to conform his narration of events to that given by Webb. He claimed that at the time of the crime Webb had his car and he was in Maxine's room playing Pokena, and that he stayed there until 8:30, when he left to try to locate Webb. He also claimed he had been mistreated by the police and repudiated parts of a statement he had made to them. He gave a different version than did the officers of his response to accusatory statements. He said that he told the officers that Webb lied like a dog in his statement, and that while Maxine told a "pretty good story" parts of it were untrue.

The sufficiency of the evidence to support the verdicts under counts 3, and 4 and 5 is beyond question. Defendant virtually concedes this, for among other things he states in the premise to his opening brief: "In order to present most clearly the vital errors as to Count III, the homicide sentence, the errors will be presented chiefly in their relation to that sentence. * * * Further to emphasize the vital errors as to Count III, the homicide, this brief will not contest the adequacy of the evidence to show that this [defendant] conspired with an accomplice and original co-defendant, Webb, to rob the service station of one Leonard Brown, that they made the at-

tack and that in the course of the robbery or of the escape, one of the robbers shot and killed Virgil Marques as he was coming to rescue."

[5] Another concession by defendant is couched in the following language: "Of course, this brief will not contest the point of law that where a murder is committed by one of two robberies, confederates, each or both may be found guilty of murder in the first degree and, in a proper case, after a fair and impartial trial adhering to due process, the jury, in the exercise of its sole discretion, must determine as to each defendant whether he is to expiate the murder by his death or by confinement in the state prison." Thus defendant recognizes that regardless of whether it was he or Webb who actually fired the fatal shot at Marques, both were subject to conviction of first degree murder and imposition of a death penalty.

But defendant argues that if it was Webb who actually fired the shot, it is highly unfair for Webb, through a plea of guilty, to enjoy a sentence of less than death while defendant must pay the extreme penalty. And in this connection and also with respect to other points raised by the appeal, the present counsel for defendant charge that his trial attorney, the public defender, was guilty of numerous errors of omission and commission in his conduct of the defense. In the cases of omission, such as the public defender's asserted failure to introduce available evidence helpful to defendant, and his asserted failure to object or preserve objections to improper evidence or to request appropriate instructions, the present counsel recognize that ordinarily these matters do not furnish grounds of reversible error. But it is argued that where a defendant is represented by court-appointed counsel or by a public official, instead of by counsel of his own choosing and such official is derelict in duty, the failure of proper defense is a failure of the court itself to afford the defendant due process and a fair trial, and such errors must be considered on appeal despite the absence of proper objections and the fact that the errors arose through no fault other than that of defendant's representative. Assum-

ing this to be so, none of the matters urged by present counsel appear to have prejudiced defendant.

[6] The first error of omission is said to be the public defender's failure to introduce in evidence a transcript of the testimony taken on the preliminary hearing. This testimony is said to be very favorable to defendant, in that Brown then gave a most convincing account of the part played by each of the two men in the commission of the robbery and murder and he was far more definite than at the trial in his view that defendant stayed with him in the rear room, thus leaving Webb as the man in front who fired the fatal shot. For a consideration of this point, this court, without objection by the prosecution, permitted augmentation of the record to include the preliminary transcript. A review of the testimony therein shows that defendant was not prejudiced by failure to introduce it at the trial. The matters shown are at most cumulative, and would have added little if anything to the strong showing made at the trial leading to the conclusion that it was Webb, and not defendant, who was in the front office at the time of the shooting. Under the facts, which show no extenuating circumstances, it is wholly improbable that the jury, believing defendant to have been one of the pair who carried out the robbery, and murder, would have rendered any different verdict if the transcript had been introduced. The fact that Webb received a lesser sentence than death does not affect the disposition of the cause against defendant.

Complaint is made of three instances where accusatory statements were received in evidence without objection on the part of the public defender.

One of the officers testified that while defendant was being driven to Los Angeles after his arrest, a conversation was had wherein defendant attempted the explanation that someone stole his car and used it in a holdup; that the officer said he would tell defendant what happened; that he then told defendant the results of the police investigation which revealed the circumstances under which the robbery and murder were committed; that he thereupon asked

defendant what he thought about the story; and that defendant replied, "I have told you all I am going to tell you. Somebody stole my car, and that is all I have to say."

There was received in evidence a nine page sworn statement of Maxine Woods, wherein she recited conversations allegedly had with defendant. The officers testified that this statement was handed to defendant and that he read it from beginning to end. He was asked, "Did you read it all?" and he said, "Yes." He was then asked, "Well, what do you think of it? Did she tell everything?" to which defendant replied, "Well, she told enough," and in response to the further question, "What do you think about it?" defendant said, "I told you all I am going to tell you. I have nothing more to say."

There was also received in evidence a statement made by Webb. The officers testified that this statement was also handed to defendant to read, after which the following conversation was had: "He [defendant] handed me the statement back and I said, 'Did you read it all?' He said, 'Yes.' I said, 'What do you think about that? Did he tell it all?' He said, 'It looks like he told it all and about every body.' I said, 'Well, what do you think about it?' He said, 'I have told you all I am going to tell you, I am not going to tell you anything else.' I said, 'Did you read in there where he said you are the one that shot the man, that you had the pistol and you killed the man?' He said, 'Yes, I read that.' I said, 'Well, do you admit that or deny it?' He said, 'I have told you all I am going to tell you, I have nothing more to say.'"

[7-9] Accusatory statements of the character here involved are plain hearsay. They may properly find their way into the record only as admissions, under the familiar exception to the hearsay rule. If the accused responds to the statement with a flat denial, there is no admission and hence nothing that may be received in evidence. If, on the contrary, the truth of the statement is admitted, the statement may properly be introduced. A third situation is presented when the accused stands mute in the face of the accusation or responds with an evasive or equivocal reply. In

that situation this court has held that *under certain circumstances* both the statement and the fact of the accused's failure to deny are admissible on a criminal trial as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt.

[10, 11] The theory underlying this rule is that the natural reaction of an innocent man to an untrue accusation is to enter a prompt denial. Where his response is silence, evasion, or equivocation, it is for the trial court to determine in the first instance whether the accusation has been made under circumstances calling for a reply, whether the accused understood the statement, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness. Where the trial judge determines that such an inference may be drawn, the statement is then admitted, not as substantive evidence in proof of the fact asserted but merely as a basis for showing the reaction of the accused to it. As stated in *People v. Yeager*, 194 Cal. 452, 486, 229 P. 40, 54: "It is for the court in the first instance to determine whether the import of the statements is such that it would furnish a foundation for proof of conduct, and it is then for the jury to decide whether the accused was aware the statements were made, whether, under all of the circumstances shown, they called for a disclaimer, whether the accused did reply to them, and whether, if he did not do so, such failure showed criminal intent or a consciousness of guilt. If these propositions of fact are resolved in favor of the prosecution, the item of conduct should be given the effect to which upon the entire case it is entitled."

For other general statements of the rule see *People v. Lew Fat*, 189 Cal. 242, 207 P. 881; *People v. Ong Mon Foo*, 182 Cal. 697, 189 P. 690; *People v. Lapara*, 181 Cal. 66, 183 P. 545; *People v. Byrne*, 160 Cal. 217, 116 P. 521; *People v. Philbon*, 138 Cal. 530, 71 P. 650; *People v. Teshara*, 134 Cal. 542, 66 P. 798; *People v. Amaya*, 134 Cal. 531, 66 P. 794; *People v. Estrado*, 49 Cal. 171; *People v. McCrea*, 32 Cal. 98; *People v. Peterson*, 66 Cal.App.2d 420, 152 P.2d 347; *People v. Shellenberger*, 25 Cal.App.

2d 402, 77 P.2d 506; *People v. Smith*, 25 Cal.App.2d 241, 77 P.2d 277; *People v. King*, 7 Cal.App.2d 672, 46 P.2d 798; *People v. Egan*, 133 Cal.App. 152, 23 P.2d 1042; *People v. Bisbines*, 132 Cal.App. 239, 22 P.2d 762; *People v. Holmes*, 130 Cal. App. 507, 20 P.2d 67; *People v. Susoeff*, 129 Cal.App. 78, 18 P.2d 442; *People v. McCoy*, 127 Cal.App. 195, 15 P.2d 543; *People v. Smith*, 111 Cal.App. 579, 295 P. 862; *People v. Piscitella*, 90 Cal.App. 528, 266 P. 349; *People v. Egan*, 77 Cal.App. 279, 246 P. 337; *People v. Edwards*, 72 Cal.App. 102, 236 P. 944; *People v. Shelest*, 62 Cal. App. 213, 216 P. 389; *People v. Graney*, 48 Cal.App. 773, 192 P. 460; *People v. Ayhens*, 16 Cal.App. 618, 117 P. 789; 8 Cal. Jur. § 196, p. 102; 20 Am.Jur. § 570, p. 483; 115 A.L.R. 1510.

That silence or an equivocal reply is not always indicative of a consciousness of guilt cannot be gainsaid, for the Scriptures bear witness that when Jesus stood under accusation before Pontius Pilate, the governor, and was asked, "Art thou the King of the Jews?" he replied, "Thou sayest," and "when he was accused of the chief priests and elders, he answered nothing. Then said Pilate unto him, Hearest thou not how many things they witness against thee? And he answered him to never a word; insomuch that the governor marvelled greatly." Matt. chap. 27, v. 11-14; 4 Wigmore on Evidence § 1072, pp. 84-85.

[12] It is also apparent that when a person is in the hands of his accusers he may well and soundly conclude that his best interests will be served by silence, evasiveness, or equivocation. For this reason, in a number of jurisdictions it has been held that the mere fact of arrest is sufficient to render inadmissible the fact of the accused's failure to deny accusatory statements when made in his presence and hearing. These courts maintain that it is the common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused whether he be guilty or innocent; that the maintenance of silence is the best strategic policy for one in the custody of the law, and that it is entirely consistent with innocence. See 2 Wharton's Criminal

Evidence, 11th ed., § 661, p. 1101; 80 A.L.R. 1262; 115 A.L.R. 1510; 20 Am.Jur. § 574, p. 486, citing cases from Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Louisiana, Missouri, Nebraska, New York, Ohio, Oklahoma, Rhode Island, Texas, and federal decisions. Other jurisdictions, including California, have adhered to the more flexible rule that the fact of arrest, alone, may not be sufficient to render the testimony inadmissible, but that such fact deserves consideration as one of the circumstances under which the accusation was made, in determining whether the accused was afforded an opportunity to deny and whether he was naturally called on to do so. See 2 Wharton's Criminal Evidence, 11th ed., supra; 80 A.L.R. 1259; 115 A.L.R. 1517; 4 Wigmore on Evidence, 3d Ed., § 1072, p. 80, and cases cited, particularly from Alabama, California, Hawaii, Illinois, Indiana, Kentucky, Michigan, Montana, Ohio, Pennsylvania, West Virginia and Wisconsin.

It is recognized that those decisions which announce the rule of inadmissibility stem for the most part from acceptance of an early Massachusetts precedent. *Commonwealth v. Kenney*, 12 Metc. 235, 46 Am. Dec. 672. Courts taking the opposite view charge that those decisions have misconstrued the Massachusetts rule, and point out that in the Kenney case there were other circumstances existent which, apart from the mere fact of arrest, would have prevented a reply by the defendant, and that it was upon these circumstances also, and not only the fact of arrest that the evidence was excluded. See discussion 80 A.L.R. 1266, 4 Wigmore 3d Ed., p. 80.

[13] Early California cases foreshadowed adoption in this state of a limited rule of admissibility (*People v. Dole*, 122 Cal. 486, 55 P. 581, 68 Am.St.Rep. 50; *People v. Estrado*, 49 Cal. 171; *People v. Ah Yute*, 53 Cal. 613; *People v. McCrea*, 32 Cal. 98), and when the question was directly presented, such a rule was adopted and the Kenney case was distinguished. *People v. Amaya*, 134 Cal. 531, 536, et seq., 66 P. 794, 796. This court said: "It is, no doubt, true that, to render evidence of this character admissible, *the occasion and the circum-*

stances must have been such as to afford the accused person an opportunity to act or speak, and the statement must have been one naturally calling for some action or reply. Greenl. Ev., par. 197. But in this state it has been uniformly held that an accusation of crime does call for a reply, even from a person under arrest. (citing cases.)" (Emphasis added.) This rule has since been consistently followed. *People v. Matthew*, 194 Cal. 273, 228 P. 424; *People v. Ong Mon Foo*, 182 Cal. 697, 703, 189 P. 690; *People v. Schoon*, 177 Cal. 678, 171 P. 630; *People v. Byrne*, 160 Cal. 217, 234, 116 P. 521; *People v. Sanchez*, 35 Cal.App. 2d 231, 235, 95 P.2d 169; *People v. Fallai*, 99 Cal.App. 297, 303, 278 P. 449; *People v. Shelest*, 62 Cal.App. 213, 217, 216 P. 389; *People v. Willis*, 70 Cal.App. 465, 469, 233 P. 812; *People v. Graney*, 48 Cal.App. 773, 192 P. 460; *People v. Swaile*, 12 Cal.App. 192, 198, 107 P. 134; *People v. Sullivan*, 3 Cal.App. 502, 86 P. 834.

Properly applied, the limited rule of admissibility appears to be preferable to that of strict nonadmissibility on ground of arrest only, for the determinative point is not whether the defendant is under arrest at the time of the accusation, but is whether the circumstances are such that a reply is called for and the defendant is free to speak spontaneously. Arrest is but one form of restraint that at times might bar a free response. Many other forms of restraint have the same effect, such as fear, physical pain, suffering, advice of counsel, admonition as to silence, warning against self-incrimination, a belief that the accused will serve his best interests by silence, or other physical or mental pressure. A response under any of these forms of restraint may be such as will not give rise to an inference of acquiescence or guilty consciousness, and thus it is said on the question of admissibility that "the better rule is to allow some flexibility according to circumstances." 4 Wigmore on Evidence, 3d Ed. § 1072, p. 81.

In this state, under a proper application of the rule, it has at times been held either by the trial court in the first instance, or by the courts on appeal, that the surrounding circumstances were not such as to ren-

der the evidence admissible. See *People v. Davis*, 210 Cal. 540, 553, 293 P. 32; *People v. Kelly*, 203 Cal. 128, 263 P. 226; *People v. Wong Loung*, 159 Cal. 520, 531, 114 P. 829; *People v. Weber*, 149 Cal. 325, 86 P. 671; *People v. Williams*, 133 Cal. 165, 65 P. 323; *People v. McEvers*, 53 Cal.App.2d 448, 452, 128 P.2d 93; *People v. Smith*, 25 Cal.App.2d 241, 247, 77 P.2d 277; *People v. Kazatsky*, 18 Cal.App.2d 105, 111, 63 P.2d 299. In many other cases, as above cited, even where the defendant was under arrest at the time of meeting the accusation, the evidence has been admitted.

There appears however, of late to be a growing tendency on the part of trial courts to indulge too broad a discretion in allowing admission of such evidence in the first instance; a failure to fully consider the question of whether the accused replied under restraint; whether the circumstances under which the accusation was made called for a reply; whether the accused understood the statement; and whether his conduct merely indicated a desire to avail himself of the rule against self-incrimination or whether it could reasonably give rise to an inference of acquiescence or guilty consciousness.

Obviously, when a defendant repeatedly asserts, as did the defendant here, "I have told you all I am going to tell you," and is repeatedly pressed by police officials into further conversation, his response is not a free and spontaneous one. It is made under mental, if not physical coercion, exercised by the police officials, and this despite the fact the defendant's replies clearly indicate a desire to take advantage of the rule against self-incrimination. Of what avail is it to warn a defendant that he need not reply to police questioning unless he wishes to, and that anything he may say may be used against him, if, in the event he is unresponsive under this admonition, his silence or equivocal reply is later turned against him as indicative of a consciousness of guilt?

[14] There is another growing practice in the use of the accusatory statement which is erroneous and must be unqualifiedly condemned. It is described by text-

writers in the following language: "A practice popular among police officials as a means of obtaining evidence by means of tacit admissions is that of reading detailed statements of the crime purportedly made by a codefendant or companion in the crime with a view toward eliciting either a complete confession or an admission by silence, to be used against the defendant to whom the statement is read." Such statements have been held to be inadmissible when sought to be introduced upon the ground that they were tacitly admitted. Some reasons given for such holdings are that there was no necessity for denying or answering the statement read, and that the circumstances and occasions were not such as to afford the accused an opportunity to deny, or such as to naturally call for a contradiction. 2 Wharton's Criminal Evidence, 11th Ed., § 660, p. 1098, and 80 A.L.R. 1255, citing cases from Nebraska, Washington, South Carolina, and England.

Another objection to this form of evidence is that there is placed before the jury under the guise of an accusatory statement a vast amount of hearsay testimony otherwise utterly inadmissible. Lengthy statements are taken by the police from third persons who may or may not thereafter be witnesses. (In the present case the statement of Maxine Woods is nine pages long.) The defendant, under arrest, is then asked to read the statement. If it contains indications of his guilt and he responds with other than a flat denial, the statement is then put in evidence as an accusatory statement. Although the jury may properly be cautioned to receive it, not as substantive evidence in proof of the facts asserted but merely as a basis of showing the reaction of the accused to it, the fact is that a lengthy transcript containing any amount of extraneous matter apart from the direct accusation is read into the ears of the jury and the matter remains in their mind during their deliberations. See *People v. Yeager*, supra; *People v. King*, 7 Cal.App.2d 672, 46 P.2d 798; *People v. Rhinehart*, 79 Cal.App. 499, 250 P. 203; *People v. Egan*, 77 Cal.App. 279, 246 P. 337.

If it were possible to introduce in evidence only that portion of the statement of

a third person or transcript of such statement which contains an accusation and the defendant's response thereto, the effect of such evidence might not be so damaging, but this course is prevented by the fact that if a witness testified that an incriminating statement was made without stating what it consisted of, such testimony would be objectionable as a mere conclusion, 2 Wharton's Criminal Evidence, 11th Ed., § 656, pp. 1091-1093. Any practice of introducing in evidence only part of a document is objectionable, and without hearing the whole statement a jury could not be sure of correctly appraising the effect of the defendant's response to it. For these reasons, it has been the practice to admit the entire statement, under proper instructions to the jury, and thus reveal to the jury a mass of hearsay matter, otherwise inadmissible.

Another objection to this method is that the accusation is, in a manner of speaking, second hand. The defendant is not confronted with the witness who made the statement to the police, but after arrest the so-called accusation is made by the police by having the defendant read the statement, or reading it to him. In such a situation, even more than under a direct attack, a defendant would be likely to assume that evasion or the maintenance of silence would be a justifiable course of action, whether innocent or guilty.

It is, as already stated, for the trial court in the first instance to determine the import of the accusatory statement; that is, whether it has been made under such circumstances that it may furnish a foundation for proof of conduct. It is then for the jury to decide, on any statement properly admitted, whether the accused did reply to it, and whether if he did not do so, or his reply was evasive or equivocal, it showed criminal intent or a consciousness of guilt, or acquiescence. It is said in *People v. Yeager*, supra, 194 Cal. at page 486, 229 P. at page 54, that "If these propositions of fact are resolved in favor of the prosecution, the item of conduct should be given the effect to which upon the entire case it is entitled." This is but another way of saying that if the jury choos-

es to draw from the evidence the inference that the defendant's response does indicate acquiescence, or a consciousness of guilt, it is in effect a tacit admission; that is, an admission of the accusation, or in other words, of the contents of the statement.

For this reason, any accusatory statement and a response thereto made by a defendant under restraint, should be considered with great caution, and if the police questioning has been insistent, so that the defendant has been induced or persuaded against his better or more considered judgment to make a response or has adopted the policy of silence, the accusatory statement should be held inadmissible by the trial judge in the first instance. The same ruling should be made if it appears that a great mass of extraneous hearsay matter will be placed before the jury through this device. Where a defendant is under mental police coercion the situation is no different than if a gun were held at his head to compel him to talk, and his response should certainly be held inadmissible unless, at the time of questioning, the defendant has been clearly advised that his reaction can be held against him as an admission. And certainly the fact that the accused is under arrest or any other form of restraint should be an important factor pointing to inadmissibility. No violation of the privilege against self-incrimination can be sanctioned.

As stated by Mr. Wigmore in discussing this privilege (8 Wigmore on Evidence, 3d Ed., § 2251, p. 308 et seq.): "No doubt a guilty person may justly be called upon at any time for guilt deserves no immunity. But it is the innocent that need protection. Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law, or on public rumor, or on secret betrayal, two abuses have always prevailed and inevitably will prevail; first the petty judicial officer becomes a local tyrant and misuses his discretion for political or mercenary or malicious ends; secondly, a blackmail is practiced by those unscrupulous members of the community who through threats of inspiring a prosecution are able to prey upon the fears of the

weak or the timid. * * * The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system."

An early comment on the police practice of proving guilt through inducing self-incrimination is found in the History of the Criminal Law, by Sir J. F. Stephen, as quoted by Mr. Wigmore at page 312: "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."

[15, 16] In an opinion rendered in 1936 by the Committee on Professional Ethics and Grievances of the American Bar Association, the following comment is made (Opn. No. 150 (1936 Ed.), p. 294): "The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done. Canon 5. To that end he should not offer as proof of a defendant's guilt statements of the defendant while in custody, obtained by the setting of traps or by persuasion or duress, or by the power of the custodian's office, even though he does not himself participate in the procurement thereof. State v. Albert, 50 La. Ann. 481, 23 So. 609; Opinion 85; In re Robinson, 151 App. Div. 589, 136 N.Y.S. 548, affirmed 209 N.Y. 354, 103 N.E. 160. The fact that such evidence is legally admissible, even though obtained by unlawful means (see Olmstead v. United States, 277 U.S. 438,

48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376) does not alter our conclusion."

[17] For the foregoing reasons it is apparent that the prevailing liberality in the admission of accusatory statements and the response of the defendant thereto, made at a time when he is under arrest or other restraint preventing freedom of reply or justifying silence or equivocation, must be greatly curtailed, and particularly so where an entire transcript is sought to be introduced in evidence by this device. In the present case the statements of Maxine Woods and of the codefendant Webb should not have been admitted for any purpose against the defendant, and could properly have been used only as impeachment of said persons in case they were called as witnesses. Defendant was under restraint by the police officers. He was, or should have been advised by them, but at any rate knew from his past criminal experience, that anything that he might say would be used against him and that he did not have to make any statements. He therefore quite properly remarked, in comment on the Woods' statement, "I told you all I am going to tell you. I have nothing more to say," and in comment on the Webb statement, "I have told you all I am going to tell you, I am not going to tell you anything else." This, while not a denial of the contents of the statements, was certainly not an admission of their truth, and it did not lay a foundation for the introduction of such hearsay evidence under the rule herein announced. In other words, it is obvious that defendant was attempting to exercise his constitutional privilege against self-incrimination, despite the insistence of the officers upon carrying on a conversation about the contents of the statements, and that his responses were not such as could give rise to an inference of acquiescence or of guilty consciousness. In this situation it was an abuse of discretion on the part of the trial court to admit the evidence in the first instance; the circumstances were such as to foreclose it.

[18] Although the admission in evidence of these statements was clearly erroneous, and if the evidence were so con-

flicting or uncertain as to create a doubt as to the guilt of the defendant, would be held prejudicial, in this case, in view of the overwhelming evidence of guilt of the defendant, exclusive of any evidence erroneously admitted, and the fact that the jury could have arrived at no other conclusion than that of guilt; and in view of the mandatory provision of section 4½ of article VI of the Constitution of California, it must be held that the error was not such as to justify a reversal of the judgment.

There was also read in evidence another statement made by Webb in the office of the district attorney on January 30, 1945. Although defendant concedes that this statement could properly have been admitted for the purpose of impeaching the story told by Webb on the witness stand, including his admission on cross-examination that he fired the fatal shot, defendant argues that its reception in evidence without narrowly limiting its purpose and effect constituted serious error. It is apparent from the record, however, that defendant suffered no prejudice. During the cross-examination of Webb he first testified that he could not remember giving the statement, but later said he recalled it. He was interrogated as to each question and answer contained in it, and admitted some answers and denied others. This evidence directly attacked the truthfulness of the testimony given by Webb on direct examination and its purpose could not have been misunderstood.

Defendant calls attention to three occurrences during the trial which he states show that the public defender did not properly protect him from prejudice. They are as follows:

[19] 1. After a police officer had been cross-examined by the public defender and the public defender had stated "No questions," defendant personally wanted to ask the witness a question. The court instructed defendant to be quiet and advised him that he had an attorney to take care of the matter. At defendant's insistence, and with the acquiescence of the court, but against his own expressed better judgment, the public defender then asked the witness

whether defendant was not arrested on January 9th for a robbery other than that of the furniture store, and the witness answered that it was for both robberies. The matter was explained in some detail. Defendant testified that he did not participate in the furniture store robbery and that he was in custody for the other robbery. In insisting that the matter be brought out, defendant obviously had in mind a proper subject of impeachment of the police officer. He cannot now complain that he was prejudiced by development of the matter which he thought was material to his defense.

[20] 2. During the direct examination of another police officer, the witness was asked to read a portion of the Webb statement, and cautioned not to read other portions. Defendant insisted that if any part of the document was placed in evidence, then all should go in. The court stated that the portions conceived to be admissible by the district attorney should be read and that if defendant so desired, he could put in the remainder later. This procedure was followed and on cross-examination the witness was told, at defendant's request to read the omitted part. This portion contained information pertaining to the commission by defendant and Webb of another robbery after the robbery of the furniture store. If the inclusion of this matter was erroneous, the error was invited by defendant. Under the record as a whole, it was clearly not prejudicial.

[21] 3. Defendant claims that Webb should not have been called as a witness. But this witness too was called at defendant's specific and insistent request, and defendant cannot now complain that the testimony given was so full of contradictions as to be of no benefit to him.

[22] Defendant complains of the failure of the public defender to request, or the court to give of its own motion, instructions on two allegedly vital points. One of these, the matter of limiting the purpose of the Webb statement, has already been disposed of. The second point is that the court should have instructed the jury that the testimony of Webb, an accomplice, was to be viewed with distrust. However, since

Webb was called as a witness on behalf of defendant, there was no occasion for the giving of such an instruction. *People v. Melone*, 71 Cal.App.2d 291, 297, 162 P.2d 505.

[23] The court gave, with certain modifications, an instruction proposed by defendant bearing on the subject of accusatory statements. If the court had properly denied the admission in evidence of the accusatory statements, there would have been no necessity for an instruction on that subject. Yet it is clear that the jury could not have been confused or misled by the charge, and for the reasons heretofore stated, defendant suffered no prejudice from it.

The judgment and order denying a new trial are and each of them is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

EDMONDS, J., concurred in the judgment.

SHENK, Justice (concurring).

I concur in the judgment of affirmance but I dissent from that portion of the opinion which holds that the accusatory statements were inadmissible. In the first place that question is not properly before the court on this appeal. It is conceded that on the trial defendant's counsel made no objection to the admission of the statements in evidence and no motion to strike or limit its effect was made. It is the rule that unless objection to it, is made at the trial such evidence is beyond attack on appeal and may be considered in support of the judgment. *People v. Lawrence*, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193; *People v. Peterson*, 66 Cal.App.2d 420, 152 P.2d 347; 2 Cal.Jur. § 82, p. 263; 8 Cal.Jur. § 516, p. 500; 4 Cal.Jur. 10-Yr.Supp. (1943 rev.) 909.

Moreover, there was no error in the admission of the accusatory statements. Section 1870, subdivision 3, of the Code of Civil Procedure authorizes the admission in evidence of "An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." It is the general rule in California, as elsewhere, that when a state-

ment tending to incriminate one accused of committing a crime is made in his presence and hearing, and is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as indicative of a consciousness of guilt, or as evidence of his acquiescence in its truth. *People v. Yeager*, 194 Cal. 452, 229 P. 40; *People v. Lew Fat*, 189 Cal. 242, 207 P. 881; *People v. Ong Mon Foo*, 182 Cal. 697, 189 P. 690; *People v. Lapara*, 181 Cal. 66, 183 P. 545; *People v. Amaya*, 134 Cal. 531, 66 P. 794; *People v. Teshara*, 134 Cal. 542, 66 P. 798; *People v. McCrea*, 32 Cal. 98; *People v. Egan*, 133 Cal.App. 152, 23 P.2d 1042; *People v. Bisbines*, 132 Cal. App. 239, 22 P.2d 762; 8 Cal.Jur. § 196, p. 101; 20 Am.Jur. §§ 570-577, pp. 483 et seq.; 4 Wigmore on Evidence, 3d Ed. 1940, §§ 1069-1072, pp. 68 et seq.; 2 Wharton's Crim. Evidence, 11th Ed. 1935, §§ 656-665, pp. 1089 et seq.; 115 A.L.R. 1510 et seq.; 80 A.L.R. 1235 et seq.; Fricke on California Criminal Evidence, pp. 5 et seq. Such a statement is accepted in evidence not as proof of the truth of the matters therein contained, but because it serves as a basis for the showing of the reaction of the accused to it. As has been commented: "The crystallization of the experience of men shows it to be contrary to their nature and habits to permit statements tending to connect them with actions for which they may suffer punishment to be made in their presence without objection or denial by them unless they are repressed by the fact that the statement is true. Consequently, silence under accusation is some evidence from which the jury may infer that the accused acquiesces in the statement and admits its truth. But silence or failure to deny, of itself, unaccompanied by the statement in the face of which the accused remained silent or which he failed to deny, cannot well be testified to so as to convey meaning. The witness might testify that an incriminating statement was made without stating what it consisted of, but such testimony would be objectionable as a mere conclusion. * * * An evasive answer or one unresponsive to the declaration is tantamount to absolute silence and, when not amounting to a denial or an express ad-

mission, renders admissible both the statement and the reply under the rule as to tacit admissions." 2 Wharton's Crim.Evidence, 11th Ed.1935, §§ 656, 657, pp. 1092-1093.

The California rule, which is in harmony with the general rule, is stated in the following language in *People v. Yeager*, supra, 194 Cal. at page 486, 229 P. at page 54: "The admission of such evidence is an exception to the hearsay rule. Evidence of conduct is receivable if it tends to show a consciousness of guilt or intent. * * * 8 Cal.Jur., § 157, p. 42. Such evidence is not admissible for the purpose of proving the truth of the accusatory statements, but rather as indicating a consciousness of guilt on the part of the accused by allowing an imputation opposed to the presumption of innocence to pass unchallenged. It is for the court in the first instance to determine whether the import of the statements is such that it would furnish a foundation for proof of conduct, and it is then for the jury to decide whether the accused was aware the statements were made, whether, under all the circumstances shown, they called for a disclaimer, whether the accused did reply to them, and whether, if he did not do so, such failure showed criminal intent or a consciousness of guilt. If these propositions of fact are resolved in favor of the prosecution, the item of conduct should be given the effect to which upon the entire case it is entitled."

Here, had the defendant promptly denied the accusations, there would have been no reaction to show or admission to introduce, and the statements could not properly have been received in evidence. But the defendant's remarks did not constitute a full and prompt denial. In response to one accusation he said, "I have told you all I am going to tell you. Somebody stole my car, and that is all I have to say." With respect to the Woods statement he commented in part, "Well, she told enough * * * I have nothing more to say," and in response to the Webb statement, he said in part, "It looks like he told it all and about everybody."

The equivocal remarks, such as, "Well, she told enough," were stronger against de-

fendant than if he had stood mute or said he had no reply to make. A comment such as, "I have nothing more to say," is not a denial of an accusation. *People v. Edwards*, 72 Cal.App. 102, 123, 236 P. 944. In *People v. Egan*, 77 Cal.App. 279, 282, 283, 246 P. 337, 338, where the defendant's reply to an accusatory statement was that he "had nothing to say," it was held that the statement was properly received in evidence. The court said: "The accusatory statement in the instant case was read to appellant in the presence of Wright, and appellant, being asked if he had anything to say, was fairly afforded an opportunity to make a reply. If, under those conditions, he made no reply to the accusatory statements, the circumstance of his silence was proper evidence to be considered by the jury as indicating an admission of guilt." See, also, *People v. Egan*, 133 Cal. App. 152, 156, 158, 23 P.2d 1042; *People v. Marineau*, 55 Cal.App.2d 893, 905, 132 P.2d 22.

It is argued that because the defendant was represented by the public defender the rule requiring timely objection in the trial court to the introduction of evidence should not be applied. The majority opinion does not meet this issue squarely, but states: "Assuming this to be so, none of the matters urged by present counsel appear to have prejudiced defendant."

The assumption may not be indulged. The public defender is subject to the same rules as any other counsel, as is also his client; hence failure of the public defender to object to the questioned evidence when it was offered should foreclose the consideration of the point on appeal. The argument here made with respect to the status of the public defender was considered in the recent case of *Ex parte Hough*, 24 Cal.2d

522, 528, 529, 150 P.2d 448, 451, and this court there said:

" * * * When the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right 'to have Assistance of Counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime. * * * With such plenary powers given a public defender when appointed to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant. In no sense can it be held that the prosecuting officers of the county are in any respect charged with the consequences of such an act. The contention therefore that the petitioner is not bound by his pleas of guilty, on the ground that in so pleading he was misled by the advice of the public defender acting as his attorney, is not well taken."

The record fails to show any error in the trial of the case.

SPENCE, J., concurred.

28 Cal.2d 727

PEOPLE v. LEARY et al.
Cr. 4652.

Supreme Court of California, In Bank
Aug. 16, 1946.

1. Homicide ⇨253(1)

Evidence sustained conviction for first-degree murder.

2. Robbery ⇨24(1)

Evidence sustained conviction for attempted robbery.

3. Homicide ⇨234(1)**Robbery** ⇨24(3)

In prosecution for murder and attempted robbery, that identification of defendant by two witnesses was uncertain and that another witness could recognize defendant, but not the man who was with defendant at the time the crimes were committed, went merely to the credibility of the witnesses and the weight of the evidence not to its sufficiency to sustain conviction.

4. Homicide ⇨268**Robbery** ⇨26

In prosecution for murder and attempted robbery, defendant's denial at trial of his confession to police officers created a conflict between his testimony and that of the officers which was for jury.

5. Criminal law ⇨1186(4)

In prosecution for homicide and attempted robbery, defendant suffered no prejudice by admission in evidence of an accusatory statement in view of his admissions and overwhelming evidence of guilt. Const. art. 6, § 4½.

6. Criminal law ⇨406(1), 793

Accusatory statements, when they are admissible, may be received against a defendant whether he be tried alone or jointly, provided that in the latter case they are properly limited to the defendant concerned.

7. Criminal law ⇨1144(15)

Where accusatory statement was admissible only as to one defendant in joint prosecution against two defendants, it was assumed on appeal that trial court's admonition to jury to consider the statement only as to the defendant against whom it was admissible was followed.

8. Criminal law ⇨1166½(1)

Where charges against two defendants of murder, attempted robbery, and robbery, were consolidated for trial with charges under another information against three defendants, including the first two, for other robberies, and a severance was had as to the additional defendant under the second information, the bringing of the additional defendant into courtroom while witnesses for prosecution were testifying, for purpose of being identified as one of the robbers, was not prejudicial to defendants being tried under the first information.

9. Criminal law ⇨608

In prosecution for murder where defendant did not in his defense claim to have acted in self-defense, motion for continuance on defendant's claim that he had every reason to believe that he might recover the murder gun and develop a case of self-defense was properly denied on ground that sufficient proof of its necessity was not made. Pen.Code, § 1050.

10. Robbery ⇨24(3)

Evidence identifying participants in robbery, but failing to identify defendants was insufficient to sustain defendant's conviction for robbery notwithstanding his possession of some of the stolen goods.

11. Robbery ⇨24(3)

Mere possession of stolen property is not sufficient to connect an accused with the theft of it, and some evidence of other inculpatory circumstances must be produced to justify a conviction of the theft.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Dan Leary and William Crain were charged with offenses and second-named defendant was convicted of murder, attempted robbery, and robbery with two prior convictions, and he appeals.

Judgment of conviction on one robbery count reversed; judgments of conviction on other counts affirmed.

Paul E. Tapley and E. W. Miller, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Appellant Crain and his codefendant Dan Leary were charged by information 100192 with the following crimes: First count, the murder in November, 1944, in Los Angeles of Frank Ocello; second count, attempted robbery of the same victim; third, fourth, and fifth counts, the respective robberies in Los Angeles on December 9, 1944, of Nathan Rack, Joseph B. Mathews, and Ellen Landers. Each defendant was also charged with two prior convictions.

Crain pleaded not guilty and not guilty by reason of insanity, and denied the prior convictions. Leary entered like pleas. The two defendants, represented by separate counsel, were tried jointly. The jury found Crain guilty of murder as charged in the first count of the information and made no recommendation as to penalty. He was found guilty as charged on the other four counts. During the course of the trial he admitted the first but denied the second prior conviction. The jury found the latter prior conviction to be true. On the insanity plea a verdict was returned to the effect that he was sane at the time of the commission of the several offenses. The record does not show what verdicts were rendered as to defendant Leary. An appeal by him is being separately prosecuted. 172 P.2d 41.

Another information, 100187, was filed against Crain, Leary, and one Hardeson, charging four robberies committed in Los Angeles on December 15th. These charges were consolidated for trial with those in information 100192, except that a severance was had as to Hardeson. No appeal was taken from the judgments of conviction entered under information 100187, and the evidence in the present transcript relating to those crimes will not be considered.

Both Crain and Leary made motions for new trial, which were denied. Crain was sentenced under count one to pay the extreme penalty, and under the other four counts to serve the term prescribed by law, the latter sentences to run consecutively to each other and concurrently with the sentence under the first count.

On his appeal Crain urges the insufficiency of the evidence to support the verdicts

against him. However, he qualifies his contention by the statement that "appellant is * * * not taking the position on this appeal that the evidence demands a reversal of counts IV and V. But the appellant urges that it is insufficient to sustain the verdicts and judgment of conviction as to Count I, the murder, Count II, the attempted robbery of Frank Ocello, and Count III, the robbery of the place of Nathan Rack on December 9th."

Crain, Leary, and Hardeson were acquaintances of many years standing. In 1931 they were in trouble together; Crain was sent to San Quentin, Leary to reform school, and Hardeson was released on probation. Shortly before the occurrences here involved, Crain, who was out on parole, visited Leary and persuaded him to again embark on a career of crime. Leary is taller than Crain and is afflicted with a continual trembling of parts of the body which markedly increases in times of excitement and is due to the chronic disease of chorea, causing muscular tremors and twitchings. The manner in which the men dressed, the difference in their height, and Leary's affliction were aids to identification, so that in addition to testimony of positive identification, a number of witnesses made partial identifications or testified to bodily resemblances.

The evidence bearing upon the crimes of murder and attempted robbery charged in counts one and two shows in substance the following: On November 15, 1944, an automobile belonging to Leary was parked in an alley which intersects 47th Street near Western Avenue, Los Angeles. Leary was in the driver's seat and Mrs. Leary occupied the back seat. After some conversation at the parked car Crain and Leary went to a liquor store at the corner of 47th Street and Western Avenue. Crain, armed with a .32 caliber revolver, forced the owner of the store, Frank Ocello, into the rear storeroom where Mr. Linden, an agent of the Department of Internal Revenue, was working. Crain fired one shot at the agent and missed. Crain then turned Ocello back into the main store. The agent heard voices in the store, the crashing of bottles and two shots. He ran from the back entrance of the store and encountered Crain,

who with Leary was running along 47th Street toward the alley. Crain again fired at the agent and missed. Ocello was in pursuit of Crain and Leary, but turned back crying out that he had been shot. Crain, Leary and Leary's wife escaped in the automobile. Ocello was taken to the hospital, where a .32 caliber bullet was removed from his back and other surgical operations were performed. He died two weeks later from peritonitis resulting from the gunshot wound.

Identification testimony was given and the occurrence was described in part by agent Linden, by Mrs. McDermott, who was washing the window of her upper flat over the alley when the automobile parked almost beneath it, by a Mrs. Bryan who was visiting in the lower flat, by Mr. White, the owner of a paint shop on the southwest corner of the intersection, and by Mrs. Ocello, who conducted a pet shop next door to the paint shop.

On the evening of December 9th the three robberies were committed which are the subject of counts three to five of information 100192. Crain claims to have been so intoxicated at the time as to have no clear recollection of these events. On December 14th Crain's home was searched and a suit of clothes was found which was identified by Nathan Rack as having been taken from his store by Hardeson in the robbery of December 9th.

On the evening of December 14th Crain and Leary escaped from the rear of Leary's home while officers were being admitted at the front door. They climbed into the parked car of a Mr. Gillespie and, by threatening him with guns, forced him to drive them some distance away. On the following day, December 15th, the four robberies were committed for which convictions were had under information 100187, and which netted the perpetrators considerable cash. Crain remembers committing robberies on that day but claims to have been drinking a great deal.

On the evening of the 15th Crain, Leary and Hardeson made a down payment on a LaSalle car bearing license number 08 Z 332. On the 16th a highway patrol officer received a radio message to watch for a LaSalle bearing that number. The

car was sighted, the highway blockaded, and several officers shot at the car as it sought to evade the blockade by making a full turn in the road. Leary, slightly wounded, came from behind the driver's seat, and Crain and Hardeson from the other side of the car. Over the embankment on that side the officers found two loaded .38 caliber revolvers.

On the way to the sheriff's office at Newhall, in response to a question by Officer Barrett, "Well, what do you suppose will happen to you now," Crain replied, "Well, they are going to try and pin a murder rap on me; I can smell the gas chamber now." At Newhall Officer Hurst told Crain that Mrs. Leary had been taken into custody on December 14th and on December 15th had made a statement which was reduced to writing, saying among other things that when Crain and Leary returned to the automobile from the liquor store, Crain told her that he had shot Ocello. The officer remarked that he did not think that Mrs. Leary was guilty of anything. Crain agreed saying "he and Danny [Leary] pulled that caper, and she had no knowledge of it"; that "Leary will hate me for telling you this." Crain also spoke of the fact that several young men were under investigation by the police, and remarked that if those boys were taken to court on the murder, he was going to give himself up, because "nobody was going to ride his beef." He also said that he shot Mr. Ocello with a .32 revolver which he later threw into the ocean.

The same evening, December 16th, Officer Hurst told Captain Brown, Crain being present, that Crain had confessed the murder to him, and Crain admitted that this was so. After Leary was brought in, Crain asked Captain Brown what kind of a deal he could give them, saying that all they wanted was to beat the gas chamber. He also said Mrs. Leary did not know of their intention to rob the liquor store but that "When we came running out * * * I told her I shot the old guy." Leary, when asked if that was right, nodded his head in the affirmative.

On the trial Crain took the witness stand in behalf of the defense. He admitted a recollection of some discussion

about trying to "tap me up on this murder rap," but denied having had any discussion with the officers about a "deal" or about the gas chamber. He testified that at the time of the murder he was still at home recuperating from a truck accident which had occurred the previous February. He recalled being very drunk on December 9th and also committing the robberies on December 15th in a drunken state. He also admitted evading the officers on the evening of December 14th, but in attempted justification said he did not want to be caught carrying two guns, since he was then still on parole. He denied having committed the murder or ever having confessed or admitted to an officer or to anyone else that he did commit it.

[1-4] It requires but the recital of these facts to show that the record contains sufficient evidence to support the verdicts against Crain on counts one and two of first degree murder and attempted robbery of Oerllo. Crain's denial of his confession and of the conversations related by the officers created no more than a conflict between his testimony and theirs, which was a matter for the jury to resolve. The attack made upon the evidence of identification, the claim that the identification made by Linden and White was uncertain, and that it was peculiar that Mrs. Bryan could recognize Crain but not the man with him, are matters which go merely to the credibility of these witnesses and the weight of the evidence. They frankly said that because of the excitement and the fear engendered by the shooting they could not be explicit as to every detail of the occurrence, but their identification of Crain was positive and unqualified, and their statements were clear and consistent.

Crain contends that the trial court erred in admitting in evidence, over the objection of counsel for each defendant, a statement which was in the form of a police reporter's transcript consisting of questions asked Mrs. Leary by Officers Hurst and Brown about 5 p. m. on December 18th, in the presence of Crain, Leary, and some four other officers and her answers thereto. In that statement Mrs. Leary reaffirmed her previous statement of December 15th,

which she had read and initialed as correct earlier in the afternoon, and she also answered further questions. At the conclusion of the questioning, the following took place: "Q. (By officer) Bill, you have heard Mrs. Leary's statement, is there anything you want to add to it or anything you want to say? William Crain: I have nothing to say. Q. How about you, Dan? Daniel Leary: All I can say is I don't like it very much. Q. Do you deny it? (To that question there was no answer.) Q. Do you Bill? William Crain: Well I'm kind of in the middle here, Captain. Q. Whatever you want to do. William Crain: I am going to deny it. Q. All right."

[5] The subject of the admissibility in evidence of an accusatory statement to which a defendant under arrest has made an equivocal reply is reviewed in *People v. Simmons*, Cal.Sup., 172 P.2d 18. Assuming that under application of the rule there declared in the similar situation here shown it may have been error to admit the accusatory statement, it is clear that the defendant suffered no prejudice in view of his admissions and the overwhelming evidence of his guilt. No error justifying a reversal of the judgment on the counts to which the statement pertains has been shown (Const. art. VI, § 4½).

[6,7] Exception is taken to the admission in evidence of the written statement of December 15th, initialed by Mrs. Leary. When counsel for Crain objected to the offer of this statement in evidence, the court admonished the jury as follows: "Well, so far as the defendant Crain is concerned, of course, that is not evidence against him and cannot be considered against him. It is admissible only as to the defendant Leary, and as to him it is marked 22 in evidence." The reason for the admonition was that Crain was not present when the statement was shown by Officer Hurst to Leary in a conversation with the latter alone. Crain claims that the admonition could not have cured the prejudice which resulted to his rights as well as those of Leary. It must be assumed, however, that the jury followed the admonition. Accusatory statements, when they are admissible, may be received against a defend-

ant whether he be tried alone or jointly, provided that in the latter case they are properly limited to the defendant concerned. *People v. Yeager*, 194 Cal. 432, 486, 229 P. 40.

[8] Crain claims to have been prejudiced by the fact that Hardeson was brought into court on several occasions although he was not then on trial. Under information 100187 Crain, Leary and Hardeson were jointly charged with the four robberies committed on December 15th, and a severance of trial was ordered as to Hardeson. While some of the witnesses for the prosecution were testifying, Hardeson was brought into the courtroom for the purpose of being identified as one of the robbers. This was no more prejudicial to Crain than if Hardeson had remained at all times in the courtroom. As he was a participant in some of the crimes, he was properly brought in for identification. No objection to this procedure appears to have been made at the trial.

Criticism is made of the failure of the prosecution to call Mrs. Leary as a witness, thus giving Crain an opportunity to cross-examine her. However, when Mrs. Leary was called to testify for the defense, she was dismissed after a few preliminary questions and answers on grounds of possible self-incrimination.

[9] At the conclusion of the case for the prosecution, Crain's counsel asked for a short continuance, stating that he had every reason to believe that he might recover the murder gun and develop a case of self-defense. The trial court properly denied a continuance on the ground that sufficient proof of its necessity was not made (*Pen.Code*, § 1050; *People v. Franklin*, 41 Cal.App.2d 669, 107 P.2d 500), and Crain's counsel then said. "Well, I think we are ready to proceed, Your Honor." Nowhere in his defense did Crain claim to have acted in self-defense. His sole defense at the trial was an outright denial of the commission of the murder, and an assertion that he was at home recuperating from an accident when it occurred.

It is contended that the evidence is insufficient to establish attempted robbery as charged in count two and that the conviction

is based on the erroneous assumption that when a victim is backed into a rear room of his store at the point of a gun the purpose must be to rob him. But the evidence as a whole without serious question establishes facts from which it may be inferred that the purpose of entering the liquor store was to commit the crime of robbery.

[10] It is contended that the evidence is insufficient to support a conviction under count three of information 100192 charging the robbery of Nathan Rack of \$82 and three suits of clothes. Mr. Rack positively identified two men who entered his tailor shop on December 9th and robbed him. Crain was not one of them. He saw no third person who participated in the crime. Crain denied that he had taken part in it. The strongest evidence tending to connect him with it was the fact that one of the three stolen suits was found by the police in his home.

[11] It is established that the mere possession of stolen property is not sufficient to connect an accused with the theft of it. *People v. Childs*, 127 Cal. 363, 59 P. 768; *People v. Luchetti*, 119 Cal. 501, 51 P. 707; *People v. Crotty*, 70 Cal.App. 515, 233 P. 395; *People v. Russell*, 120 Cal.App. 622, 8 P.2d 209. Some evidence of other inculpatory circumstances must be produced to justify a conviction of the theft of the property. *People v. Vidal*, 121 Cal. 221, 53 P. 558; *People v. Bonner*, 5 Cal. App.2d 623, 43 P.2d 343; *People v. Swanson*, 120 Cal.App. 173, 7 P.2d 380; *People v. Cataline*, 54 Cal.App. 36, 200 P. 1060; *People v. Gibson*, 16 Cal.App. 347, 116 P. 987. In each of the last cited cases the facts showed some corroborative circumstance in addition to the possession of the stolen property. Here there was none when the entire record is considered which may be deemed sufficient to constitute such corroboration on count three. In view of the positive identification of the participants in that robbery and of the failure to prove that Crain was one of them his conviction based on that count must be reversed. As to counts one, two, four and five the evidence is sufficient to support the verdicts and no good reason has been

shown for disturbing the judgments thereon.

The judgment on count three of information 100192 is reversed. The judgment on counts one, two, four and five are affirmed. The order denying a motion for a new trial is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

SHENK, Justice (concurring).

I concur in the judgment of affirmance but do not agree in the assumption that certain accusatory statements were erroneously admitted in evidence. These statements were properly received.

The trial court admitted in evidence over the objection of counsel for each defendant, as the majority opinion states, a statement of Mrs. Leary consisting of questions asked her by Officers Hurst and Brown about 5 p. m. on December 18th, in the presence of Crain, Leary, and some four other officers. In that statement Mrs. Leary reaffirmed her previous statement of December 15th, which she had read and initialed as correct earlier in the afternoon, and she also answered further questions. At the conclusion of the questioning, the following took place: "Q. (By officer). Bill, you have heard Mrs. Leary's statement, is there anything you want to add to it or anything you want to say?"

"William Crain: I have nothing to say.

"Q. How about you, Dan?

"Daniel Leary: All I can say is I don't like it very much.

"Q. Do you deny it? (To that question there was no answer.)

"Q. Do you Bill?

"William Crain: Well, I'm kind of in the middle here, Captain.

"Q. Whatever you want to do.

"William Crain: I am going to deny it.

"Q. All right."

It is the general rule in California, as elsewhere, as pointed out in my concurring opinion in *People v. Simmons*, Cal.Sup., 172 P.2d 18, that when a statement tending to incriminate one accused of crime is

made in his presence and hearing, and is not denied, contradicted, or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as indicative of a consciousness of guilt, or as evidence of his acquiescence in its truth. See *People v. Simmons*, supra, concurring opinion, and cases there cited.

Here Crain objected to the admission of the reported account of the questioning of Mrs. Leary on December 18th on the ground that it was not a statement, that it was not the best evidence, that it was admitted under an improper instruction to the jury, and that there was a denial by Crain.

Although Mrs. Leary's testimony was in question and answer form, it was a statement containing clear and unmistakable accusations against Crain and Leary. As one example of the accusations, Mrs. Leary told the officers that "Crain said that he had shot the man and let's get going, so we took off and went home." The reaction of Crain to these accusations shows that he fully understood their import; that is, the conditions under which the trial judge was justified in admitting the statement in the first instance were fully met, for the circumstances show that Crain understood the statement and accusations, that they called for a reply, that he was free to make any response he might choose, and that his response was such that the jury might reasonably draw from it an inference of acquiescence or guilty consciousness.

The suggestion that the accusatory statement was not the best evidence because Mrs. Leary attended the trial and her testimony could have been produced, overlooks the fact that the statement was not admitted as evidence of the matters therein referred to, but solely for the purpose of showing the conduct of the accused in response to it. Had Crain promptly denied the accusations, there would have been no reaction to show or admission to introduce, and the statement could not have been received in evidence. But Crain's remarks did not constitute a full and prompt denial. He first said, as hereinbefore quoted, "I have nothing to say," then, "Well, I'm kind of in the middle here, Captain," and lastly, "I am going to deny it."

The reply, "I have nothing to say," was not a denial of the accusations. *People v. Edwards*, 72 Cal.App. 102, 123, 236 P. 944; *People v. Egan*, 77 Cal.App. 279, 282, 283, 246 P. 337; *People v. Egan*, 133 Cal.App. 152, 156, 158, 23 P.2d 1042.

Crain's second reply, "Well, I'm kind of in the middle here, Captain," was certainly not a denial. It was stronger against him than if he had stood mute, or again said he had no reply to make. Crain's third statement, "I am going to deny it," was not a prompt and full denial. An analogous case is *People v. Marineau*, 55 Cal.App.2d 893, 905, 132 P.2d 22, where the defendant, "when asked if he had anything to add to the [accusatory] statement, replied by a negative sign, thus failing to deny the statement with which he was confronted, though given an opportunity to do so." The statement was held to be properly admitted in evidence under instructions to the jury correctly limiting its purpose.

The cases relied upon by Crain are in harmony with the above pronouncements. In *People v. Teshara*, 134 Cal. 542, 544, 66 P. 798, the defendant "expressly denied" the accusatory statement; similarly in *People v. Lapara*, 181 Cal. 66, 71, 183 P. 545, 547, when confronted with the accusation, "Why did you kill this man * * *?", the defendant replied, "I did not kill him." In each of these cases the prompt and full denial rendered the accusatory statement inadmissible. The other case cited by Crain, *People v. Shellenberger*, 25 Cal.App.2d 402, 77 P.2d 506, 509, is authority only to the effect that where an accusatory statement is addressed to two defendants and only one of them makes a reply, "it does not present a situation under which an occasion exists which would naturally call for a reply from the other defendant."

In the present case the court instructed the jury that "when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, or makes an equivocal reply which is not a direct denial of the charge or accusation, the circumstances, of such silence on his part, or

his conduct or his failure to make a direct denial may be taken against him as evidence indicating an admission of guilt, depending on the construction you place on his conduct or reply. In such cases the accusatory statement itself is not evidence but the conduct of the accused in respect to such accusation may be considered by you together with the accusatory statement itself for the purpose of determining his reaction thereto. If you find that accusatory statements were made to a defendant and you should find beyond a reasonable doubt that his conduct and reaction thereto were not those of an innocent person charged with crime under like circumstances, then you may consider both the accusation and defendant's reply, otherwise you will totally disregard the entire incident and not consider it for any purpose."

It is asserted that the giving of this instruction was erroneous because the accusatory statements were not put to the defendants in a sufficiently direct manner to call for an affirmation or denial and it is argued that therefore the only effect of the instruction was to confuse the jury. The case of *People v. Shellenberger*, supra, 25 Cal.App.2d 402, 77 P.2d 506, is cited in support of this claim. In that case it is said, 25 Cal.App.2d at page 407, 77 P.2d at page 509, that a similar instruction should not have been given "because nowhere in the transcript do we find evidence of any occasion when appellant remained silent in the face of an accusation which would naturally call for a reply." In the present case an entirely different situation is presented. Crain, when confronted with the accusations, made three equivocal replies, none of which was a prompt and full denial. Hence the rule of the *Shellenberger* case is inapplicable, and the instruction was properly given.

At the request of Leary, an instruction was given to the jury which reads in part as follows: "Evidence concerning any statement made by one defendant as to any alleged offense or offenses, if said statement was made subsequent to the commission of the alleged offense, is not to be considered by you as evidence against the second defendant unless such statement

was made in the presence of the second defendant; it is not to be considered by you as evidence of the alleged facts as stated therein, but is admissible solely to show what reaction, if any, the second defendant made to such statement in his presence. The question is whether his said reaction showed or tended to show an admission or confession or a consciousness of guilt. * * *

Whether this instruction, given at defendant Leary's request, could be complained of by him is not involved in this appeal. But Crain asserts that Leary's reaction to the accusations was "so incomplete, vague and uncertain as to give the jury nothing definite to weigh without a further elucidation * * *," and inasmuch as he, Crain, finally indicated a denial of guilt, the instruction unquestionably "established a prejudicial state of mind with the jury" and was prejudicial to his rights. Leary's reply to the accusations has already been given. No prejudice, as claimed, is shown.

No error on the part of the trial court has been shown.

SPENCE, J., concurred.



28 Cal.2d 740

PEOPLE v. LEARY.

Cr. 4683.

Supreme Court of California, in Bank.

Aug. 16, 1946.

Rehearing Denied Sept. 12, 1946.

1. Criminal law Ⓒ563

Proof of the corpus delicti does not require proof that the crime was committed by the defendant, or that the identity of the perpetrators of the crime be proved.

2. Homicide Ⓒ250

Robbery Ⓒ24(1)

In prosecution for murder and attempted robbery, evidence identifying defendant

172 P.2d—3½

as the one who committed the crimes, and defendant's admissions to police supported conviction.

3. Robbery Ⓒ24(3)

Positive identification of the defendant by the victim sustained conviction for robbery.

4. Robbery Ⓒ24(3)

In prosecution for two robberies, admissions to police coupled with evidence that defendant acted as driver of automobile used during commission of robberies supported conviction, notwithstanding lack of direct evidence of defendant's connection with the crimes.

5. Criminal law Ⓒ1186(4)

Even though accusatory statements may have been erroneously admitted, defendant in murder and robbery prosecution suffered no prejudice, in view of his admissions to police and other detailed evidence in proof of the crimes overwhelmingly establishing guilt. Const. art. 6, § 4½.

6. Criminal law Ⓒ622(1), 700

Where two defendants were charged in one information with murder, attempted robbery of the same victim, and with robbery on specified date, and with two prior convictions, and in another information with four robberies committed on another date, and proof of the crimes overwhelmingly established guilt, the district attorney could not be charged with prejudicial misconduct in requesting court to consolidate the murder charge with the other charges, nor was there any abuse of discretion on the part of the court in not ordering separate trials of the two defendants. Pen. Code, § 1098.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Dan Leary was convicted of first-degree murder, attempted robbery, and robberies, with prior convictions, and he appeals.

Judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant Dan Leary and his codefendant William Crain were charged by information 100192 with the following crimes: First count, the murder in November, 1944, in Los Angeles of Frank Ocello; second count, attempted robbery of the same victim; third, fourth and fifth counts, the respective robberies in Los Angeles on December 9, 1944, of Nathan Rack, Joseph B. Mathews and Ellen Landers. Each defendant was also charged with two prior convictions.

Leary pleaded not guilty, not guilty by reason of insanity, and denied the prior convictions. The two defendants represented by separate counsel, were tried jointly. During the course of the trial Leary admitted the two prior convictions. The jury found him guilty of first degree murder as charged in the first count of the information, fixed the punishment at imprisonment for life, and found him guilty as charged in the other four counts. Thereafter, Leary withdrew his plea of not guilty by reason of insanity, and was sentenced to the state prison for the terms prescribed by law, the sentences on the last four counts to be consecutive as to each other and concurrent with the sentence under count one. Judgments of convictions were entered against him and his codefendant Crain, from which appeals have been separately prosecuted. See *People v. Leary*, Cal.Sup., 172 P.2d 34. Each defendant made a motion for a new trial. The motions were denied.

Another information, 100187, was filed against Leary, Crain, and one Hardeson, charging four robberies committed in Los Angeles on December 15th. These charges were consolidated for trial with those in information 100192, except that a severance was had as to Hardeson. No appeal was taken from the judgments entered pursuant to information 100187.

Leary, in propria persona, filed an opening brief. Later he asked this court to ap-

point an attorney designated by him to represent him in the further prosecution of his appeal and the request was granted.

The points urged in the original opening brief touch upon the sufficiency of the evidence to support the judgment. An examination of the record reveals a course of criminal activities on the part of Leary, Crain and Hardeson. The facts concerning the murder and attempted robbery charged in counts one and two as well as those concerning the robberies charged in counts three to five are clearly established.

On November 15, 1944, an automobile belonging to Leary was parked in an alley which intersects 47th Street near Western Avenue, Los Angeles. Leary was in the driver's seat and Mrs. Leary occupied the back seat. After some conversation at the parked car Crain and Leary went to a liquor store at the corner of 47th Street and Western Avenue. Crain, armed with a .32 caliber revolver, forced the owner of the store, Frank Ocello, into the rear store-room where Mr. Linden, an agent of the Department of Internal Revenue, was working. Crain fired one shot at the agent and missed. Crain then turned Ocello back into the main store. The agent heard voices in the store, the crashing of bottles and two shots. He ran from the back entrance of the store and encountered Crain, who with Leary was running along 47th Street toward the alley. Crain again fired at the agent and missed. Ocello was in pursuit of Crain and Leary, but turned back crying out that he had been shot. Crain, Leary and Leary's wife escaped in the automobile. Ocello was taken to the hospital, where a .32 caliber bullet was removed from his back and other surgical operations were performed. He died two weeks later from peritonitis resulting from the gunshot wound.

Identification testimony was given and the occurrence was described in part by agent Linden, by a Mrs. McDermott, who was washing the window of her upper flat over the alley when the automobile parked almost beneath it, by a Mrs. Bryan who was visiting in the lower flat, by Mr. White, the owner of a paint shop on the

southwest corner of the intersection, and by Mrs. Ocello, who conducted a pet shop next door to the paint shop.

On the evening of December 9th the three robberies were committed which are the subject of counts three to five of information 100192. About 8 o'clock a man walked into the tailor shop of Nathan Rack, with gun in hand, and said "All your money or you will be killed." Mr. Rack identified Leary as this man. With Leary was another man whom Mr. Rack identified in the courtroom as Hardeson. Leary told Mr. Rack to face the wall, and extracted his pocket book containing \$87. Mr. Rack was then told to lie on the floor, which he did, and as the men walked out, he saw Hardeson take three suits of clothes. On December 14th Crain's home was searched by the police and one of the suits was found there.

About 8:15 of the same evening a man with a gun came up to Ellen Landers, the cashier in a theater ticket office, and demanded all the bills she had, whereupon she gave him \$19. She identified Crain as this man. She did not see Leary.

About 9:05 of the same evening a man walked in the cafe of Joseph B. Mathews, pulled a handkerchief off of a gun which he was holding, and said, "Give me your money, I am not fooling; this is a stick-up." Mr. Mathews gave him \$39 from the cash register, and he left. He was identified as Crain by Mr. Mathews and by a Mrs. Yates, who was sitting at the bar. When he left, Mrs. Yates walked out and saw a car parked across the street. Seated at the wheel was a dark haired man with glasses, but she did not see his face. Crain entered this car and it drove off.

On the evening of December 14th Crain and Leary escaped from the rear of Leary's home while officers were being admitted at the front door. They climbed into the parked car of Mr. Gillespie and, by threatening him with guns, forced him to drive them some distance away. On the following day, December 15th, the four robberies were committed for which convictions were had under information 100187, and which netted the perpetrators considerable cash.

On the evening of December 15th Crain, Leary and Hardeson made a down payment on a LaSalle car bearing license number 08Z332. On the 16th a highway patrol officer received a radio message to watch for a LaSalle bearing that number. The car was sighted, the highway blockaded, and several officers shot at the car as it sought to evade the blockade by making a full turn in the road. Leary, slightly wounded, came from the driver's seat, and Crain and Hardeson from the other side of the car. Over the embankment on the latter side the officers found two loaded .38 caliber revolvers. About \$570 was taken from Leary in loose bills which he was carrying inside his shirt and waist, and currency was also taken from the persons of the other two men.

Shortly before midnight of December 16th a conversation was had in which three of the officers, Crain and Leary participated. One of the officers testified that the following occurred in the course of this conversation: "I [the officer, who knew that on the previous day Mrs. Leary had been taken into custody and had made a full statement to the police], said, 'There is only one thing I would like to know, did Mrs. Leary know, when you men went to the Ocello liquor store, you were going there to commit a holdup?' Crain said, 'No.' Leary shook his head in the negative. I said, 'When did she first know that you were going there to pull a robbery?' Crain says, 'When we came running out and I told her I shot the old guy.' I looked at Leary and I said, 'Is that right, Dan?' He nodded his head in the affirmative."

Earlier in the evening one of the other officers had a conversation with Leary, had told him Mrs. Leary was in custody, and had given him the substance of the matters contained in her statement. He testified that he then "stated to Leary that I did not think his wife was guilty of anything. Leary then says to me, 'What do you want me to do about it?' And I says, 'I don't want you to do anything about it.' He looked at me and he said, 'I am going to take it the hard way.'"

On December 18th Mrs. Leary was questioned in the presence of Crain, Leary and

the officers, and the conversation was transcribed by a reporter. She asserted the correctness of her previous statement, and again said that after Leary parked his car in the alley, Crain and Leary left, saying that they were going to "take" the liquor store; that she then heard shots; and that Crain and Leary came running back to the car and Crain said "that he had shot the man. * * *" Mrs. Leary gave a full account of all details to which she could bear witness. At the close of this questioning the police, according to the officers' testimony, asked the following questions of Crain and Leary and received the following replies:

"Q. Bill [Crain], you have heard Mrs. Leary's statement, is there anything you want to add to it or anything you want to say? William Crain: I have nothing to say.

"Q. How about you, Dan? Daniel Leary: All I can say is I don't like it very much. Q. Do you deny it?"

To that question there was no answer.

(Reading): "Q. Do you, Bill?

"William Crain: Well, I'm kind of in the middle here, Captain.

"Q. Whatever you want to do.

"William Crain: I am going to deny it."

On December 19th Leary was again questioned by police officers and, according to the testimony of one of them, was asked, "Just what happened out at the liquor store? Was there a fight or did the old man take a swing at Crain, or what happened that he shot him?" and Leary replied, "I don't know just what happened. I saw him scuffling and saw him fall down and I turned and ran out." Leary was also questioned concerning the robberies of December 9th. With respect to the Rack robbery he said that "he had just stepped inside the door and Crain had gone back to the counter where the man was," and that they had taken some suits. He also said they had "pulled" the hold-up of the theater cashier the same night, that he was driving his own car, and that they also "pulled" the Mathews job.

On December 20th Leary, Crain and Hardeson were questioned concerning the

robberies of December 15th, charged in information 100187, and from their replies it appeared that Leary drove the car at that time while his companions committed the several crimes.

After his arraignment at preliminary examination Leary asked an officer if he could read the statement made by Mrs. Leary. The officer brought it to Leary at the county jail on December 23d. After Leary had read it the officer asked him if he had anything to say regarding it, and his only reply, according to the officer's testimony, was to ask "why they separated he and Crain when they put them in the county jail."

On the trial Leary took the witness stand in his own defense and denied certain remarks attributed to him by the officers.

[1] In the opening brief prepared by the defendant he argues, under headings one and two, that the corpus delicti as to the murder was not proved as to him, and that the evidence failed to establish the corpus delicti connecting him with any of the other offenses charged in the information. He concedes that the evidence establishes that Mr. Ocello was murdered and that several robberies were committed, but he overlooks the fact that proof of the corpus delicti does not require proof that the crime was committed by the defendant, or that the identity of the perpetrators of the crime be proved. *People v. Selby*, 198 Cal. 426, 245 P. 426; *People v. Bollinger*, 196 Cal. 191, 200, 237 P. 25; *People v. Vertrees*, 169 Cal. 404, 408, 409, 146 P. 890; *People v. Ward*, 134 Cal. 301, 306, 66 P. 372; *People v. Fierro*, 58 Cal.App.2d 215, 220, 136 P.2d 94; *People v. Shapiro*, 40 Cal.App.2d 321, 323, 104 P.2d 688; *People v. Wilt*, 40 Cal.App.2d 124, 127, 104 P.2d 387; *People v. Carter*, 10 Cal.App.2d 387, 388, 52 P.2d 294; *People v. Meyers*, 7 Cal. App.2d 351, 46 P.2d 282; *People v. Cowling*, 6 Cal.App.2d 466, 471, 44 P.2d 441; *People v. Durborow*, 130 Cal.App. 615, 618, 20 P.2d 708; *People v. Sameniego*, 118 Cal. App. 165, 169, 4 P.2d 809, 5 P.2d 653; *People v. Strider*, 96 Cal.App. 632, 635, 274 P. 601; *People v. Coker*, 78 Cal.App. 151, 160, 248 P. 542; *People v. Rodway*, 77 Cal.App. 738, 740, 247 P. 532; 8 Cal.Jur. § 247, p.

166. Defendant's real contention seems to be that of the insufficiency of the evidence of his identification with respect to the several crimes charged against him.

[2,3] From the evidence it appears that Leary is taller than Crain and is afflicted with continual trembling and twitching of parts of the body, which is due to the chronic disease of chorea. These muscular tremors and twitchings markedly increase in times of excitement. The manner in which the two men dressed, the difference in their height, and Leary's affliction were aids to identification. With respect to the Ocello murder, one witness was able to testify to the nervousness of the driver of the car, his hands shaking at the wheel. Others testified to the comparative sizes of the two men, to the fact that the shorter man did the shooting, and to the manner in which they were clothed. This evidence of identification, coupled with Leary's admissions to the police, was amply sufficient to support the verdict against him on the first and second counts of the information. With reference to the third count, Leary was positively identified by the victim, Rack.

[4,5] With reference to the fourth and fifth counts, the Mathews and Landers robberies, although there was no direct evidence of Leary's connection with these crimes, his admissions to the police coupled with the evidence that he acted as driver of the automobile for the entire series of crimes, sufficiently supports the verdicts against him.

It is argued both in defendant's opening brief, and by counsel in his reply brief, that the trial court committed prejudicial error by permitting the introduction in evidence of the two statements of Mrs. Leary. When told by the police of the first, or written statement, Leary replied, as above set forth, "I am going to take it the hard way," and he later nodded his head in the affirmative, in corroboration of Crain's statement that Mrs. Leary first knew they were going to rob the liquor store after they came out and Crain told her "he shot the old guy." Later, when confronted with Mrs. Leary herself, Leary first replied, "All

I can say is I don't like it very much," and then stood mute before the further query "Do you deny it?" The subject of the admissibility in evidence of an accusatory statement to which a defendant under arrest has made an equivocal reply is reviewed in *People v. Simmons*, Cal.Sup., 172 P.2d 18. Assuming, that under application of the rule there declared in the similar situation here shown it may have been error to admit the accusatory statements, it is clear that the defendant suffered no prejudice in view of his admissions and the other detailed evidence in proof of the crimes, overwhelmingly establishing guilt. No error justifying a reversal of the judgment is shown. Const. art. VI, § 4½.

[6] From the record the district attorney may not justly be charged with prejudicial misconduct in requesting the court to consolidate the murder trial with that on the other charges, nor was there any abuse of discretion on the part of the court in not ordering separate trials of the two defendants. Pen.Code, § 1098.

The proof of guilt of the defendant in this orgy of crimes is overwhelming and he suffered no prejudice by anything that occurred at the trial.

The judgment and the order denying a new trial are affirmed.

SHENK, Justice (concurring).

I concur in the affirmance of the judgment but challenge the assumption that certain accusatory statements were erroneously admitted in evidence.

For the reasons set forth in my concurring opinion in the case of *People v. Simmons*, Cal.Sup., 172 P.2d 18, the statements were clearly admissible. There is no showing that upon the occasions when Leary was confronted with the statements he was under any compulsion or that he was pressed for a continuance of his conversation with the police when he chose to terminate it. In view of his admissions and other detailed evidence in proof of the crimes, the matter contained in Mrs. Leary's statements was merely cumulative;

the statements were not used as a device to read into the record testimony of matters which could not otherwise be shown.

The fact that the accusations were made by the wife of the accused who was incompetent to testify against him without his consent (Pen.Code, § 1322), did not render the statements inadmissible (People v. McCrea, 32 Cal. 98, 100; People v. Murphy, 45 Cal. 137, 143; People v. Ah Yute, 53 Cal. 613; 8 Cal.Jur. § 196, p. 103; State v. Portee, 200 N.C. 142, 156 S.E. 783, 80 A.L.R. 1229; Richards v. State, 82 Wis. 172, 51 N.W. 652; State v. Laudise, 86 N.J.L. 230, 90 A. 1098; Joiner v. State, 119 Ga. 315, 46 S.E. 412; Nunn v. State, 143 Ga. 451, 85 S.E. 346; State v. McNamara, 116 N.J.L. 497, 184 A. 797, 185 A. 479; Thomasson v. State, 21 Ala.App. 562, 110 So. 563; Allen v. State, 20 Ala.App. 467, 103 So. 712; State v. Wooley, 215 Mo. 620, 115 S.W. 417; Rex v. Bartlett, 7 Car. and Pay. 832; Rex v. Smithers, 5 Car. and Pay. 332; 8 Wigmore on Evidence, 3d Ed., 1940, § 2232, p. 237; 22 C.J.S., Criminal Law, § 734, p. 1259; 20 Am.Jur. § 577, p. 487; 2 Wharton's Criminal Evidence, 11th Ed., 1935, § 658, pp. 1094 et seq.; 80 A.L.R. p. 1246), nor did the fact that Mrs. Leary was under arrest on suspicion of being an accomplice in the commission of the crimes make them inadmissible. People v. Shelest, 62 Cal.App. 213, 217, 216 P. 389.

Defendant complains of the instruction given on the subject of the limited purpose of the accusatory statements. The instruction, however, was correct. In the absence of exceptional circumstances, which are not here present, accusatory statements of the character here under attack are admissible against a defendant whether he be tried alone or jointly, provided that in the latter case they are properly limited to the defendant concerned. People v. Yeager, 194 Cal. 452, 486, 229 P. 40. The court stated to the jury at least three times that "the testimony of a conversation as to one defendant is admissible only as to the one who made it."

The record shows no error at the trial.

SPENCE, J., concurred.

FRENCH v. JORDAN, Secretary of State, et al.
L. A. 19775.

Supreme Court of California, in Bank.
Aug. 26, 1946.

1. Mandamus ⇐74(3)

Mandamus is appropriate proceeding to test right of registrar of voters and of Secretary of State to include in offices to be filled at general election the office of judge of the superior court and place upon that ballot as a candidate name of any qualified person nominated by petition after death of candidate who was elected at the primary. Code Civ.Proc. § 1085; Elections Code, § 3000 et seq.

2. Judges ⇐8

The language of constitutional section pertaining to term of office of judges of the superior courts and the filling of vacancies is explicit and unambiguous so that there is no necessity to resort to judicial construction to ascertain its meaning. Const. art. 6, § 8.

3. Constitutional law ⇐29

The section of Constitution declaring that a candidate for a nonpartisan office, who at a primary election receives majority of all votes cast shall be elected to such office is self-executing. Const. art. 2, § 2¾.

4. Judges ⇐8

Where a superior court judge was re-elected at the 1946 primaries for a full term commencing in 1947, his death before the November 1946 general election created a continuing vacancy lasting until a new six year term would commence in 1949 for a person elected in 1948 which vacancy the governor was required to fill by appointment until a new term commenced and which could not be filled at the November 1946 election. Election Code, § 3000 et seq.; Const. art. 2, §§ 2, 2½, 2¾; art. 6, § 8.

TRAYNOR, J., dissenting.

Original proceeding in mandamus on the petition of F. Walter French against Frank M. Jordan, as Secretary of State, etc.,

and others to compel respondents to omit from the ballot in Los Angeles County any reference to the office of Judge of the Superior Court, Los Angeles County, Office No. 10.

Writ granted.

F. Walter French, in pro. per., Frank J. Indovina and J. Leroy Irwin, all of Santa Monica, for petitioner.

Joseph W. Aidlin (real party in interest), in pro. per., of Los Angeles, and Robert W. Harrison, of San Francisco, for real party in interest.

Robert W. Kenny, Atty. Gen., Robert O. Curran, Deputy Atty. Gen., and Harold W. Kennedy, County Counsel, and Charles C. Stanley, Jr., Deputy County Counsel, both of Los Angeles, for respondents.

SHENK, Justice.

This is an application for the writ of mandate to compel the secretary of state and the Registrar of Voters of Los Angeles County, respondents herein, to omit from the ballot to be used at the general election to be held on Tuesday, November 5, 1946, any reference to the office of Judge of the Superior Court, County of Los Angeles, Office No. 10. An alternative writ was issued. The matter is submitted on the petition and general demurrers thereto showing the following facts:

On November 5, 1940, the Honorable John Beardsley was elected to succeed himself as Judge of the Superior Court in and for the County of Los Angeles. The term for which he was then elected was six years, expiring in January, 1947. He was a candidate for reelection at the primary election held on June 4, 1946 the office being designated on the ballot as Office No. 10. He was opposed at that election but received a majority of all the votes cast for that office and was therefore elected for a full term commencing in January, 1947. He passed away on June 10, 1946.

It is alleged in the petition that the respondents intend to, and unless otherwise ordered by the court will, include in the offices to be filled at the ensuing general election in November the office of Judge of the Superior Court, Los Angeles County,

Office No. 10, and will place upon that ballot as a candidate the name of any qualified person who is nominated for that office pursuant to division 5, chapter 3 (§ 3000 et seq.) of the Elections Code, together with a space provided for a so-called "write-in" candidate.

[1] The present proceeding is appropriate to the end sought. Code Civ.Proc. § 1085; Gage v. Jordan, 23 Cal.2d 794, 800, 147 P.2d 387; Donham v. Gross, 210 Cal. 190, 193, 290 P. 884.

It is the position of the petitioner that by reason of Judge Beardsley's death a vacancy occurred in the office theretofore occupied by him, which vacancy may only be filled by the governor under section 8 of article VI of the state Constitution as adopted on November 2, 1926, and that the person so appointed will hold office until January 3, 1949.

The respondents contend that the current vacancy occurred at a time which will permit the nomination by petition pursuant to section 3000 et seq. of the Elections Code, or that some person may be elected to that office by the "write-in" method.

Section 8 of article VI of the Constitution provides as follows: "The term of office of judges of the superior courts shall be six years from and after the first Monday of January after the first day of January next succeeding their election. A vacancy in such office shall be filled at the next succeeding general State election after the first day of April next succeeding the accrual of such vacancy by the election of a judge for a full term to commence on the first Monday of January after the first day of January next succeeding his election. The Governor shall appoint a person to hold such vacant office until the commencement of such term."

[2] The language just quoted is plain, explicit and free from ambiguity. There is no necessity or opportunity to resort to judicial construction to ascertain its meaning. When the facts in any particular case come within its provisions it is the duty of the court to apply and enforce it. The respondents contend that circumstances were shown to justify a refusal to apply

it in *Bearden v. Collins*, 220 Cal. 759, 32 P.2d 604, and that they likewise appear in the present case. It will appear from the following discussion that the facts here presented call for its application.

The Constitution, section 2½ of article II, by amendment adopted November 3, 1908, gave the Legislature plenary power to enact laws relative to nominations of delegates to conventions of political parties and for the direct nomination of candidates for public office at elections to be known and designated as primary elections. Section 23 of the Direct Primary Law, Stats. 1913, p. 1404, provided that in the case of but one person to be elected to a judicial office at the November election, the name of the candidate who at the primary election received a majority of the total number of votes cast for all the candidates for such office, should be the only one for such office placed on the official ballot at the ensuing November election. Prior to 1926 the nonpartisan offices for which candidates might be elected at the primaries did not include judicial offices. Consequently situations similar to that presented in *Miller v. Childs*, 28 Cal.App. 478, 152 P. 972, became possible. There the question was whether the foregoing provision of the Direct Primary Law prevented the election of another by the "write-in" method. In that case *Childs*, who sought nomination for the office of superior judge in Del Norte County, was defeated for the nomination at the primary election of 1914. *Miller*, his opponent, received a majority of all the votes cast for nominees for the office at the primary, and his name was the only name printed on the ballot at the November election. But after his defeat for the nomination *Childs* conducted a "write-in" campaign for election to the office in November and he received the majority of the votes cast. *Miller* contested, but it was held that *Childs* was duly elected because the provision that the name of the candidate who received the majority vote at the primary should be the only one for such office "placed on official ballot" at the ensuing November election, did not prevent another candidate's name being written in by the voters

Probably to prevent similar results in other cases the people in November, 1926, adopted section 2¾ of article II of the Constitution providing for the inclusion of the judicial office in the nonpartisan offices for which candidates might be elected at the primary election. The pertinent portion of that section reads: "Any candidate for a judicial, school, county, township, or other nonpartisan office who at a primary election shall receive votes on a majority of all the ballots cast for candidates for the office for which such candidate seeks nomination, shall be elected to such office." In the argument to the voters it was said that the constitutional amendment was designed to cure an injustice existing in the law which did not include the judiciary among the nonpartisan candidates who could be elected at the primary election, and to put the judiciary on a parity with other nonpartisan officials. There was no argument against the measure.

The method of filling vacancies in the office of judge of the superior court was changed in 1926. Prior to that time when a vacancy occurred section 6 of article VI of the Constitution (as revised in 1879) vested in the governor the power to appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, the election to take place at the next succeeding general election, and the person so elected to hold office for the remainder of the unexpired term. At the general election of November, 1926, the present section 8 of article VI above quoted was adopted to replace the then existing provisions of section 6 of that article. At that election the following statement was made to the voters, with no counterargument: "The election of judges of the superior court for a 'short term,' which is sometimes for only a few weeks between election day and the following January, is done away with, and whenever a vacancy occurs prior to April first of an election year a judge will be elected at the general election to hold office for the full term of six years. If a vacancy occur after April first of an election year the time is too short to circulate petitions and satisfactorily prepare for an election at the August primary, and in

such case the governor will make an appointment to fill the vacancy until the next election year."

The amendment eliminated the principal objectionable feature from the prior provision which was the election of a successor to hold office for the remainder of the unexpired term. This was the so-called "short term" referred to in the argument. Since then the election has been for a full six-year term instead of an unexpired term. In order, however to give the candidate sufficient time to prepare and file his nomination papers and the people sufficient time to consider a successor for a full rather than a partial or "short" term, it is also provided that the successor should not be elected at the next succeeding election if the vacancy occurred in an election year after April first.

In *Bearden v. Collins*, supra, 220 Cal. 759, 32 P.2d 604, the vacancy occurred on April 19th in an election year. Nevertheless it was there held that the election of a successor for a full six-year term should take place in the same year, which was the last year of the incumbent's term, because there was yet time in that year for the election processes to function. The result in that case is not controlling on the facts presently before the court and insofar as it is inconsistent with the conclusion herein that case is overruled.

[3, 4] Here a candidate to succeed the incumbent (being the incumbent himself) upon expiration of his term of office in January, 1947, was elected at the 1946 primary, and died shortly thereafter. The respondents contend that nevertheless an opportunity should be afforded to file independent nominations, and that the voters should not be deprived of their privilege to "write-in" a candidate's name at the forthcoming November election. The difficulty with their position is that as to the selection of a successor to take office upon the expiration of the incumbent's term, the elective processes have already spent their force. By the self-executing provision of section 2¾ of article II of the Constitution (see *DeWoody v. Belding*, 210 Cal. 461, 292 P. 265; *Kerr v. Russell*, 209 Cal. 36, 285 P. 311), a successor was elected, and

there is no election for that office to go before the people in November. It is argued that the death of the incumbent following his reelection left a vacancy in each of two terms, that is, a present vacancy in the occupied term expiring in January, 1947, and a vacancy in futuro in the term to which he was elected for the six years commencing in January, 1947. Actually any "term" for which Judge Beardsley had been elected ceased to exist when he died. The vacancy in the office is a continuing one which lasts until a new six-year term shall commence in January, 1949, for a person elected at the 1948 election. The situation calls for an appointment to fill the office until the new term commences.

It follows that the respondents should be directed to omit from the ballot to be used at the forthcoming general election any mention of the office of Judge of the Superior Court, County of Los Angeles, Office No. 10.

Let the peremptory writ issue accordingly, effective immediately.

EDMONDS, CARTER, and SCHAUER, JJ., concur.

SPENCE, Justice (concurring in the judgment).

The result reached in the majority opinion is highly desirable as it avoids what has been termed a "hit-and-miss, slipshod, irregular election" (see *State v. Claussen*, 216 Iowa 1079, 250 N.W. 195) for the important office of judge of the superior court. I deem it unfortunate, however, that the majority of this court has thought it necessary or proper to overrule in any measure the case of *Bearden v. Collins*, 220 Cal. 759, 32 P.2d 604. While that case was decided by a divided court, the majority opinion there placed a workable, common-sense construction upon section 8 of article VI, based upon a reading of the entire section in the light of its history and purposes, and in the light of other sections of the Constitution, rather than a construction based upon a literal reading of a single sentence, which construction will admittedly lead to confusion and to absurd results in many cases.

As was said in *Bearden v. Collins*, supra, 220 Cal. at pages 761 and 762, 32 P.2d at page 605: "Clearly, the provision does not contemplate a deferred election in a year when the general law provides for a regular election to fill the new term to begin the following year. Therefore, when a term is expiring at the close of the year of a general election, the occurring of a vacancy at any time in such year is a false quantity, except that, under the last sentence of said provision, the vacancy can be filled by the governor, until the commencement of the new term. Moreover, in order to harmonize the first sentence of said provision and other related provisions of the Constitution with the sentence under construction, it is necessary to give it the above meaning." In other words, whenever by reason of the approaching expiration of the term of an incumbent in the following January, an election to fill the new term is scheduled to take place at the general election in any given year, that election must proceed to completion in that year regardless of any vacancy which may occur at any time in that year, whether before or after April 1, by reason of the death or resignation of the incumbent. The majority of the court there refused to rest upon a literal construction of a single sentence of section 8 of article VI of the Constitution, which construction would permit an incumbent to resign at any time after April 1 and either (1) thereby defer the pending election for two years, or perhaps longer, if the next appointee should similarly resign two years later and after April 1, or (2) thereby nullify the results of a completed election of the successful opponent of the incumbent or nullify the results of a completed election of a successful candidate in an election in which the incumbent might not have been a candidate. The dissenting opinion in that case apparently recognized such difficulties when it there said, 220 Cal. at page 764, 32 P.2d at page 606: "If under a different state of the facts its literal enforcement would lead to an absurdity or tend to thwart the preferential right to elect, that situation may adequately be dealt with when it arrives." In other words, such literal

construction admittedly cannot stand the test under all circumstances.

As I read the majority opinion in the present case, it not only expressly overrules *Bearden v. Collins*, supra, "insofar as it is inconsistent with the conclusion" reached, but it also contains language which seems to indicate the adoption in toto of the views expressed in the dissenting opinion in that case. This leaves the law in a state of confusion as election officials and candidates for the office of superior court judge will be compelled to speculate, whenever an incumbent dies or resigns after April 1 in the election year at the end of his term, as to whether a majority of this court will adhere to a literal construction of the single sentence of said section 8 of article VI or will abandon such construction because in the particular circumstances they may feel that such construction "would lead to an absurdity or tend to thwart the preferential right to elect."

In my opinion, the views expressed in the majority opinion in *Bearden v. Collins*, supra, are sound and there should be no departure from those views. The underlying purpose of the adoption of section 8 of article VI of the Constitution was to avoid confusion in the operation of the election processes but the majority opinion here tends to create confusion as above indicated. In the ballot argument, quoted in the majority opinion, it is said: "If a vacancy occur after April first of an election year, the time is too short to circulate petitions." This is not true in the election year at the end of an incumbent's term when an election is to be held in the normal course and all persons know before the beginning of that year that an election is to be held and that petitions may be circulated. The section under consideration was designed to defer an election to fill a vacancy occurring after April 1 only in those general election years in the middle of a term of the incumbent when no election would normally be held in that year for the incumbent's office. In such years, any attempt to get the election processes into operation to fill an unexpected vacancy occurring after April 1 would almost necessarily lead to confusion and to a "hit-and-

miss" election. The section was not designed, however, to disrupt the normal election processes in the general election year at the end of the term of the incumbent and thereby to deprive the electorate of the right to participate in an election at least once in each six years for the office of judge of the superior court. To adhere to a literal construction of the single sentence under consideration might deprive the electorate of that right for an indefinite period, for every normal election for the office to be held in the last year of the incumbent's term might be deferred at the will of the incumbent or by the hand of fate.

The views expressed above do not, however, lead me to the conclusion that the writ should be denied under the circumstances presented here. In the present case, unlike the Bearden case, the election had been completed at the primary with the election of Judge Beardsley for another term. The only question here is whether the death of Judge Beardsley, following his election at the primary, should be held to open the door to a "hit-and-miss" election at the general election in November of this year. In my opinion, the answer to this question should be in the negative despite the fact that I believe such conclusion necessitates the overruling, at least in part, of *DeWoody v. Belding*, 210 Cal. 461, 292 P. 265, 266, which case was likewise decided by a divided court. I agree with the majority opinion in that case insofar as it holds that the candidate who was successful in obtaining a majority of all votes cast at the primary was "elected at the primaries," that such election "was [in effect] a final election," and that the death of the successful candidate after the primary "did not convert the primary election into a nominating election." I do not agree, however, that the subsequent death of the successful candidate rendered such election "abortive." While his subsequent death prevented him from later qualifying for the office for the new term, it did not affect the validity of his prior "final" election. There the election processes had spent their full force for that office for that year and a second "final" election should not have been held for that office at the general election of that year but should have awaited the orderly

procedure provided for the primary and general election two years later. The same situation is presented here and no second "final" election should be held for the office in question at the general election this year. I therefore believe that *DeWoody v. Belding*, supra, should be overruled insofar as it is inconsistent with the views above expressed.

In the present case, it should be said in justice to respondents that their opposition to the issuance of the writ was apparently fully justified by their reliance upon the majority opinions in *Bearden v. Collins*, supra, and *DeWoody v. Belding*, supra. But the result of sustaining the position of respondents would be to compel the holding of a "hit-and-miss" election in November, at which election any person obtaining a mere plurality of votes by the "write-in" method or otherwise would be elected. In my opinion, there is nothing in our election laws which requires or permits the holding of a second "final" election of this type.

In ordering the writ to issue, it appears absolutely necessary for this court to disapprove, at least in part, one or the other of the majority opinions in the above mentioned cases. The majority of this court has deemed it proper to disapprove, at least in part, the majority opinion in *Bearden v. Collins*, supra. It appears to me preferable to disapprove, at least in part, the majority opinion in *DeWoody v. Belding*, supra. While it is regrettable that the members of this court find themselves divided in their views on this important phase of the law governing elections, I feel impelled to express my views in opposition to the disapproval by the majority opinion here of the construction placed upon said section 8 of article VI by the majority opinion in *Bearden v. Collins*, supra. That construction is one which will in all circumstances avoid the interruption of the normal election processes by the possible occurrence of unexpected vacancies while such normal election processes are operating, and is a construction which will clearly indicate the course to be pursued by the officials charged with the duty of supervising the operation of such election processes.

TRAYNOR, Justice (dissenting).

I dissent on the authority of *Bearden v. Collins*, 220 Cal. 759, 761, 32 P.2d 604, and *DeWoody v. Belding*, 210 Cal. 461, 464, 465, 292 P. 265. In my opinion neither of these cases should be overruled.



28 Cal.2d 775

HAILS v. MARTZ et al.

L. A. 19318.

Supreme Court of California, in Bank.

Aug. 27, 1946.

Rehearing Denied Sept. 19, 1946.

1. Pleading ☞49

Where there was no inconsistency between allegations of complaint and prayer, prayer could be resorted to in an effort to ascertain plaintiff's theory of action.

2. Appeal and error ☞197(1)

Where plaintiff claimed a prescriptive easement to have water carried across defendants' land and considerable evidence tending to prove adverse user was admitted during trial without objection, on appeal defendants could not assert that claim of a prescriptive easement was not properly put in issue.

3. Easements ☞36(1)

Generally, as respects establishment of a prescriptive easement, open, visible and notorious possession raises a presumption of notice to owner of servient tenement.

4. Waters and water courses ☞126(3)

In action for wrongfully causing surface waters to flow on plaintiff's land, where plaintiff claimed a prescriptive right to have water flow across defendants' lands, and evidence tended to show that the alleged easement was visible, open and notorious thereby raising presumption of notice to defendants, plaintiff had right to have issue of prescriptive right determined notwithstanding assertion by defendant that there was no evidence that defendants

had actual knowledge of diversion of water over their lands.

5. Waters and water courses ☞150

Although a person has no right to divert surface water onto his neighbor's land, if he does so for period of time required to establish a right by adverse possession, such diversion may ripen into an easement by prescription.

6. Appeal and error ☞1071(6)

In action for wrongfully causing surface water to flow over plaintiff's land, where there was evidence tending to support plaintiff's claim of an easement by prescription to discharge waters in a ditch across defendants' land, failure to determine issue of existence of such easement was error notwithstanding finding that water naturally drained over plaintiff's land.

Appeal from Superior Court, Los Angeles County, John Beardsley, Judge.

Action by Raymond R. Hails against James L. Martz and others for wrongfully causing surface water to flow over plaintiff's land. From a judgment for defendants, plaintiff appeals.

Reversed, and remanded for a retrial.

Prior opinion, see, 164 P.2d 834.

John A. Jorgenson, of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, Cushman & Paul, Robert R. Ashton, and George H. Emerson, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiff brought this action claiming that the defendants had wrongfully caused surface water to flow over his land. He appeals from an adverse judgment.

In 1942 plaintiff became the owner of several acres of land in Los Angeles County which he leased for agricultural purposes. This property is adjoined on the west by land owned by the defendants Martz. Both properties are bounded on the north by Del Amo Street, beyond which lies a large tract of land owned by the defendant Del Amo Estate. The de-

fendant Pacific Electric Railway Company owns a spur track erected on an embankment crossing the Del Amo property a short distance north of Del Amo Street. The lands to the north are higher than the properties south of Del Amo Street, and during the rainy season waters flowing southward from the Del Amo property pass through two culverts located in the spur track embankment, thence southward across Del Amo Street in front of plaintiff's property.

In 1924, one Marconi, while a tenant of the land now owned by plaintiff erected an embankment along the north boundary, which was later enlarged and improved by the county (and thereafter known as the county dike). At the same time Marconi constructed a ditch immediately beyond the embankment, and along the south side of Del Amo Street, extending it to the Martz boundary line, thence south several feet on their land. The water flowed through this ditch and onto the Martz land where it was diffused until January, 1926, when Marconi, then also a tenant of the Martz land, extended the ditch along an embankment, entirely across the Martz property. From that time until 1942 water crossing Del Amo Street in front of plaintiff's property was carried across the Martz land in this ditch.

Plaintiff purchased his land in June, 1942, and in the following August the defendants Martz filled in the ditch on their land. At about the same time they constructed an embankment along their easement boundary line and these changes prevented the surface water from flowing onto the Martz land as it had formerly done. The water then accumulated on Del Amo Street and the county cut the dike to prevent it from backing up on the land to the north. Thereafter, in an effort to prevent the water from spreading over plaintiff's land an embankment running southwesterly from the cut in the dike, was erected on his property. During heavy rains in January, 1943, water broke through the embankments on both lands and spread over each property.

The court found that the configuration of the lands was such that the water flowing southward across Del Amo Street nat-

urally flowed over plaintiff's land and that it did not naturally flow over the Martz land.

The principal point urged by plaintiff on this appeal is that regardless of the direction in which the water naturally flowed he had acquired a prescriptive easement by reason of the construction by Marconi in 1924 of the ditch and embankment before mentioned, to have the water diverted from his land onto the Martz property. There was no finding on this issue and it is urged that this failure necessitates a reversal of the judgment.

[1,2] It is asserted that the plaintiff was not entitled to a finding on this issue because a prescriptive easement was not pleaded. Although the complaint does not specifically allege a prescriptive right for the diversion of the water over the land of the defendants Martz, the allegations of the complaint showed that plaintiff was seeking to establish a right in himself to have the water flow over and onto the Martz lands. The prayer of the complaint asks that plaintiff "be declared to have an easement over said lands of defendants Martz" for the purpose of carrying the water westward. We find no inconsistency between the allegations of the complaint and the prayer, and the latter may therefore be resorted to in an effort to ascertain plaintiff's theory of action. *Canby v. Council of City of Los Angeles*, 114 Cal. App. 94, 96, 299 P. 732; see, also, *United B. & T. Co. v. Fidelity & Deposit Co.*, 204 Cal. 460, 465, 268 P. 907; *Sullivan v. Compton*, 61 Cal.App.2d 500, 503, 143 P.2d 357; *McPheeters v. McMahon*, 131 Cal. App. 418, 424, 21 P.2d 606. Moreover, considerable evidence tending to prove the adverse user was admitted during the trial without objection and it may not now be successfully asserted that the claim of a prescriptive easement was not properly put in issue.

[3,4] Defendants also argue that plaintiff is not entitled to a finding on the issue of a prescriptive right because there was assertedly no evidence that defendants Martz had actual knowledge of the alleged diversion of water over their land. It is the general rule that open, visible and no-

torious possession will raise a presumption of notice. *Chapman v. Sky L'Onda Mut. Water Co.*, 69 Cal.App.2d 667, 678, 679, 159 P.2d 988; *Wood v. Davidson*, 62 Cal. App.2d 885, 889, 890, 145 P.2d 659; to the same effect are: *Bernstein v. Dodik*, 129 Cal.App. 454, 458, 18 P.2d 983; *Schudel v. Hertz*, 125 Cal.App. 564, 570, 13 P.2d 1008; *Gurnsey v. Antelope Creek etc. W. Co.*, 6 Cal.App. 387, 391, 92 P. 326; 2 C.J.S., *Adverse Possession*, § 41, p. 554. The location of the ditch and embankment running across the Martz property was about 150 feet south of Del Amo Street. A fact-finding body could therefore have inferred that they were visible not only on the property itself, but from Del Amo Street and from a farm road running along the east boundary of the Martz property. Moreover, several witnesses who lived in the neighborhood during the time the prescriptive easement allegedly accrued testified they knew of the flow of the waters over the Martz property. One of them stated he had seen plaintiff's predecessors in title cleaning out the ditches on the Martz land. All this evidence tended to show that the alleged easement was "visible, open and notorious," within the import of the rule just referred to.

[5] Although a person has no right to divert surface waters onto his neighbor's land, if he does so for the period of time required to establish a right by adverse possession it may ripen into an easement by prescription. *Naporra v. Weckwerth*, 178 Minn. 203, 226 N.W. 569, 570, 65 A.L.R. 124; *Crumbaugh v. Mobile & O. R. Co.*, 105 Miss. 485, 62 So. 233; see, also, *Galbreath v. Hopkins*, 159 Cal. 297, 301, 113 P. 174; *Learned v. Castle*, 78 Cal. 454, 461, 18 P. 872, 21 P. 11; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396, 406; *Los Angeles Brick etc. Co. v. City of Los Angeles*, 60 Cal.App.2d 478, 486, 141 P.2d 46; *Darr v. Carolina Aluminum Co.*, 215 N.C. 768, 3 S.E.2d 434, 437; *Gould on Waters*, 3d Ed., § 279; p. 555; 3 *Kinney, Irrig. and Water Rts.*, 2d Ed., p. 2969; 17 *Am.Jur.* 986; 26 *Cal.Jur.* 289, 290; 25 *Cal.Jur.* 1193.

[6] In view of the evidence in the record tending to support plaintiff's claim of an easement by prescription, he was en-

titled to a finding on this issue. Since the determination of this question may affect other issues, the entire cause should be remanded for a retrial, and a discussion of points relating to the rights and obligations of other defendants is not presently necessary.

Judgment reversed.

S H E N K, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



28 Cal.2d 863

WOO et al. v. MARTZ et al.

L. A. 19319.

Supreme Court of California, in Bank.

Aug. 27, 1946.

Rehearing Denied Sept. 19, 1946.

Appeal and error ⇐ 1071(6)

In action for damages to crops by the flow of water over lands rented by plaintiffs, where there was evidence tending to establish that plaintiffs' landlord had a prescriptive easement to discharge waters in a ditch across defendants' land, failure to determine the issue of existence of such easement was error notwithstanding determination that water naturally drained over the rented land.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by George Woo and others against James L. Martz and others for damages for causing surface water to flow on and destroy plaintiffs' crops, wherein defendants cross-complained for similar relief. From a judgment for defendants and cross-complainants, plaintiffs appeal.

Reversed, and remanded for a retrial.

Prior opinion, 164 P.2d 840.

John A. Jorgenson, of Los Angeles, for appellants.

Cushman & Paul, of Los Angeles, for respondents.

GIBSON, Chief Justice.

This is a companion case to *Hails v. Martz*, Cal.Sup., 172 P.2d 52, this day decided.

In the present action plaintiffs who are lessees of R. H. Hails (plaintiff in the companion case) sought damages for injury to their crops caused by the alleged wrongful acts of defendants Martz in closing up a ditch on their land through which surface waters had formerly been diverted from the lands leased by plaintiffs. Plaintiffs appeal from a judgment denying them relief and awarding damages against them under a cross-complaint which alleged that plaintiffs had wrongfully diverted the surface waters onto defendants' land. The facts underlying the litigation are more particularly set forth in the companion case.

The rights of the parties here involved are dependent on the question, discussed in the companion case, whether plaintiffs' lessor is entitled to an easement by prescription to have the surface water diverted onto the lands of the defendants Martz. Inasmuch as the judgment in the companion case has been reversed for failure to find on this issue, the judgment herein must necessarily be reversed.

Judgment reversed

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



28 Cal.2d 779

McARTHUR v. STATE BAR OF CALIFORNIA.

L. A. 19568.

Supreme Court of California, in Bank.
Aug. 27, 1946.

I. Attorney and client ⇐61

The Supreme Court has the inherent power to reinstate disbarred attorney, despite an unfavorable report on him by the board of bar governors of the state bar.

2. Attorney and client ⇐61

The recommendation of the board of bar governors concerning reinstatement of disbarred attorney is advisory only, but, as that body has been provided by legislative enactment as an arm of the Supreme Court to assist in matters of admission and discipline, the greatest deference is accorded to its recommendation by the Supreme Court.

3. Attorney and client ⇐61

The final determination in matters concerning reinstatement of a disbarred attorney, rests with the Supreme Court, whose powers in that regard are plenary and whose judgment is conclusive.

4. Attorney and client ⇐61

Findings of committee of board of bar governors of state bar that disbarred attorney seeking reinstatement to practice law was not sufficiently rehabilitated to warrant his reinstatement, that he did not have the high moral qualifications required of a member of the bar, and that his present ability and learning in the law was adequate, were sufficient to enable Supreme Court to make an intelligent and fair review of the board's decision and sufficient to advise Supreme Court of grounds on which decision denying application for reinstatement was based.

5. Attorney and client ⇐61

On application by disbarred attorney for reinstatement, court's object is to determine whether his character is such that he should be admitted to an office of trust and recommended to the public as a trustworthy person, fit to be consulted by others in matters of confidence.

6. Attorney and client ⇐61

On application by disbarred attorney for reinstatement, burden of proof is on applicant to convince court by positive evidence that effort applicant has made toward rehabilitation has been successful.

7. Attorney and client ⇐61

A disbarred attorney seeking reinstatement should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question.

8. Attorney and client ☞61

On application by a disbarred attorney for reinstatement, proof presented must be sufficient to overcome court's former adverse judgment of applicant's character.

9. Attorney and client ☞61

Evidence established that disbarred attorney had not so rehabilitated himself as to be entitled to reinstatement, where, at time of hearings before committee of board of bar governors, he had not repaid sums misappropriated from an estate, and his chief concern was to secure a satisfaction of a judgment against him for such sums for smallest amount possible.

10. Attorney and client ☞61

A restoration of money misappropriated by disbarred attorney is not necessarily essential to a showing of rehabilitation to entitle attorney to reinstatement, and the importance of making restitution and weight to be attached thereto should be determined largely by financial or other ability of attorney as well as by his attitude of mind regarding the matter.

Proceeding by Leland McArthur, petitioner, to review the action of the Board of Governors of the State Bar of California, respondent, refusing to recommend the petitioner's readmission to practice law.

Application for reinstatement denied.

Philbrick McCoy, of Los Angeles, for petitioner.

T. Paul Moody and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

Petitioner seeks reinstatement as an attorney at law. The Board of Governors of The State Bar, by unanimous vote of the 13 members present and voting, declined to recommend reinstatement. After consideration of the entire record we have concluded, for the reasons hereinafter stated, that petitioner has failed to establish that he has attained such degree of rehabilitation as would justify us in reinstating him.

Petitioner was admitted to the practice of law in Illinois in 1916 and in California

in 1920, and on June 12, 1933, upon recommendation of the Board of Governors he was disbarred by order of this court. He sought no review of the board's recommendation in that proceeding. Petitioner had, however, previously (on June 22, 1932) been suspended from the practice of law for 18 months upon order of this court made after a review of the proceedings leading to a recommendation by the Board of Governors that such suspension be imposed. *McArthur v. State Bar*, 215 Cal. 652, 12 P.2d 453. In addition, on December 21, 1932, while the proceedings which resulted in petitioner's disbarment were pending, he pleaded guilty to two counts of an information filed against him in the superior court in Los Angeles; one of the counts charged him with issuing a check without sufficient funds, and the other with grand theft. On the same day he was sentenced to San Quentin Penitentiary, the sentence was suspended, and he was placed on probation for a total period of 20 years upon certain terms and conditions and was thereupon released. Neither suspension nor disbarment followed as a result of these criminal proceedings.

The ground for the disbarment of petitioner was that he commingled certain funds of the estate of Mildred Ritchie, a minor, with funds of his own; it appears that the estate was reimbursed before the disciplinary proceedings were instituted. The grounds for suspending petitioner for 18 months are fully set forth in our opinion in that proceeding (*McArthur v. State Bar*, supra, 215 Cal. 652, 12 P.2d 453) and it is sufficient to state here that the suspension resulted from charges that petitioner unlawfully took from one Cora Dodd Tippie the sum of \$3,000. This sum also was repaid by the end of June, 1933.

As to the two counts of the criminal information to which petitioner pleaded guilty, he states in his petition to this court to review the reinstatement proceedings, that "The record * * * shows that petitioner pleaded guilty to a charge of grand theft of some \$9,000 and the issuance of a bad check for \$1,000." The record discloses further that the two offenses were committed in February and March of 1931 when petitioner was the attorney for

Madge Morrison, administratrix of the estate of Mary Fitzgerald, deceased, and involved funds handled by petitioner for the estate. On November 2, 1933, Madge Morrison as such administratrix secured a judgment against petitioner in the sum of \$9,601.10, together with interest and costs, following findings by the court that petitioner had appropriated to his own use that sum of estate money in addition to other funds belonging to the estate and that he had repaid no part of the \$9,601 which represented the principal of the judgment. The findings and judgment state further that as collateral security for repayment of the misappropriated sums petitioner had delivered to the then attorney for the Fitzgerald estate eight described "evidences of indebtedness, securities, and/or choses in action." One of the terms of the probation granted petitioner following his sentence to San Quentin was that he make restitution of the sum of \$9,601 to Madge Morrison, administratrix of the Fitzgerald estate. On December 21, 1942, petitioner received from the governor of this state a pardon which stated, among other things, that "I am informed that the applicant has made restitution by repaying the sums of money misappropriated. He has delivered to this office, for transfer to the aggrieved parties, a promissory note as final payment." On September 3, 1943, petitioner filed with The State Bar his petition for reinstatement.

Following eight hearings held during the period of November 29, 1943, through April 23, 1945, before a special administrative committee of The State Bar, instructed by the Board of Bar Governors, "to investigate and hear evidence and make findings of fact based thereon," that committee found, and reported to the board, on August 10, 1945, that "(1) The petitioner is not sufficiently rehabilitated to warrant his reinstatement; (2) The petitioner has not the high moral qualifications required of a member of the Bar; (3) The present ability and learning in the law of the petitioner is adequate," and that the petition for reinstatement should be denied. This report was approved by the Board of Governors.

Petitioner urges, first, that the quoted report does not constitute findings, and that

the "failure of the committee and the Board of Governors to adopt findings of fact based on the evidence was contrary to law," and, second, that the evidence would not support findings adverse to petitioner on the issues of rehabilitation and of moral qualifications. It is conceded that if more detailed findings are required on such issues they would also be necessary on that of petitioner's ability and learning in the law.

[1-4] Petitioner states that he has "found no decisions in proceedings for the reinstatement of a disbarred attorney which either support or negative" his contention that he is entitled to more detailed findings, but urges that such contention is "amply supported by sound decisions in comparable cases" and cites various authorities having to do with proceedings before administrative boards. However, as reiterated in the very recent case of *Preston v. State Bar*, Cal.Sup., 1946, 171 P.2d 435, 438: "That this court has the inherent power and authority * * * to reinstate an applicant previously disbarred despite an unfavorable report upon such application by the board of bar governors of the State Bar, * * * is now well settled in this state. [Citations.] The recommendation of the board * * * is advisory only but as that body has been provided by legislative enactment as an arm of this court for the purpose of assisting in matters of admission and discipline, the greatest deference should be, and always has been, accorded to its recommendation by this court. Nevertheless the final determination in all these matters rests with this court, and its powers in that regard are plenary and its judgment conclusive. [Citations.]" We are satisfied that for the purpose of enabling us to make an intelligent and fair review of the decision of the board, the findings adopted by the committee and by the board are, in the light of the circumstances of this case, sufficient to advise us of the grounds upon which the decision is based. Cf. *In re Cate*, 77 Cal. App. 495, 499, 508, 247 P. 231; *In re Stevens*, 83 Cal.App. 745, 746, 747, 257 P. 218; *In re Cate*, 207 Cal. 443, 445, 449, 279 P. 131. Likewise, we are satisfied that petitioner, on this record, is not prejudiced

by a lack of greater particularity in the findings.

From the record of the several hearings it appears that petitioner was born December 30, 1893, and that following his admission to practice in California (in 1920) he practiced law in San Francisco until July, 1923, and in Long Beach from that date until his suspension in June, 1932. As stated above, his conviction on the criminal charges and admission to probation took place in December of the same year, and his disbarment in June, 1933. From May, 1933, until the time of his petition for reinstatement and the hearings thereon (held September 3, 1943, to April 23, 1945) petitioner supported himself and his wife by engaging in various employments and independent undertakings, including the selling of fruit juices, election campaign work, the newspaper and the contracting business, and the operation of a gasoline service station. During the early portion of this period he apparently also supported two, and possibly three, sons who had not yet reached majority. In May, 1935, further and even more grievous misfortune beset petitioner. His eldest son was shot and killed in an attempted holdup of a San Pedro market in which the son was employed. In the fall of 1937 petitioner's mother died after a long and expensive illness, the financial burden of which he had borne. These adversities seemed greater than petitioner was then prepared to face. He sought escape for a time by indulgence in excessive drinking, but in December, 1937, he closed his publishing business and, at the instance of friends and with his own acquiescence, was committed the following month to Patton State Hospital, where he remained for six months.

In June, 1938, petitioner returned to Long Beach and according to his testimony has since then indulged in no intoxicating liquors except for three "social cocktails" at widely spaced intervals. He states in his petition for review that "For all practical purposes" his rehabilitation "commenced with his return to Long Beach in the summer of 1938." Thereafter, he secured employments including on several occasions the satisfactory handling of political cam-

paign funds amounting to several thousands of dollars. At the time of the hearings on the petition for reinstatement petitioner was engaged in operating a service station as his own business and also had occasional temporary employment as Chief Investigator for the California Legislature's Interim Committee on Juvenile Delinquency. He estimated his average monthly earnings from 1933 until his commitment to Patton in January, 1938, as \$100 and from the summer of 1938 through 1940 as \$200. During 1941 his only income was \$200 per month lent to him by Mr. Thomas A. Gregory, president and manager of the Long Beach Building and Loan Association, from Gregory's personal funds. From February, 1942, to the time of the hearings petitioner's average monthly earnings were \$225 and those of his wife, which petitioner stated belonged to her for her own use, from about the middle of 1942 were \$140 per month. He estimated the monthly living expenses of himself and his wife as of January, 1944, at \$185, and stated that he was also contributing \$25 per month to the support of his father, although such contribution was not essential to his father's comfort.

In addition to the Tippie and the Morrison matters, mentioned hereinabove, petitioner since his disbarment has been named as a defendant in various civil actions, certain of which were dismissed, settled, not prosecuted, or resulted in judgments in petitioner's favor, and others of which resulted in judgments against petitioner totaling over \$11,000. It appears that none of such actions were based on acts of moral delinquency on the part of petitioner, and he testified that he intends to satisfy or settle the judgments against him when he is able so to do. In March, 1937, as the result of a dispute with an employee over wages, a complaint was filed against petitioner in the municipal court in Long Beach charging him with violation of the state wage law; the matter was settled and the complaint dismissed.

In addition to the \$2,400 borrowed from Mr. Gregory, petitioner at the time of the hearings owed to a savings and loan association approximately \$1,200, secured by a

trust deed on real estate standing in the name of petitioner and his wife. Petitioner testified that this property rented for \$45 to \$50 a month, which "pays for the taxes."

Concerning restitution of the \$9,601 to the Fitzgerald estate—ordered in December, 1932, as a condition of petitioner's probation—Miss Morrison, the administratrix, testified that petitioner had paid to her a total of only \$1,123.50 of which she received approximately \$623 through the "court trustee"; that in addition she had been paid \$4,000 by a securities company involved in the misappropriation by petitioner; that in 1937 petitioner stated to her and to the court "that he had been left sole heir in the mother's will" and that he would pay the Fitzgerald estate "out of what he received from his mother's estate," but that the witness subsequently learned that petitioner was to receive nothing from that source; that she had at no time received any of the securities or property mentioned in the civil judgment secured by her against petitioner or any reimbursement derived from the securities; and that she had not been consulted concerning petitioner's pardon before it was granted. The record disclosed that Miss Morrison was paid the \$4,000 by the securities company pursuant to an agreement that she would repay that amount to the company from the first sums collected by her on account of her judgment against petitioner.

Mr. Joseph Wapner, the attorney who represented Miss Morrison in the civil action which resulted in the \$9,601 judgment against petitioner, testified that he had made no independent investigation of the securities "but I felt they were worthless. * * * I don't recall just how I did reach the conclusion. * * * I think I did tell Mr. McArthur and his attorneys on many occasions that I felt that any security that they would offer was absolutely worthless. * * * After I came into it and after going over the matter with my client and my predecessor, Mr. Lyter, we came to the conclusion that these so-called securities were absolutely valueless. That was why I filed * * * suit against Mr. McArthur"; that he did not attempt to realize on the securities because he "thought there

wasn't sufficient there to warrant the effort and expense."

It is not contended that petitioner had made any greater cash payments than those testified to by Miss Morrison. Petitioner stated that he was originally ordered to pay \$25 per month as a condition of probation, but that he was unable to do so; that prior to his commitment to Patton (in January, 1938), he had delivered to the probation officer approximately six "bad checks" ranging in amounts from \$10 to \$50, each of which was paid in full within five or six days after it was issued; and that "Shortly after I returned from Patton * * * I started paying \$10 a month regularly from then on." The record indicates that the payments made by petitioner to Miss Morrison through the probation office amounted to \$258.50 before the Patton commitment plus \$340 during the years 1939 through 1941; and that thereafter he made only two payments, one of \$15 in October and the other of \$10 in November, 1942.

It is undisputed that in applying for the pardon petitioner represented that he had made restitution by repaying the sums misappropriated from the Fitzgerald estate and that after the pardon was granted he made no further payments. In defense and explanation of such conduct, petitioner testified as to his own opinion of the value of the collateral securities mentioned above and stated that at the time he turned them over to Miss Morrison's attorney "The figures that I had * * * showed that the value at the time * * * was in the neighborhood of \$10,000 or a little better. * * * I felt and represented [to the advisory pardon board] that everything I had turned over * * * represented more than the actual amount of the judgment that was against me. Now the fact that they hadn't realized on those I didn't consider to be my fault because they were * * * in a position to do so"; that he had turned over to Miss Morrison or her attorneys everything of value which he had except a mountain cabin worth \$750 to \$800; that he had no control over the securities after they were delivered to Miss Morrison's attorneys, and that he had "endeavored unsuccessfully * * * to bring about a

liquidation of those securities so as to have a credit against" the judgment; that he did not recall whether when applying for a pardon he had disclosed that the judgment of \$9,601.10 remained unsatisfied of record, but that "It is possible that * * * the representation was not made that the judgment was unsatisfied because * * * during the pendency of the pardon it was suggested to me by I think either [the] * * * secretary to the Governor, or [the secretary of the advisory pardon board] * * * as a matter of good faith if there is any difference between the values, that I should put in the Governor's hands a note for \$1,000. That note was executed and sent to [one of the named secretaries]" and that neither Miss Morrison nor her attorney was consulted concerning the note, which was unsecured. The record indicates that the note disappeared without being delivered to the Fitzgerald estate.

Petitioner testified further that Miss Morrison's attorney had informed him that the balance owing on the \$9,601 judgment could be settled for \$1,500, that petitioner was attempting to settle for only \$1,000, which he expected to borrow from other sources, and that such attempts were "partly the reason" for his ceasing to make payments on the judgment after his pardon was granted; that "The payments had extended over a period of time and I was endeavoring to get a lump sum settlement"; that he did not regard it as his obligation to continue monthly payments; that "I don't know as I can give * * * categorically a reason as to why I discontinued the payments except that I had in mind the filing of this petition [for reinstatement] at that time. I felt that if I refused to make any further payments it would be best for me to come to this committee with a clear-cut settlement of the obligations to the Fitzgerald Estate. I knew of no other way. I had made numerous attempts in the past, and the reason was I tried to get some opinion from the Fitzgerald Estate as to what they would require me to pay to close up that judgment." Petitioner was informed by the three members of the special committee that unless he disclosed other justification for cessation of the payments to Miss Morrison upon the granting of his pardon, they

would vote against reinstatement. The record indicates that subsequently, on February 1, 1945, petitioner delivered to Miss Morrison's attorney an installment note for \$1,250 signed by petitioner and payable to Miss Morrison at the rate of \$25 a month commencing February 1, 1943, and paid \$1,250 in cash to her plus the first \$25 monthly installment on the note and \$1,250 cash to the securities company involved in his misappropriations, and received in return a full satisfaction of the judgment against him together with the securities described in the judgment, and that evidence of this settlement was submitted to the committee at the final hearing on April 23, 1945.

Concerning petitioner's handling of political campaign funds, four Long Beach businessmen, including one attorney, testified that petitioner collected and accounted for such funds and that in their opinion he was honest and rehabilitated. Another witness, who testified that he felt that petitioner had been rehabilitated, stated that his opinion was based upon a statement made to him by petitioner that the latter had made full restitution of the misappropriated sums. A newspaper publisher and member of the city council in Long Beach, testified that in 1934 and 1935 petitioner while an employee of the newspaper satisfactorily collected and accounted for funds owing to the paper, and that the witness had discussed legal matters with petitioner and considered him to be a "pretty smart attorney." Two attorneys called by petitioner also testified that they frequently discussed legal matters with petitioner, that his legal ability was good, and that he appeared to be keeping up with new developments in the law.

[5-8] Upon an application by a disbarred attorney for reinstatement, the object of the court, as observed in *Kepler v. State Bar*, 216 Cal. 52, 55, 13 P.2d 509, 510, "is to determine whether or not the character of the applicant is such that he should be admitted to an office of trust, and recommended to the public as a trustworthy person, fit to be consulted by others in matters of confidence. [Citations.] In such proceeding the burden of proof is upon the one who seeks, after disbarment, to accomplish

a restoration to the ranks of the legal profession, and, before the court may grant the petition for reinstatement, it must be satisfied and fully convinced by positive evidence that the effort he has made toward rehabilitation of his character has been successful. [Citations.] It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. * * * The proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character. [Citations.]" See, also, *Wettlin v. State Bar*, 24 Cal.2d 862, 869, 151 P.2d 255.

[9] The showing made by petitioner, as related above, does not convince us that he has so rehabilitated himself that he should be reinvested with the position of trust and confidence that is held by an attorney at law. The record is clear that even at the time of the hearings before the special committee he had not become impressed with a sense of his moral obligation to repay the sums he had misappropriated from the Fitzgerald estate, and that his chief concern was to employ such means or methods as he could devise to secure a satisfaction of the judgment for the smallest amount possible. Despite the fact that his earnings from the beginning of 1942 to the time of the hearings averaged \$225 monthly and that during the greater portion of that time his wife was also earning \$140 a month, he paid only \$25 to Miss Morrison in 1942, and subsequent to the granting of his pardon in December, 1942, suspended payments entirely. He testified that such cessation of payments was made in an effort to secure a settlement of the judgment for \$1,000, although he admittedly had repaid only \$1,123.50 of the \$9,601 misappropriated. We are not impressed with his argument that the securities delivered by him to Miss Morrison's attorneys were of a value in excess of the judgment; his testimony as to their value was unsubstantiated by any other evidence whatsoever, and Mr. Wapner, Miss Morrison's attorney, stated that he and his predecessor were convinced that the securities were not

worth the effort and expense of attempting to realize upon them. The fact that in submitting his pardon application petitioner, without consulting or notifying Miss Morrison or her attorney, represented that he had made full restitution indicates that he himself was not so convinced of the value of the securities that he was willing that a complete disclosure of the whole transaction be made. And the final settlement of the judgment, secured in the interim between the final two hearings before the special committee, was negotiated by petitioner in a frank attempt to alter the announced intentions of the committee members to vote against his reinstatement. As indicated above, this settlement meant that petitioner paid in cash a total of only \$3,648 of the \$9,601, and gave an unsecured note on which was owing an additional \$1,225.

[10] Payments made or settlements obtained by the means and under the circumstances depicted here fall far short of displaying that high integrity and awareness of legal and moral obligations demanded as a matter of course of a member of the bar of this state. As explained in *Wettlin v. State Bar*, supra, 24 Cal.2d 862, 869, 151 P.2d 255, 259. "We do not mean to hold that it is necessary for a disbarred attorney in all cases to make full restoration in order for him to show that he has sufficiently rehabilitated himself to be entitled to be reinstated as a member of the bar. As stated in the case of *In re Andreani* [1939], 14 Cal.2d [736,] 750, 97 P.2d [456]: 'The importance of making restitution, and a conclusion respecting the weight which should be attached thereto, should be determined largely by the financial or other ability of the attorney to restore that which he has misappropriated, as well as by his attitude of mind regarding the matter.' In that case no restitution whatever was made, yet the applicant was reinstated. In other cases only partial restitution has been required, but in all cases even when full restoration is made, the applicant must show a proper attitude of mind regarding his offense before he can hope for reinstatement. In other words he must produce satisfactory and convincing proof that in his efforts to reform his ways he has been reasonably successful.

The evidence in petitioner's behalf does not meet this test. * * * Nor, for the reasons above stated, does the evidence in the matter now before us convince us that petitioner should be reinstated.

The application of petitioner for reinstatement is denied.



BLISS et al. v. CALIFORNIA CO-OP. PRODUCERS et al.

Sac. 5729.

Supreme Court of California, in Bank.

Aug. 27, 1946.

Rehearing Granted Sept. 23, 1946.

1. Bills and notes ☞344

The transferee of installment notes is not a "holder in due course" as to any part of the notes when the transfer had been made after the maturity of one or more, but less than all, of the installments, and the same rule applies where the instruments transferred are a part of a series of notes given by the maker in the same transaction and the taker knows that the notes are a part of a series. Civ.Code, §§ 3133, 3164.

See Words and Phrases, Permanent Edition, for all other definitions of "Holder in Due Course".

2. Bills and notes ☞348

A transferee of a note after interest on note is overdue is a "holder in due course" unless there is a self-executing acceleration clause. Civ.Code, §§ 3133, 3164.

3. Bills and notes ☞348

A transferee of an installment note which is transferred after the date fixed in the note for the payment of one or more installments is not a "holder in due course" as to any part of the note regardless of whether or not the past due installments have been paid. Civ.Code, §§ 3133, 3164.

4. Bills and notes ☞348

In action on fruit growers' installment notes pledged to plaintiffs by payee co-operative corporation as security for its note to plaintiffs, plaintiffs who took the

notes after the first installment was due were not "holders in due course", and makers were entitled to urge as against plaintiffs all defenses which would have been available if a transfer of the notes had been a mere assignment instead of a negotiation to a holder in due course. Civ. Code, §§ 3133, 3164.

5. Contracts ☞83

"Failure of consideration" is the failure to execute a promise, the performance of which has been exchanged for performance by the other party, and the failure may arise from the willful breach of the promise.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure of Consideration".

6. Contracts ☞83

In a bilateral contract, failure of consideration is a defense to an action for a breach of the contract inasmuch as it is contemplated that the performance of unilateral promises shall be in exchange for each other; performance being considered as the equivalent of value.

7. Agriculture ☞6

Notes executed by members of a co-operative corporation, in consideration of the corporation's marketing of the members' products and maintaining policies on the members' lives, were not supported by consideration due to the insolvency of the corporation which prevented it from continuing to accept and market the members' products and maintain the policies in effect.

8. Contracts ☞312(1)

The insolvency of a promisor in a bilateral continuing contract is tantamount to a breach of the contract by him.

9. Assignments ☞101

Generally, an assignee of a chose in action is subject to all equities and defenses existing at or before notice of the assignment; but, where there is a failure of consideration under a bilateral contract consisting of a breach by the assignor, such failure is a good defense to an action by the assignee, whether it occurred before or after the notice of assignment. Civ.Code, § 1459; Code Civ.Proc. § 368.

10. Bills and notes ➞319

In action on fruit growers' installment notes pledged to plaintiffs by payee co-operative corporation as security for notes to plaintiffs, failure of consideration for the notes caused by the subsequent insolvency of the corporation constituted a defense to the action by plaintiffs who were not holders in due course, notwithstanding there was no failure of consideration when the notes were pledged to them. Civ.Code, §§ 1459, 3133, 3164; Code Civ.Proc. § 368.

11. Bills and notes ➞98

Where notes given by defendants to co-operative corporation in consideration for marketing defendants' products and maintaining policies on defendants' lives were pledged by corporation to plaintiffs, that defendants continued as members of the corporation after the pledge, continued to market their products through the corporation and to accept the benefits of insurance, never repudiated the transaction between themselves and the corporation, did not estop defendants from defending action on the notes on ground of failure of consideration when corporation subsequently became insolvent.

12. Corporations ➞1

In action on fruit growers' installment notes pledged to plaintiffs by payee co-operative corporation as security for its note to plaintiffs, where the notes were void for failure of consideration due to subsequent insolvency of corporation and its inability to carry out its obligations to the growers, evidence did not justify disregarding the corporate entity and holding that the insolvency of the corporation was in fact the insolvency of the growers.

TRAYNOR, EDMONDS, and SPENCE, JJ., dissenting.

ment against defendants Shidler, Winchester, and Galbreath, they appeal.

Judgment reversed.

Prior opinions 154 P.2d 929; 156 P.2d 259.

B. J. Galbreath, in pro. per., of Marysville, and Muldary & Elkington, of San Francisco, for appellants.

Charles A. Bliss, in pro. per., Irvin C. Ford, and C. K. Curtright, all of Sacramento, for respondents.

CARTER, Justice.

Judgment was given for plaintiffs against defendants and appellants Shidler, Winchester and Galbreath on three promissory notes of which they were the makers. Their defenses, among others, were fraud and failure of consideration. Plaintiffs are the transferees of the notes, the payee being California Cooperative Producers, a corporation.

The series of events leading up to the execution of the notes had their beginning in 1926. In that year the idea was conceived by Mr. Johnson, president of the Union Construction Company, and a Mr. Campbell, to use the shipping terminal facilities and property at the harbor in Oakland, California, then held by the Union Construction Company under a lease from the city of Oakland, for a terminal for processing and shipping agricultural products. It was proposed to form a corporation to be known as California Cooperative Producers (hereinafter referred to as the corporation, which was later formed), as the instrumentality to conduct the enterprise. A promotional firm, Allen, Hobson and Simons, a copartnership, was engaged under contract of April 15, 1927, to promote and organize the business and conduct a campaign to induce growers of agricultural products to let the corporation handle their products. The corporation was incorporated on April 26, 1927, with a capital stock of \$15,000 under the then section 653a of the Civil Code authorizing ordinary business corporations to divide a portion of their profits among persons other than their stockholders. The stock (other than director's qualifying shares) was to be issued

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action on notes by Charles A. Bliss and others against the California Cooperative Producers, a co-operative business corporation, I. C. Shidler, Helen A. Winchester, C. J. Galbreath, and others. From a judg-

only to associations of producers (which were to be organized) who marketed their products through the corporation. Johnson was named president and Hobson and Allen directors of the corporation. Pursuant to a permit therefor one share of stock was issued to each director.

The promotional firm launched its drive, made financial arrangements, and obtained manufacturing and marketing contracts, hereafter called marketing contracts, for the corporation from many producers of agricultural products, including the three appellants, in which the producers agreed to market their products through the corporation. Appellants, as producers, were members of either one or the other of two producer's associations formed pursuant to the plan. The associations' manufacturing and marketing agreement, hereafter referred to as association contract, with its member-producers and the marketing contracts required its members to deliver their products to the corporation. The marketing contracts called for the procurement of policies of insurance on the lives of the producers, the corporation to pay the premiums, and provided: "In order to assist in the manufacturing and/or marketing of said products, and in further consideration of the payment of the premiums on policies of endowment life insurance on the life (name of defendant signing same) for the amount of (amount of insurance issued), if and when issued and assigned to California Cooperative Producers, said producer hereby extends his credit to California Cooperative Producers in the amount of a certain promissory note of even date herewith in the principal sum of \$—— (amount of note executed, and sued for herein) made by said producer in favor of said California Cooperative Producers." The notes involved were executed in 1927 as a part of the transaction by appellants and were noninterest bearing negotiable instruments payable in annual installments. The principal of the notes was arrived at by an estimate of the annual produce to be delivered by the producer and maker of the note to the corporation.

On April 17, 1928, the corporation pledged the notes to plaintiffs, together with

others, as security for the payment of a note for \$5,000 in which the corporation was maker and plaintiffs payees.

The first installment on appellants' notes was due on January 2, 1928. (The transfer to plaintiffs, as noted, was April 17, 1928.) The court found that the corporation entered credits on its books against the appellants' notes on August 31, 1928, in the amount of the first installment, and in that connection, that the credits were made after appellants knew of the transfer to plaintiffs and without consent of plaintiffs. The court also found that while the plaintiffs were not holders in due course because one installment of the notes was past due on their face at the time of the transfer, plaintiffs were purchasers in good faith and without notice of any defense of appellants; that the corporation had, when the first installment matured, in its possession property, money and credits belonging to appellants sufficient to pay the first installment. The corporation became a voluntary bankrupt on September 5, 1930.

Appellants' defenses were failure of consideration and fraud. The court found that the appellants ratified and confirmed the note given by the corporation to plaintiffs, and the pledging of their notes for security, and waived, and are estopped to rely upon the alleged fraud or failure of consideration. Further, that some of the asserted fraudulent statements made to appellants were as to prospective matters rather than existing facts and were not made with intent not to perform them.

[1,2] On the issue of whether or not the transferee of a negotiable installment note taken after the maturity of one or more but less than all of the installments, is a holder in due course, reference must first be made to the negotiable instruments law as embodied in our statutes: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) * * * (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; * * *." Civ.Code, § 3133. "The instrument is dishonored by nonpayment when—(1) * * * (2) Presentment is excused and the instru-

ment is overdue and unpaid." Civ.Code, § 3164. The general rule has been stated repeatedly both under the negotiable instruments law and the common law that the transferee of an installment note is not a holder in due course as to any part of the note when the transfer has been made after the maturity of one or more but less than all of the installments. Cases in which uniform negotiable instruments law not mentioned: *Hall v. E. W. Wells & Son*, 24 Cal. App. 238, 141 P. 53; *Archibald Hardware Co. v. Gifford*, 44 Ga.App. 837, 163 S.E. 254; *General Motors Acceptance Corporation v. Talbott*, 39 Idaho 707, 230 P. 30; *Vinton v. King*, 4 Allen, Mass., 562; *McCorkle v. Miller*, 64 Mo.App. 153; turns on lack of payment, *Shadman v. O'Brien*, 278 Mass. 579, 180 N.E. 532; *Norwood v. Leeves*, Tex.Civ.App., 115 S.W. 53; *First Nat. Bank v. Forsyth*, 67 Minn. 257, 69 N.W. 909, 64 Am.St.Rep. 415; cases decided under the uniform negotiable instruments law: *Hibbard v. Collins*, 127 Me. 383, 143 A. 600; *City of New Port Richey v. Fidelity & Deposit Co.*, 105 F.2d 348, 123 A.L.R. 1352; *United States v. Capen*, D.C., 55 F.Supp. 81. And the same rule has been applied where the instruments transferred are a part of a series of notes given by the maker in the same transaction and the taker knows that the notes are a part of a series. Under the uniform negotiable instruments law: *Beasley Hardware Co. v. Stevens*, 42 Ga.App. 114, 155 S.E. 67; *Reconstruction Finance Corporation v. Smith*, Tex.Civ.App., 96 S.W.2d 824; *Hobart M. Cable Co. v. Bruce*, 135 Okl. 170, 274 P. 665, 64 A.L.R. 457; *Little v. Shields*, Tex.Com.App., 63 S.W.2d 363; contra: *Hobart M. Cable Co. v. Bruce*, 135 Okl. 170, 274 P. 665, 64 A.L.R. 451; uniform negotiable instruments law not mentioned: *Iowa City State Bank v. Friar*, Tex.Civ.App., 167 S.W. 261; *First Nat. Bank at East St. Louis v. Street Imp. Dist.*, No. 326, D.C., 48 F.Supp. 225; *Stegemann v. Emery*, 108 Fla. 672, 146 So. 650. But it has been held that a transferee after interest on the note is overdue is a holder in due course unless there is a self-executing acceleration clause. See cases collected: *Merchants Nat. Bank v. Smith*, 110 S.C. 458, 96 S.E. 690, 11 A.L.R. 1277; *Barbour v. Finke*, 47 S.D. 644, 201 N.W.

711, 40 A.L.R. 832; *Daniels on Negotiable Instruments* (7th ed.), vol. 2, § 910; *Brannan's Negotiable Instruments Law* (6th ed.), p. 567; 10 C.J.S., *Bills and Notes*, § 312. The general rules on all those questions seem to be clear. See 10 C.J.S., *Bills and Notes*, § 312; *Daniels on Negotiable Instruments* (7th ed.), vol. 2, § 910; 44 Harv.L.Rev. 464; 40 Id. 634; 8 Am.Jur., *Bills and Notes*, § 432; *Hobart M. Cable Co. v. Bruce*, 135 Okl. 170, 274 P. 665, 64 A.L.R. 457. It might appear that there should logically be no distinction between overdue interest and overdue installments of principal but the former has been treated as a mere incident of the debt and not a part of the principal. Hence it cannot be said that the note—the principal or any part thereof, is overdue when the interest is past due. In any event, that issue need not now be determined.

[3] Some of the authorities heretofore cited appear to make pivotal the question of whether or not the case involved a situation where the installment had not in fact been paid at the time of the transfer. The argument being advanced that if the installment has in fact been paid, nothing appearing on the note to indicate one way or the other, the transferee may be a holder in due course although the note was indorsed to him after the due date of the installment specified on the face of the note. (In the instant case one of the issues presented is whether the installment had been paid when the notes were indorsed to plaintiffs, which involves the question of credits alleged to be owing to the makers-appellants from the payee-corporation when the installment fell due.) However, most of the authorities do not discuss or make a point of whether or not the installment has actually been paid and we believe the better rule to be that a transferee of an installment note which is transferred after the date fixed in the note for the payment of one or more installments is not a holder in due course as to any part of the note regardless of whether or not the past due installments have been paid. It most certainly would be true that he is not a holder in due course if the installment is unpaid and also if the note on its face showed that it was unpaid. The loss of defenses

occurring where negotiable instruments are involved is a harsh one from the standpoint of the maker, and is justified only by the policy favoring facile commerce therein. The uniform negotiable instruments law and the law merchant before it are largely mechanical and highly technical rules of thumb and the essence of the various rules involved is the appearance on the face of things—the surface view—the face of the note—etc. Extraneous and collateral matters are ignored. Therefore, we must look to the face of the instrument and when we find that the date has passed which is fixed by the instrument for its payment, no further inquiry need be made. It is past maturity paper and a transferee cannot be a holder in due course.

[4] The foregoing views are in harmony with the negotiable instruments law. It will be noted from the above quoted statute (Civ.Code, § 3133) that the holder to be a holder in due course must have taken the instrument before it was overdue *and* without notice of dishonor if it had been dishonored. We are here concerned only with the "overdue" factor. It must mean overdue on its face, that is, the date fixed for the payment of an installment has passed. Hence it follows that appellants were entitled to urge against plaintiffs all defenses that would have been available if the transfer of the notes had been a mere assignment instead of a negotiation to a holder in due course of a negotiable instrument.

[5, 6] Turning to appellants' defenses, the court found that the corporation and its officers were the agents of appellants in the marketing of their products. The stock of the corporation was to be issued to associations of producers. The corporation was "in effect owned" by the associations of which appellants were members. The notes executed by appellants were a part of the same transaction in which they executed the marketing and association contracts. The interest on the \$5,000 note delivered to plaintiffs by the corporation was paid until July 17, 1930, but none of the principal was paid although \$4,000 of it became due before that date. On the issue of appellants' defense of failure of consideration or fail-

ure by the corporation to perform under the marketing contract, it appears that the corporation failed to pay the premiums on the insurance policies after July, 1930; that because of its insolvency it has failed to and could not since then pay such premiums or process, manufacture or market appellants' products. Failure of consideration is a good defense to an action on a negotiable instrument by one not a holder in due course. Civ.Code, § 3109. Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Among other situations, the failure may arise from the wilful breach of the promise. And in a bilateral contract, such failure of consideration is a defense to an action for a breach of the contract inasmuch as it is contemplated that the performance of the unilateral promises shall be in exchange for each other, the performance being considered as equivalent in value. It is said in *Bray v. Lowery*, 163 Cal. 256, 260, 124 P. 1004, 1005; "This case therefore comes within the rule stated in *Richter v. Union Land & Stock Co.*, 129 Cal. [367], 372, 62 P. [39], 40, as follows: 'In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; and a failure to perform constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of section 1689 of the Civil Code.' See, also, *Sterling v. Gregory*, 149 Cal. [117], 121, 85 P. 305, and *Cleary v. Folger*, 84 Cal. 316, 24 P. 280, 18 Am.St. Rep. 187." See, also, *Mulborn v. Montezuma Imp. Co.*, 69 Cal.App. 621, 628, 232 P. 162; *Rest.*, Contracts, § 266 et seq.; *Williston on Contracts* (rev. ed.), vol. 3, §§ 813-814. In the instant case, although there was no express promise in the marketing contract on the part of the corporation to process and market appellants-producers' products nor a fixed time during which the producers agreed to deliver their products to the corporation, we believe it may fairly be implied that the promises in that connection were to run for at least 10 years inasmuch as the notes were payable in 10 annual installments. It will be noted from the heretofore quoted paragraph from

said contract, that in order to assist in the marketing and processing of the products, and in *further consideration* of the payment by the corporation of the premiums on the insurance policies, the notes were given. They were given as an extension of credit to the corporation, implying that the corporation was to continue its activities and maintain the insurance policies in return for the continuation of the extension of credit by the notes which were payable, not in a lump sum, but in 10 annual installments. The court found that the notes were executed for the purposes mentioned in the marketing contracts and "at the same time and as a part of the respective transactions." The court also found that from 1927 to 1930 *pursuant to the marketing contracts* appellants delivered their products to the corporation and the corporation *entered credits on its books* as payments on the notes, indicating that the continued operation of the corporation was exchanged for the payment of the promissory notes. A further indication of the reciprocal nature of the promise in the notes and that of the corporation appears from the following clause in the marketing contracts: "*The release of the Producer from delivering his said products or any part thereof in accordance with said Manufacturing and Marketing Agreement, or a failure on his part so to deliver his said products or any part thereof, shall not release the maker from any portion of his liability under said promissory note.*" (Emphasis added.) The producers were obligated on the note even if they violated their agreement to deliver their produce. It necessarily follows that if they did deliver their products and were able and willing to do so in the future, the corporation was under an equal obligation to continue to receive, process and market it as long as the installments on the notes continued to become due.

[7] The breach of the marketing contracts consisted of the failure after 1930 to handle appellants' products and maintain the insurance policies in force arising from the voluntary bankruptcy of the corporation in that year rendering it incapable of further performance. The insolvency of a promisor in a bilateral continuing contract is tantamount to a breach of the con-

tract by him. *Caminetti v. Pacific Mut. Life Ins. Co.*, 23 Cal.2d 94, 142 P.2d 741; *Central Trust Co. of Illinois v. Chicago Auditorium Assn.*, 240 U.S. 581, 36 S.Ct. 412, 60 L.Ed. 811.

[8,9] Plaintiffs urge that the asserted failure of consideration did not occur until after appellants had notice of the transfer of their notes to plaintiffs and thus the failure of consideration is not a defense. The general rule is that an assignee of a chose in action is subject to all equities and defenses existing at or before the notice of the assignment. (Civ.Code, § 1459; Code Civ.Proc. § 368; 3 Cal.Jur. 286-289). But where there is a failure of consideration under a bilateral contract consisting of a breach by the assignor, such failure is a good defense to an action by the assignee whether it occurred before or after the notice of assignment. It is said: "On the other hand, payment to the assignor or other defenses acquired by the debtor against the assignor after notice of the assignment are invalid, *unless the defense, though acquired after notice, is based on a right of the defendant inherent in the contract by its terms. Thus if payments under an executory contract are assigned, the debtor may set up failure of the assignor to fulfill his part of the contract though such failure occurs after notice of the assignment*, for the assignor cannot give another a larger right than he has himself; * * *" (Emphasis added.) Williston on Contracts, Rev.Ed., vol. 2, § 433. In *Stern v. Sunset Road Oil Co.*, 47 Cal.App. 334, 190 P. 651, the court held that recoupment was available to the debtor against the assignee although the breach of the contract by the assignor occurred after notice of the assignment. See, also, *Pacific Rolling Mill Co. v. English*, 118 Cal. 123, 50 P. 383; Rest., Contracts, §§ 161, 167(1), illus. 3. Plaintiffs refer to the statement in 19 California Jurisprudence, page 1002 that: "A failure of consideration in whole or in part after the transfer of an instrument to a bona fide holder is no defense in a suit by such holder, notwithstanding his full knowledge of the original consideration for which the paper was given." The cases cited for that proposition (*Flood v. Petry*, 165 Cal. 309, 132 P. 256, 46 L.R.A.,

N.S., 861; *Bank of Ukiah v. Gibson*, 109 Cal. 197, 41 P. 1008; *Splivallo v. Patten*, 38 Cal. 138, 99 Am.Dec. 358; *Pratt v. Dittmer*, 51 Cal.App. 512, 197 P. 365; *First Nat. Bank v. Fickert*, 51 Cal.App. 99, 196 P. 112) concern situations where a negotiable note given as a part of a contract transaction was transferred before maturity to a bona fide purchaser in the regular course of business. In other words, the transferee was a holder in due course. The court merely held that the knowledge of the transferee that the note was given as consideration for an executory promise in the contract but without notice that the promise had not been performed, was insufficient to destroy his status as a holder in due course. In the instant case, as we have seen, plaintiffs were not holders in due course for they were transferees after maturity. Hence their lack of that status is not dependent upon actual notice of equities in favor of appellants. The general rule has been repeatedly stated that an assignee of a note who is not a holder in due course takes subject to all defenses that would be available against the assignor, one of such defenses being failure of consideration.

[10,11] Plaintiffs contend that there was no failure of consideration when the notes were pledged to them. (That, as we have seen, is immaterial.) And, further, that appellants have enjoyed the fruits of the marketing contract with the corporation and hence are estopped to raise the defense of failure of consideration. The failure of consideration was, as above shown, the failure and inability after insolvency of the corporation to continue to accept, process and market appellants' products and maintain the life insurance policies in effect. In this connection the court found:

"That on or about the 21st day of May, 1928, [appellants] became aware of the transfer of their respective notes * * * to plaintiffs, * * *; that said [corporation] was declared a bankrupt on its voluntary petition September 5th, 1930; that during the whole time between said dates, [appellants] continued as members of said corporation and said producers associations

[the associations who were stockholders in the corporation] and delivered and marketed their products through said corporation, enjoyed and received the benefits of the insurance on their respective lives, the premiums on which insurance were paid by the corporation; accepted and retained the benefits of the money borrowed from plaintiffs [the \$5,000 borrowed by the corporation for which appellants' notes were pledged as security], which money was used in the processing and marketing of the products of [appellants], as above recited, and all other benefits of their membership in and affiliation with said [corporation] and said Growers Associations, but they never at any time repudiated or rescinded or attempted to rescind the said transactions between themselves and said corporation or between said corporations and plaintiffs herein.

"* * * That [appellants], by the execution of said * * * Marketing [contract] * * * by the execution of said notes, and by delivering the same to said corporation for the purpose of extending to it their credit in the amount of said notes, thereby enabling said corporation to borrow said \$5,000 from plaintiffs; by the receipt of the benefits of life insurance on their respective lives, and the benefits of said loan by plaintiffs to said defendant corporation, and by all other benefits provided in said * * * Marketing [contract]; and by continuing as members of said corporation after the borrowing of said money as aforesaid, and after they had knowledge of the borrowing of said money as aforesaid, and after having knowledge of the transfer of their said notes as security therefor, and all of the other matters and things herein found to be true, said [appellants], ratified the acts of said corporation in borrowing said money from plaintiffs, and transferring said notes to plaintiffs as security for its repayment; and they are by their said acts and conduct, and by the benefits they received as herein found, estopped from setting up any defense to this action on the ground of any alleged fraud * * *, or from making any other defense thereto, * * * and that by their said acts and

conduct as herein found, said defendants waived any and all rights that they may or might have had to set up any defense to this action on the ground of any alleged fraud practiced by their said agent, California Cooperative Producers, or its agent, or from making any other defenses thereto, as to the matters hereinabove found." We do not find any estoppel or reason springing from the foregoing circumstances which prevent appellants defending on the ground of failure of consideration. The awareness on their part of the pledge of their notes to secure the payment of the \$5,000 did not impose upon them any duty with respect to the assignees. They could assume that inasmuch as the assignees had no greater rights than, and were subject to the same defenses as the corporation-assignor, they would govern their acts and protect themselves accordingly. Certainly, they continued as members of the associations, which were stockholders in the corporation, and delivered their products to the corporation. They were bound to do that under the marketing and association contracts and were privileged to assume that the corporation would continue its performance and that the plaintiffs-assignees would be subject to the defenses arising from the failure of the corporation-assignor to perform. Appellants did receive the benefits of the marketing contracts prior to insolvency but they were entitled to receive them under those contracts. Plaintiffs cite *Maddock v. Russell*, 109 Cal. 417, 42 P. 139, and *Rohrbacher v. Kleebauer*, 119 Cal. 260, 51 P. 341, for the proposition that appellants cannot complain because they have enjoyed the fruits of the contracts. Those cases are not in point inasmuch as the contracts here involved are the marketing contracts and the failure of consideration therein as above stated. The corporation has been unable to perform since 1930. Appellants did not rescind the contracts. They had no grounds for doing so insofar as failure of consideration is concerned. There was no failure of consideration until the insolvency of the corporation. Appellants did nothing to mislead plaintiffs. It is not found that they promised to pay the \$5,000 the corporation

borrowed or to pay to plaintiffs the notes executed by them. Prior to the insolvency they did not waive the defense of failure of consideration. It had not failed as yet and there is nothing to indicate that they did so as to a future possibility of a breach by the corporation.

[12] Running through the above quoted finding of the court is an undercurrent intimating that the corporation was the alter ego of the appellants-producers and the associations to which they belonged; that the insolvency was their act; and, that hence the \$5,000 note was really their note. The court also found that the corporation "was in effect owned by said 'Producers Associations' composed of the fruit growers, the latter constituting the membership of the 'Producers Associations', and these fruit growers were also directly connected with the California Cooperative Producers by the Financing, Manufacturing and Marketing agreement executed by each of them." And that "said corporation and its officers were agents of [appellants] in the marketing of their products." We see no basis for disregarding the corporate entity. It was not a nonstock, nonprofit cooperative corporation. It was one in which persons other than stockholders could share in the profits. Accepting the agency relationship the marketing contracts were still binding and the corporation-agent was obligated to perform thereunder. The borrowing of the \$5,000 by the corporation from plaintiffs was on its own liability, not on that of the members. If that were not so, we would be disregarding the corporate entity, and the action would have been on the \$5,000 note rather than the pledged notes. The corporation was the agent of appellants in the sense that it was a processing and marketing agent for the producers. It is true that appellant Galbreath became a director of the corporation after the \$5,000 note was given and appellants' notes were pledged but that still does not prevent him from asserting failure of consideration under a contract he had with the corporation. It was still a corporate entity. There is no finding that the voluntary bankruptcy of the corporation was not in good faith. As far as appears no other course was

open. Indeed on the subject of disregarding the corporate entity, plaintiffs state in their brief:

"Plaintiffs have not at any time contended that the Cooperative was in law the alter ego of Appellants.

"It should also be borne in mind that this is not an action to enforce shareholders' liability, although a number of the statements in the opening brief might lead the casual reader to so believe. As appellants have stated, it had already been decided that the shareholders were liable on the Corporation note here involved; but they have not met that obligation. This is an action upon promissory notes executed by Appellants to the California Cooperative Producers and by that organization pledged to the Plaintiffs and Respondents. By reason of the nature of the defenses interposed by the Defendants, it has become necessary to show that they were so closely related to the Cooperative that they cannot escape liability on those notes by the defenses relied upon."

For the foregoing reasons the judgment is reversed.

GIBSON, C. J., and SHENK and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. In my opinion plaintiffs are holders in due course and of the notes in question and as such "free from defenses available to prior parties among themselves, and may enforce payment * * * against all parties liable thereon." Civ.Code, § 3138, N.I.L. § 57.

The majority opinion holds that one who acquires an installment note after the maturity date of the first installment cannot become a holder in due course even if that installment has been duly paid. This holding renders nonnegotiable many instruments heretofore regarded as negotiable, and prevents persons from creating an instrument payable in installments that will remain negotiable during the entire period for which a loan is made. If, for example, as is common in real estate transactions, a loan for a sum to be repaid in monthly installments has been made for a

period of 10 years, an installment note covering the loan would become nonnegotiable after the first month. The loan would not continue to be covered by negotiable instruments, unless 120 separate notes were executed corresponding to the installments called for under the loan agreement. In my opinion the provisions of the negotiable instruments law not only do not compel but preclude the obstruction to common commercial transactions entailed by the construction of those provisions by the majority opinion. The negotiable instruments law makes no distinction as to transfers of an installment note before and after the maturity date of the first installment. After setting forth the requirements of a negotiable instrument (Civ.Code, § 3082, N.I.L. § 1), including the requirement that it must contain an unconditional promise to pay a sum certain in money, it makes clear its intention that an instrument payable in installments may be negotiable by providing that "The sum payable is a sum certain within the meaning of this act, although it is to be paid—* * * (2) By stated installments; or (3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due." Civ.Code, § 3083, N.I.L. § 2.

No case has been found to support the doctrine of the majority opinion that a note ceases to be negotiable after the due date of the first installment even though that installment has been duly paid. All the cases cited were concerned with installment instruments that had become dishonored by failure to pay one or more matured installments. The issue in these cases was not whether, as the majority opinion assumes, the entire instrument became overdue after one of the installments matured, but whether the dishonor of the instrument because of the nonpayment of one installment prevented a later holder from becoming a holder in due course. The question whether the transferee had notice of the maker's failure to pay any previous installment was not considered except in *United States v. Capen*, D.C., 55 F.Supp. 81, which recognized that notice was required to prevent the transferee from being a holder in due course. See, also, *City of New Port Richey*

v. Fidelity & Deposit Co., 5 Cir., 105 F.2d 348, 352. If such notice is not required, and the transferee is prevented from being a holder in due course solely by the fact that a previously matured installment is unpaid at the time of the transfer of the note, the decision in the present case would turn on the question whether the first installment was paid when plaintiffs acquired the notes. In my opinion, however, the fact that a previously matured installment is unpaid does not prevent a transferee from being a holder in due course as to subsequent installments unless he had notice of the nonpayment of the previous installment when he acquired the note.

To be a holder in due course a holder must have taken the instrument under the following conditions: "(1) That it is complete and regular upon its face; (2) *That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;* (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Civ. Code, § 3133, N.I.L. § 52, italics added. The issue in the present case is whether the plaintiffs have met the second of these conditions; no question is raised as to the others. Plaintiffs are therefore holders in due course if they (a) acquired the notes before they were overdue and (b) without notice of any previous dishonor.

An installment note is of course overdue as to installments due before the date of the transfer, and as to such installments a transferee cannot therefore be a holder in due course. On the other hand, the fact that the maturity date of one or more installments has passed cannot make the instrument overdue as to installments payable in the future in the absence of the operation of an acceleration clause. The question then arises whether, even though the instrument is not overdue as to such installments, the taker is put on inquiry and regarded as having constructive notice that the instrument was previously dishonored because the transfer occurred after the due date of a previous installment. One who acquires a note payable in its

entirety after its due date is not a holder in due course, for it appears on the face of the note that it should have been paid and discharged and withdrawn from circulation. If such a note is paid, the payment bars its collection; if it is unpaid and circulated after maturity the likelihood is that it is subject to another defense. Although the circulation of such an overdue instrument "does not give the indorsee notice of any specific matter of defense * * * yet it puts him on inquiry." Shaw, C. J. in *Fisher v. Leland*, 4 Cush., Mass., 456, 458, 50 Am.Dec. 805; *Morgan v. United States*, 113 U.S. 476, 496, 500, 5 S.Ct. 588, 28 L.Ed. 1044. If a note is payable in installments, however, circulation of the instrument after the due date of any installment except the last does not serve as a warning that the installment has not been paid and that the maker may have a defense, for the instrument was made to circulate until the maturity date of the last installment. The fact that it thus circulates does not put a transferee thereof on inquiry. Nor must the transferee of such an instrument expect to find a dated receipt on the note for each installment paid. The negotiable instruments law does not provide for such notations, and in any event they could be placed on the instrument by the transferor even though the installment had not in fact been paid. In the absence of any warning, the holder of such a note who takes it after the maturity date of any installment except the last has no reason to assume that installments that matured at a previous date have not been paid; he can assume that the ordinary course of business has been followed (Code Civ.Proc. § 1963(20) and that previous installments have been paid. His situation is similar to that of a holder of a note providing for the payment of installments of interest who acquires the note after the due date of one or more such installments. In many instances notes call for combined installments of principal and interest, and there is no more reason to deprive a holder of the rights of a holder in due course when he acquires a note without notice of a default in an installment of principal than there is when he acquires a note without notice of a default in an installment of interest. The

able discussion by the Supreme Court of Canada in *Union Investment Company v. Wells*, 39 Canadian Sup.Ct. 625, 635, with respect to a transfer after default in an installment of interest applies with equal force to a transfer after default in an installment of principal: "it is not argued here that the fact of the time fixed for the payment of interest being passed when the note was negotiated was in itself a circumstance of suspicion * * *; that would lead to a conclusion which nobody accepts, viz.; that whether the interest be in default or not in default the moment the date fixed for such payment is past the instrument is overdue within the rule. What then is the circumstance of suspicion? The failure to meet the obligation to pay? But that does not appear on the face of the instrument. And obviously the failure to pay the interest can be regarded as such a circumstance only on the hypothesis that the law imposes upon the person taking such an instrument after the time for such a payment is passed the duty to inquire whether the payment has been made; and not only that, but to ascertain at his peril whether it has been made. I own it seems to one to be abundantly clear that an instrument the negotiation of which is regulated by such a rule of law is not in the full sense of the term a negotiable instrument—that is to say, it is not negotiable as the commercial currency of the country is generally; and in particular, it is not negotiable as bills of exchange and promissory notes before maturity are negotiable. Consider the position, in this view, of an intending taker. If there has been a default he can acquire only such a title as his transferor can give him; and if (as must often happen) it should be impossible to ascertain this with certainty he would (obviously) be put upon an investigation of the title of his transferor. But it is the absence of the necessity of such an investigation which is the very thing that distinguishes current negotiable instruments from other classes of personal property; a distinction, as we have seen, the result of commercial necessity which requires that such instruments when taken in the ordinary course of business may, as regards

title, be taken with absolute confidence and without any of the doubt and suspicion which must follow the adoption of the rule contended for in cases to which it applies."

The holding has been adopted in other cases that if an installment of interest has fallen due and is unpaid a taker of the instrument without notice is not prevented from becoming a holder in due course. See cases collected in *Merchants Nat. Bank v. Smith*, 110 S.C. 458, 96 S.E. 690, 11 A.L.R. 1277; *Barbour v. Finke*, 47 S.D. 644, 201 N.W. 711, 40 A.L.R. 832; *Branan's Negotiable Instrument Law* (6th ed.) 567; 2 *Paton's Digest* 1976. Similarly, the holder of a note, the principal of which is payable in installments, cannot be prevented from obtaining the rights of a holder in due course as to future installments in absence of notice of nonpayment of a previously matured installment, for he is not put on inquiry as to matters that do not appear on the face of the instrument and as to which the circulation of the instrument is not a warning. To hold that any transferee of such an instrument must ascertain at his peril whether the previous installments have been paid would mean, as it would in the case of the nonpayment of an installment of interest, that the privilege of a holder of a negotiable instrument to be free from a duty to inquire into the relations between previous parties to the instrument would be denied the holder of an instrument that is payable in installments.

The governing rule has been stated in *United States v. Capen*, D. C., 55 F.Supp. 81, 83: "Where the principal of a note is payable in installments and one installment is overdue and unpaid at the time of the transfer of the note, the transferee is not a holder before maturity and hence is not a holder in due course, *unless he does not take with notice of the past-due installment.*" (Italics added.) Similarly in *City of New Port Richey v. Fidelity & Deposit Co.*, 5 Cir., 105 F.2d 348, 352, 123 A.L.R. 1352 it was stated that "default in an installment of principal *known to the indorsee* prevents his taking the paper as to unmatured installments free from defenses."

Italics added; see 10 C.J.S., Bills and Notes, § 313, p. 800. This rule is in conformity with Civil Code section 3133(2) N.I.L. § 52(2) providing that one is a holder in due course if he took the instrument "before it was overdue, and without notice that it had been previously dishonored, if such was the fact." (Italics added.) It has been held that an instrument is dishonored by nonpayment of an installment of interest (see cases cited in Merchants Nat. Bank v. Smith, 110 S.C. 458, 96 S.E. 690, 11 A.L.R. 1277, 1280); a fortiori it is dishonored by nonpayment of an installment of principal. The statute is specific, however, in requiring notice of dishonor to prevent a transferee from being a holder in due course. Thus, if a demand note is not paid upon demand, one who acquires it within a reasonable time after it has been issued is a holder in due course in absence of notice that upon demand payment was not made. See Britton, Bills and Notes, § 121; see, also, 2 Paton's Digest 1976. Since the statute now requires notice of dishonor to prevent a holder's being a holder in due course, authorities under the former law, which did not require such notice, do not control. It must be concluded, therefore, that in the absence of notice, the holder of a negotiable instrument is a holder in due course as to installments due after he became a holder even though the instrument was dishonored by a default in payment of a previous installment.

Knowledge by plaintiffs of the alleged nonpayment of the first installment was not set up in defendant's pleadings or found by the trial court. Nor does notice of dishonor follow from the fact that years later, when plaintiffs as pledgees of the notes brought action on them, they included the first installment in their complaint. Although plaintiffs inquired into the relation between the payee, their indorser, and the makers of the notes before they brought action on the notes pledged to them, their status as holders in due course can be affected only by notice at the time the notes were negotiated to them.

EDMONDS and SPENCE, JJ., concurred.

LUCICH v. LUCICH.

Civ. 13086.

District Court of Appeal, First District,
Division 1, California.

Sept. 3, 1946.

Rehearing Denied Oct. 3, 1946.

Hearing Denied Oct. 31, 1946.

1. Divorce ⇨184(4)

On appeal on the judgment roll alone from judgment in action for divorce, appellate court was required to presume that there was evidence in the record to support the findings of the trial court.

2. Divorce ⇨183

On appeal on judgment roll alone, where trial court found to be true allegations of the complaint charging cruelty and allegations of cruelty in defendant's cross-complaint were found to be untrue, appellate court had merely to determine whether the several alleged acts of cruelty charged in the complaint, if proved, would warrant the granting of an interlocutory decree of divorce. Civ.Code, §§ 92, 94.

3. Divorce ⇨184(6)

Findings will be liberally construed to support the judgment when the appeal from judgment in divorce proceeding is on the judgment roll alone.

4. Divorce ⇨162

Finding by trial court, in divorce action, "that since the marriage of plaintiff and defendant, the defendant has been guilty of extreme cruelty to plaintiff which conduct has destroyed the peace of mind and happiness of plaintiff and has caused her grief and mental suffering and has seriously impaired her health", was not a finding of fact but a conclusion of law which would not support a judgment of divorce. Civ.Code, §§ 92, 94.

5. Divorce ⇨162

A conclusion that a certain unspecified course of conduct inflicted grievous mental or physical suffering standing alone is a conclusion of law which will not support a judgment of divorce, since although such a finding is necessary and is the ultimate fact to be found under the codal section defining "extreme cruelty", unless the course of con-

duct causing the result is specifically found, the right to a review of the trial court's action would be vitiated. Civ.Code, §§ 92, 94.

6. Divorce ⚭150(2)

Grievous bodily injury or grievous mental suffering are the ultimate facts from which the conclusion of law is to be drawn that extreme cruelty exists as ground for divorce. Civ.Code, §§ 92, 94.

7. Trial ⚭404(3)

Where it clearly appears that the ultimate fact found is based upon and adduced from the findings of probative facts, and it is plain that the latter do not justify nor support the ultimate facts found, the findings of probative facts will control and so deprive the judgment of support.

8. Divorce ⚭150(2), 184(12)

Where trial court found to be true allegations, in complaint for divorce on ground of extreme cruelty, that husband impugned publicly the reputation of his wife for chastity with knowledge of the falsity of such charge, and beat his wife and took money from her through threats of violence, court's ultimate finding from these probative facts, that the acts so found did not constitute "extreme cruelty", required a reversal of judgment denying divorce. Civ.Code, §§ 92, 94.

9. Divorce ⚭6

Once a cause of action for divorce has been established, there is no discretion in the trial court to deny a divorce.

10. Divorce ⚭285

In action by wife for divorce, where it was impossible to determine from allegations of pleadings the parties' property rights and ambiguities relating thereto were carried into the findings of the trial court, court on appeal on judgment roll alone, in view of the discretion of the trial court, could not undertake to settle the property rights of the parties. Civ. Code, §§ 139, 140, 142, 143, 146.

11. Divorce ⚭231, 249(1)

Trial court in event of a denial of divorce would have power to grant support and maintenance even though no cause for

divorce existed and there would be no division of the property. Civ.Code, § 136.

12. Divorce ⚭186

Where, on appeal, it was determined that the trial court erroneously refused a divorce and the cause must be returned to the lower court for a determination of the property rights of the parties, the whole of the judgment must be reversed, so that the trial court may exercise its discretion in the matter of support and maintenance, in contemplation of a complete severance of the marital relationship.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action for divorce by Anna Katich Lucich against Mark B. Lucich, also known as Mark Lucich, wherein defendant filed a cross-complaint for a decree of separation. From judgment denying plaintiff a divorce and denying defendant's cross-complaint, but which permitted either party without prejudice to pursue any remedy they or either of them may have for any relief with respect to property or otherwise, and which awarded plaintiff \$150 a month for her support and maintenance, plaintiff appeals.

Judgment reversed with directions.

Joseph A. Brown and Robert L. Mann, both of San Francisco, for appellant.

Ivan N. Maroevich, of San Francisco, for respondent.

WARD, Justice.

The plaintiff appeals from a judgment in an action for divorce which denied her a divorce and denied her husband's cross-complaint for a decree of separation, but which permitted either party "without prejudice, * * * to pursue any remedy they or either of them may have for any relief with respect to property or otherwise" and awarded the plaintiff \$150 per month for her support and maintenance. The appeal is taken on the judgment roll alone and the appellant asks this court to grant a divorce and make a distribution of the

property on the basis of the findings of the trial court which she contends do not support the judgment but compel the contrary judgment which she seeks.

The trial court found: "That all of the allegations of paragraphs I, II, III, IV, V, VI and VII of plaintiff's complaint to be true, but in this behalf the Court finds that said acts of wrongdoing herein are such in the judgment of the Court as not to constitute nor amount to extreme cruelty."

The allegations of the complaint found to be true, which are material to this appeal, read as follows:

"VI That since the marriage of plaintiff and defendant, the defendant has been guilty of extreme cruelty to plaintiff, which conduct has destroyed the peace of mind and happiness of plaintiff and has caused her grievous mental suffering, and has seriously impaired plaintiff's health; that defendant has thereby wrongfully inflicted upon plaintiff grievous mental suffering without any excuse or without any cause or provocation on the part of plaintiff; that thereby plaintiff's happiness has been destroyed, and her life has been rendered miserable and unendurable. That plaintiff specifies some of said acts of extreme cruelty as follows:

"(a) That on a number of occasions defendant struck plaintiff and used physical violence on her.

"(b) That defendant frequently accused plaintiff of infidelity and threatened to publicly destroy her reputation for chastity.

"(c) That frequently when plaintiff was ill and received medical care, defendant would untruthfully and maliciously accuse her of having had an abortion.

"(d) That in a former action for divorce brought by plaintiff against defendant, which has since been dismissed without prejudice, defendant through his attorney in open Court on the trial of said action, both plaintiff and defendant and their counsel and the officers of the Court being present, charged plaintiff with infidelity and asked leave of the Hon. John J. Van Nostrand, the Judge presiding at said trial, for leave to file an amended answer alleging infidelity by plaintiff. That the Hon. John

J. Van Nostrand refused such permission unless defendant agreed to name a co-respondent in said pleading, which the defendant refused or was unable to do. That said charge was wholly false and known by defendant to be false, and was in execution of a threat that defendant would attack the reputation of plaintiff unless she withdrew all property demands against him.

"(e) That for a period of fourteen years, plaintiff worked as an employee of defendant in his restaurant above mentioned [alleged to be separate property in a prior paragraph found by the trial court to be true] in various capacities whether as waitress, cook or cashier under an agreement with defendant for payment to her of the same wages that would be received by a stranger. That plaintiff never received payment therefor in whole or in part, although defendant frequently promised payment. That the moneys so earned by plaintiff were used by defendant in the promotion of his restaurant business and the protection of his real estate and plaintiff thereby acquired a right of reimbursement for her community interest through the diversion of community funds by defendant to the advantage of his separate estate. That the amount of money so diverted by defendant over said period of fourteen years totaled the sum of \$13,-650.00. That plaintiff was afraid to insist on reimbursement of said sum through fear of physical violence and slanderous public attacks upon her reputation by defendant, who violently threatened plaintiff whenever she mentioned such reimbursement.

"(f) That for a period of ten years, plaintiff received from the estate of her deceased father the sum of \$60.00 per month, which defendant either compelled her to turn over to him or compelled her to spend for household expenses, through threats of physical violence or slanderous public attacks upon her reputation for chastity. That through such enforced contributions to the community funds, defendant was enabled to build up his restaurant business and protect his separate property. That plaintiff thereby acquired a right of reimbursement for her community interest, which defendant has refused to recognize.

That the amount of money so acquired by defendant from plaintiff for the advantage of his separate estate over said period of ten years totaled the sum of \$7200.00.

"VII. That plaintiff is without means to pay her attorneys for the institution and prosecution of this action and that she has incurred expenses therefor, and will incur further expense therefor; that a reasonable sum should be allowed plaintiff as and for her attorneys' fees incurred and to be incurred by bringing and prosecuting this action and for the costs thereof; that a reasonable sum should be allowed plaintiff as alimony for her support pending this action and as permanent alimony; that defendant should be ordered to refund to plaintiff the sums of money hereinabove alleged as having been taken by defendant out of the community to the advantage of his separate estate amounting to the sum of \$20,850.00."

To recapitulate, these alleged facts found to be true the trial court found did not "constitute nor amount to extreme cruelty." It is to be noted that there are no allegations with respect to community property except those above quoted which are contained in the portion of the complaint charging the acts constituting extreme cruelty. For the purposes of this opinion it is pertinent also to note that the prayer in respect to a division of property reads: "That this Court order and decree that plaintiff have and recover of and from defendant the sum of \$20,850.00 in reimbursement of the community interest of plaintiff for moneys of plaintiff used to the advantage of the separate property of defendant."

[1-4] Inasmuch as this is an appeal on the judgment roll alone, it must be presumed that there is evidence in the record to support the findings of the trial court. *Carlin v. Carlin*, 114 Cal.App. 186, 189, 299 P. 543. " * * * we have not before us a transcript of the testimony taken at the trial, but, every intendment being in favor of the findings made, the statement is not unwarranted that sufficient evidence, properly corroborated, must have been adduced by the appellant in support of the allegations in his complaint charging cruelty, for, as

already indicated, the trial court found that these several allegations were true. * * The allegations of the complaint being sustained by the findings, and keeping in view that the allegations of cruelty in respondent's cross-complaint were found to be untrue, it merely remains to determine whether the several alleged acts of cruelty charged in the complaint, if proved, would warrant the granting of an interlocutory decree [of divorce]." *Harman v. Harman*, 198 Cal. 695, 697, 247 P. 194. Although this is the general rule with respect to findings and is applicable in an appeal on the judgment roll, there is the further rule that all findings will be liberally construed to support the judgment when the appeal is on the judgment roll. *Anderson v. Anderson*, 68 Cal.App. 218, 221, 228 P. 715; *Ward v. Ward*, 15 Cal.2d 234, 236, 100 P.2d 773. Here the trial court purported also to find that the acts found to have occurred did not constitute extreme cruelty. In this connection it should be noted that one of the allegations in the complaint found to be true was "That since the marriage of plaintiff and defendant, the defendant has been guilty of extreme cruelty to plaintiff, which conduct has destroyed the peace of mind and happiness of plaintiff and has caused her grievous mental suffering, and has seriously impaired plaintiff's health. This supposed finding of fact is in irreconcilable conflict with the finding that "said acts of wrongdoing herein are such in the judgment of the Court as not to constitute nor amount to extreme cruelty." However, a finding concerning extreme cruelty in general terms is a conclusion of law. 9 Cal.Jur. 705, 725; *Bilger v. Bilger*, 54 Cal. App.2d 739, 741, 129 P.2d 752; and see *Franklin v. Franklin*, 140 Cal. 607, 608, 74 P. 155.

[5,6] Section 92 of the Civil Code provides that "extreme cruelty" is a ground for divorce. Section 94 of the Civil Code defines "extreme cruelty" to be "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." In effect the trial court here found that the conduct relied upon in the complaint and expressly found to have occurred, inflicted grievous mental suffering and grievous physical in-

jury but that in his judgment such conduct did not constitute extreme cruelty. Standing alone, a conclusion that a certain unspecified course of conduct inflicted grievous mental or physical suffering is a conclusion of law which will not support a judgment of divorce. This is the result the courts have reached because, although such finding is necessary and is the ultimate fact to be found under sec. 94, unless the course of conduct causing the result is specifically found, the right to a review of the trial court's actions would be vitiated. *Franklin v. Franklin*, supra. However, when such course of conduct is specifically found, the question of injury from that course of conduct is purely factual inasmuch as individual differences in personality make for different results from the same course of conduct. There are no findings in conflict with the affirmative fact that the specified conduct did inflict the injuries provided for in sec. 94 of the Civil Code. These injuries—grievous bodily injury or grievous mental suffering—are the ultimate facts from which the conclusion of law that the particular ground for divorce—extreme cruelty—exists is to be drawn. *Polk v. Polk*, 50 Cal.App.2d 653, 657, 123 P.2d 550; *Ungemach v. Ungemach*, 61 Cal.App.2d 29, 39, 142 P.2d 99; *Scheibe v. Scheibe*, 57 Cal.App.2d 336, 340, 134 P.2d 835; *Keener v. Keener*, 18 Cal.2d 445, 447, 116 P.2d 1.

[7, 8] However, if it could be said that the finding "that said acts of wrongdoing herein are such * * * as not to constitute nor amount to extreme cruelty" were one of ultimate fact "a reversal of the judgment is nonetheless required, for the case is brought within the rule that 'where it clearly appears that the ultimate fact found is based upon and adduced from the findings of probative facts, and it is plain that the latter do not justify nor support the ultimate fact found, that the findings of probative facts will control * * * and so deprive the judgment of support.'" *Noble v. Beach*, 21 Cal.2d 91, 99, 130 P.2d 426, 432; *Ungemach v. Ungemach*, supra, 61 Cal.App.2d at page 40, 142 P.2d at page 104. Impugning publicly the reputation of one's wife for chasity with knowledge of the falsity of such charge, beating one's

wife, and taking money from her through threats of violence would ordinarily cause both grievous mental and grievous physical suffering and this course of conduct and result the court found to be true.

[9] Once a cause of action for divorce has been established there is no discretion in the trial court to deny a divorce in California. *Harman v. Harman*, supra; *Kirkpatrick v. Kirkpatrick*, 152 Cal. 316, 92 P. 853; *Bilger v. Bilger*, supra; Ann. discretion as to denial of divorce of separation where statutory grounds are established, 74 A.L.R. 271. Although this court "is particularly reluctant to disturb the findings of the trial court in divorce cases, inasmuch as a proper decision depends to such a large extent, in this type of proceeding, upon the credibility to be accorded the testimony of witnesses" (III Nelson, *Divorce and Annulment*, 2d ed., 261) in view of the presumptions in favor of the evidence in the record in support of these findings, and in the absence of "a transcript of the testimony" (*Harman v. Harman*, supra), this court must reverse the judgment denying the divorce. It should be noted, however, that the defendant, respondent here, may appeal from the judgment of divorce necessitated by this conclusion in the event the record of the evidence does not support the findings.

[10] Appellant's second contention—that the findings necessitate an adjudication by this court that she is entitled to \$20,850 plus the \$150 per month for her support and maintenance—must be denied. Preliminarily it must be noted that the trial court's purported finding "that defendant should be ordered to refund to plaintiff the sums of money hereinabove alleged as having been taken by defendant out of the community to the advantage of his separate estate amounting to the sum of \$20,850.00" is but a conclusion from the preceding allegations and is mere surplusage. From subdivisions (e) and (f) of paragraph VI of the complaint it is impossible to ascertain first, whether the appellant seeks only her half of the community property represented by her wages which were used to the advantage of defendant's separate estate; second, whether

her separate property is now part of the community property or part of his separate property and consequently, to what extent she should be reimbursed; and third, to what extent, if at all, the separate estate was enhanced by the use of the moneys. The prayer of the complaint seems to seek recovery in a civil suit basis rather than for a division of the community property interests. These ambiguities as to theories and facts are carried into the findings. In this state of the findings, in the absence of any evidence, and in view of the discretion of the trial court under sec. 146 of the Civil Code, this court can not undertake to settle the property rights of the parties. *Bailey v. Bailey*, 60 Cal.App.2d 291, 296, 140 P.2d 693.

[11, 12] Although the court in the event of a denial of divorce would have the power to grant support and maintenance, even though no cause for divorce existed and there would be no division of the property (Civil Code, sec. 136; *Booth v. Booth*, 100 Cal.App. 28, 30, 279 P. 458; *Parnay v. Parnay*, 55 Cal.App.2d 703, 706, 131 P.2d 562), the award of support and maintenance must be reversed also. That award was made when the court considered it was not affecting the property rights and that the marriage relationship would still exist. This award was not given in lieu of community property rights, but it comes within the principles of non-separability considered in *Bailey v. Bailey*, supra, 60 Cal. App.2d at page 293, 140 P.2d. at page 695. Secs. 139, 140, 142, 143 and 146 of the Civil Code state many factors which must be considered by the court in determining the amount of an award for permanent support and maintenance, some of which are the separate property of the spouses and the division of the community property which is made upon the dissolution of a marriage. Where on appeal it is determined that the trial court erroneously refused a divorce and the cause must be returned to the lower court for a determination of the property rights of the parties, the whole of the judgment must be reversed so that the trial court may exercise its discretion in the matter of support and maintenance in contemplation of a complete severance of the marital relationship.

For the foregoing reasons the judgment appealed from is reversed with directions to the trial court to strike out from its findings all statements that the alleged acts of wrong doing which resulted in the infliction of grievous mental suffering and grievous physical injury "did not constitute extreme cruelty" and to enter an interlocutory decree of divorce on the ground of extreme cruelty in favor of plaintiff and appellant and to make such provision for the support and maintenance of the plaintiff as seems just after it has retried the issues as to the community property, exercising its discretion under sec. 146 and making specific findings with respect to the issues tendered.

PETERS, P. J., and SCHOTTKY,
Justice pro tem., concur.



75 Cal.App.2d 909

STOLTZ v. CONVERSE.

Civ. 7263.

District Court of Appeal, Third District,
California.

Sept. 4, 1946.

1. Automobiles ⇐147

The operation upon highway of a vehicle loaded to a height of more than 13 feet, 6 inches, and not the loading of vehicle in excess of height allowed by statute, constitutes the violation of law, and hence fact that truck, which was loaded to a height of 14 feet, and which allegedly caused injury to another truck driver by stopping in underpass because load was too high to pass through, was loaded by United States Government and not by owner, did not relieve the owner of liability for such injuries. Vehicle Code, §§ 586(j), 691, 697(a).

2. Automobiles ⇐244(14)

Evidence that truck was stopped in underpass in violation of statute was sufficient as respects negligence of driver to

sustain verdict against owner for injuries sustained by driver of another truck when it collided with a third truck which was forced to stop behind first truck. Vehicle Code, § 586(j).

3. Automobiles ⇨147

In action for injuries sustained by truck driver in collision with truck which had been forced to stop behind defendant's truck which had stopped in underpass in violation of statute because load was too high to pass through, fact that legend posted at underpass erroneously stated its height as being great enough to allow passage of defendant's loaded truck did not relieve defendant of liability, where defendant's driver did not testify that he relied on such legend and evidence showed he was familiar with highway. Vehicle Code, §§ 586(j), 691, 697(a).

4. Automobiles ⇨245(17)

In action for injuries sustained by truck driver in collision with truck which had been forced to stop behind defendant's truck which had stopped in underpass because its load was too high to pass through, whether driver of defendant's truck had a reasonable excuse so that stopping in violation of statute would not constitute negligence was a question of fact for jury. Vehicle Code, §§ 586(j), 691, 697(a).

5. Automobiles ⇨245(83)

In action for injuries sustained by truck driver in collision with truck which had been forced to stop near a curve in highway behind defendant's truck which had stopped in underpass, whether plaintiff was contributorily negligent in failing to see the other trucks in time to avoid collision was a question for jury.

6. Appeal and error ⇨1064(1)

Instruction that jury in assessing damages should consider, among other things, loss of earnings as general damages, was not reversibly erroneous, though verdict stated that it included loss of work, particularly where plaintiff testified without objection as to period of time that he was unable to work because of injury and amount of his earnings and was cross-examined on the subject.

7. Damages ⇨5, 142

Damages which necessarily result from act complained of are denominated "general damages" and may be proved under general allegation of damages, while those which are the natural consequences of act complained of, but not the necessary result of it, are termed "special damages".

See Words and Phrases, Permanent Edition, for all other definitions of "General Damages" and "Special Damages".

8. Damages ⇨162

Any objection to including damages for loss of time or impairment of earning power in award of general damages is waived by failure to object to evidence of such losses.

9. Appeal and error ⇨1064(1)

Instructing jury in language of statutes prohibiting stopping of vehicles on main traveled portion of highway outside of a business or residential district, though evidence did not disclose character of district in which accident occurred, was not reversible error, particularly where defendant's truck admittedly was being operated in violation of statute in that it was loaded to a height in excess of that permitted by statute. Vehicle Code, §§ 582, 583, 691, 697(a); Const. art. 6, § 4½.

10. Automobiles ⇨173(4)

A truck which because of the height of its load was unable to proceed through underpass was not a "disabled" vehicle within statute exempting such vehicles from the statutory prohibition against stopping on main traveled portion of highway. Vehicle Code, §§ 582-584.

See Words and Phrases, Permanent Edition, for all other definitions of "Disabled".

11. Automobiles ⇨173(4)

The word "disabled", as used in Vehicle Code section exempting "disabled" vehicles from statutory prohibition against stopping on main traveled portion of highway, means that a vehicle is mechanically defective and in a condition which prevents or makes it difficult to operate it on its own power. Vehicle Code, § 584.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Bernard A. Stoltz against R. N. B. Converse, individually and as an individual doing business under the firm name and style of Converse Trucking Service, and others, for personal injuries sustained in a truck collision. The action was prosecuted against named defendant only. Verdict and judgment for plaintiff, and named defendant appeals.

Judgment affirmed.

A. Dal. Thomson, of San Francisco, for appellant.

Thomas O'Hara and Robert A. Zarick, both of Sacramento, for respondent.

ADAMS, Presiding Justice.

Plaintiff sued defendants Machado, Fernandez Trucking Co., Converse Trucking Service and R. N. B. Converse, for damages for personal injuries suffered by him in an accident which occurred on January 10, 1944, in the underpass or tunnel adjacent to the town of Davis, where after a curve to the right (when traveling toward Sacramento) the highway descends at a 5% grade under the tracks of the Southern Pacific Railway Company. The action was prosecuted against Converse only, he being an individual doing business as the Converse Trucking Service. Trial by a jury resulted in a verdict in favor of plaintiff in the sum of \$3,064.58. Defendant's motion for a new trial was denied and this appeal followed.

The evidence reveals that plaintiff was an employee of Riske Truck Company, and was driving a Diesel tractor and semi-truck belonging to that concern, the overall weight of his equipment and load being about 30 tons. He was carrying a load of rice, bound for Sacramento from Chico. Defendant Machado was driving a truck and trailer belonging to Fernandez Trucking Co., and, at the time of the accident, was proceeding ahead of plaintiff and in the same direction. Ahead of Machado was a truck and trailer belonging to Converse, same being loaded with aeroplane wings belonging to the United States government, and operated by John Grizzle. The Converse equipment had an over-all

length of 56 feet, and, with its load, was 14 feet in height.

Plaintiff testified that as he approached the tunnel or underpass and made the turn therein to the right he observed the Converse truck sitting in the subway and the Fernandez equipment behind it, both being stationary; that he was traveling about 15 miles per hour and did not see same until he was within 35 or 40 feet of the Fernandez trailer; that he thought he could pull around same to the left but there was a car coming, so he pulled back to the right and applied his brakes, but was unable to bring his vehicle to a stop, and as a result struck the right corner of the Fernandez trailer and was thrown through his windshield. Injury sustained by him consisted mainly of a cut in the left wrist which severed some tendons and nerves and rendered the hand practically useless so that he no longer had any "grip" in same and could not hold or lift objects of any weight. He testified also that he was left handed, and there was medical testimony that the injury to the wrist was permanent in nature.

Grizzle, the driver of the Converse equipment, denied that he had stopped at the time of the collision, but stated that he had slowed down to a mile or a mile and a half per hour, and was looking up to see if his load would clear when he heard the noise of the collision; that the cab of his truck was in the tunnel, but the load had not yet reached the clearance point; that later he backed out of the tunnel as he could not have passed through without damaging his load; that he knew that the height of the underpass was 14 feet, and that his load was 14 feet high.

The first contention made on this appeal is that there was no showing of negligence on the part of defendant, and therefore insufficient evidence to justify the verdict; that defendant's equipment was loaded by the United States government, the owner of the aeroplane parts, and that it was also shown that, though a legend posted at the tunnel stated that its height was 14 feet, 4 inches, it was in fact but 14 feet. While appellant concedes that for the purposes of this appeal we must accept as true the testimony of plaintiff that at the time of

the accident appellant's driver was standing in the subway looking at the load, he argues that nevertheless there was a reasonable excuse for his stopping, as it was for the purpose of surveying the load with reference to the height of the tunnel; and that, though there was a technical violation of the statute in so stopping, it could not constitute negligence.

[1-4] As for the argument that the equipment was not loaded by defendant, it is not the loading of a vehicle in excess of the height (13 feet, 6 inches) allowed by statute (Vehicle Code, sec. 697(a) but its operation upon the highway (Vehicle Code, sec. 691) which constitutes the violation of law; and since we must assume that defendant's equipment was stopped in the tunnel in violation of section 586(j) of the Vehicle Code, it cannot be said that the evidence is insufficient to show negligence on the part of defendant. As for appellant's statement that the legend regarding the height of the tunnel was erroneous, it is sufficient to say that defendant's driver did not testify that he relied thereon; also the evidence shows that he was familiar with the highway. As for the argument that the violation of the statute by stopping in the tunnel was not negligence under the circumstances because there was a reasonable excuse for so doing, appellant cites *Lockie v. Pence*, 5 Cal.App.2d 172, 173, 42 P.2d 340; *Mora v. Favilla*, 186 Cal. 199, 207, 199 P. 17, and *Prescott v. City of Orange*, 56 Cal.App.2d 144, 132 P.2d 523. But those cases are not applicable here. In *Lockie v. Pence*, the parking of the truck involved in the accident was said not to be negligence because it broke down and it was impossible to move it, thus bringing the case within the exception provided by section 136 of the Motor Vehicle Act (now Vehicle Code, sec. 584) excepting disabled vehicles. *Mora v. Favilla* held no more than that a presumption of negligence from disobedience of an ordinance was not conclusive, but was subject to rebuttal "by evidence of an overruling necessity * * * to avoid more serious danger to pedestrians passing over that portion of the street." [186 Cal. 199, 199 P. 20.] At any event, whether appellant showed a reasonable excuse was, as was said in *Prescott v.*

City of Orange, supra, a matter of fact for the jury, and not one of law for this court.

Appellant's next contention is that plaintiff was guilty of contributory negligence as matter of law because it is conclusive that if he had been watching the highway he would have seen the Fernandez trailer before he reached the point 35 or 40 feet to the rear of it, at which point, as he testified, he first saw it. In this connection appellant relies upon the testimony of a surveyor who, prior to the trial, made certain observations as to visibility around the curve and into the subway, and prepared a map upon which he calculated measurements as to how far he could see from different points. On motion for a new trial defendants relied upon this testimony and made the same contention. The trial court, in its opinion rendered when denying said motion, stated: "A map was introduced showing the view a man would have standing two feet inside the white line. While objection was made and overruled to the introduction of this testimony, the Court pointed out that it was rather a question of the weight of the evidence as it was realized that the conditions were not the same, in that the plaintiff was sitting in the driver's seat in the equipment he was driving, and necessarily he was some distance farther inside the white line. It would be mere speculation for me to attempt to state how far inside the white line plaintiff was when he was driving along. In the first place while he said probably two feet, referring to the side of his truck, the distance necessarily is merely an estimate; again, whether the cab in the truck is located some distance from the side of the truck does not appear. The photographs and the diagram both show bushes along the right side of the highway, and, if we examine the photograph 'D' it will be seen that these bushes appear to shut off the view of the roadway beyond, particularly from where the cameraman may then have been standing, whether this condition existed at the time of the accident does not appear. The two pieces of equipment, defendant Converse's and also Machado's, with the space between them, occupied some distance from the tunnel, and the

rear end of the Machado equipment could not have been very far from the curve as the machine entered the highway leading to and through the tunnel. A good view of this portion of the highway will be seen by examining Exhibit 'E'. If we examine Exhibit D photo, it will be seen that the shrubbery or small trees at a point about where the roadway appears to turn to the right extend some distance over the edge of the highway, and doubtless would obstruct the view to some extent of the driver of any vehicle approaching from the west, if the same conditions as to shrubbery obtained at the time of the accident. It would not seem that defendant's showing in regard to the distance of the view of the highway was such as to make it obligatory on the jury to adopt the surveyor's estimate as final or conclusive on the question, so far as the curved portion of the roadway is concerned."

[5] We agree with this conclusion of the trial court and cannot say that under the evidence adduced plaintiff was guilty of contributory negligence as matter of law. Appellant asserts in his brief that plaintiff had an unobstructed view for 245½ feet, but this was flatly denied by plaintiff, and it was for the jury to determine whether plaintiff was or was not negligent under the circumstances of the case.

[6] Another ground for reversal urged by appellant is that at plaintiff's request the court instructed the jury that if they rendered a verdict in favor of plaintiff, in determining the amount of damages to be awarded to him they should take into consideration, among other things, loss of earnings as general damages. Appellant also asserts that the amount awarded by the jury for general damages (\$3,000) is excessive in that the verdict stated that it included "loss of work." It is asserted by appellant that "a loss of earnings, salary or wages is not necessarily sustained as a result of an accident; hence such items must be specially pleaded and are not recoverable unless so pleaded," citing: *Lombardi v. California Street Railway Co.*, 124 Cal. 311, 319, 57 P. 66; *Shaw v. Southern Pacific Railroad Co.*, 157 Cal. 240, 242, 107 P.

108; *Hoffmann v. Lane*, 11 Cal.App.2d 655, 659, 54 P.2d 477; and *Senegram v. Groobman*, 30 Cal.App.2d 514, 86 P.2d 859. But the cited cases do not support appellant's assertion.

[7] In the early case of *Treadwell v. Whittier*, 80 Cal. 574, 22 P. 266, 5 L.R.A. 498, 13 Am.St.Rep. 175, the complaint set forth the nature of plaintiff's injuries and alleged that they would permanently impair his health, strength and activity. The court instructed the jury that in assessing damages, if any, they might take into consideration the permanent loss and damage, if any was proved, arising from disability to plaintiff resulting from his injuries, which rendered him less capable of attending to his business than he would have been otherwise. It was held that there was no error in giving the requested instruction, the court saying, 80 Cal. at page 579, 22 P. at page 268, 5 L.R.A. 498, 13 Am.St.Rep. 175:

"Damages which necessarily result from the act complained of are denominated 'general damages,' and may be proved under the ad damnum clause, or general allegation of damage, while those which are the natural consequences of the act complained of, and not the necessary result of it, are termed 'special damages.'"

"The defendant must be presumed to be aware of the damages which necessarily result from the act done, and therefore he cannot be held to be taken by surprise when proof is offered of such necessarily resulting damage. But as to the damage naturally, though not necessarily, resulting from the act done, the defendant cannot be presumed to be aware of them, and therefore, in order to prevent a surprise on defendant, it must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it at the trial."

Also, 80 Cal. at page 580, 22 P. at page 268, 5 L.R.A. 498, 13 Am.St.Rep. 175:

"The court, in this instruction, only directed the jury to take into consideration in assessing the damages such as necessarily resulted from the injuries set forth in the complaint, if such injuries were proved by the evidence. That the injuries set forth

will necessarily render a person less capable of attending to his business is clearly apparent, and no argument is needed to make it clear."

In *Armstrong v. Ford*, 30 Cal.App.2d 347, 353, 86 P.2d 385, this court held that the evidence of plaintiff's earning capacity was competent under the issue tendered by the allegation in the complaint that because of the permanent character of his injuries plaintiff's earning ability would be impaired (citing *Treadwell v. Whittier*, supra, and other cases); that the issue of permanent impairment rendered the evidence of earning capacity competent; and that loss sustained on account of impaired earning capacity as a proximate result of the injury sustained may be considered under a general demand for damages. In *Lejeune v. General Petroleum Corporation*, 128 Cal.App. 404, 418, 419, 18 P.2d 429, the court instructed the jury that in arriving at the amount of damage they might consider plaintiff's loss of wages and the impairment of his earning power, if any. There, as here, appellant contended that the pleadings made no reference to a loss of wages or earning power, and that the instruction was therefore improper. But this contention was held to be unsound. Again, in *Wilcox v. Sway*, 69 Cal.App.2d 560, 571, 160 P.2d 154, the court, citing and quoting from *Castino v. Ritzman*, 156 Cal. 587, 105 P. 739, held that the value, if any, of plaintiff's time during the period she had been or would be disabled as the direct and proximate result of her injuries was an item included in her general damages, citing *Treadwell v. Whittier* and *Armstrong v. Ford*, supra, and other cases. There the appellant relied upon the same cases that appellant relies upon in this case, but the court pointed out that they were not pertinent since plaintiff was not seeking to recover for business expenses, loss of profits, damage to business or even the value of her services to such business, as was the situation in the cited cases. Also see *Zibbell v. Southern Pacific Company*, 160 Cal. 237, 251, 252, 116 P. 513; *Leiner v. Eng-Skell Co.*, 104 Cal. App. 228, 231, 285 P. 905; *Graham v. Yellow Cab. Co.*, 125 Cal.App. 141, 144, 13 P.2d 773; *Dutro v. Castoro*, 16 Cal.App.2d 116, 117, 60 P.2d 182.

[8] Furthermore, testimony by plaintiff regarding the period of time that he was unable to work because of his injury and as to the amount of his earnings was received without objection on appellant's part, and appellant's counsel cross-examined on the subject; and it has been held that even in jurisdictions where loss of time or impairment of earning power must be specially pleaded, if evidence of such losses is received without objection the objection that they were not pleaded is waived. See 15 Am.Jur. 758, and cases there cited.

[9] Appellant further contends that the trial court erred in instructing the jury in the language of sections 582 and 583 of the Vehicle Code because there was no evidence as to the character of the district where the accident occurred. No authorities are cited in this connection nor is it pointed out how or at all the reading of these sections was injurious to appellant. In view of Art. VI, section 4½, of the Constitution, this needs no further consideration, particularly since, as pointed out by the trial court, appellant's vehicle admittedly exceeded the height of 13 feet, 6 inches, the maximum allowed by law, and its operation upon the highway violated section 697(a) of the Vehicle Code, whether the scene of the accident was or was not within a business or residential district.

[10, 11] Appellant finally asserts that "for all practical purposes" defendant's equipment constituted a "disabled vehicle" within the exemption created by section 584 of the Vehicle Code. No authorities are cited in support of this contention, and it is contrary to the holding of this court as expressed in *Callison v. Dandero*, 51 Cal.App. 2d 403, 410, 124 P.2d 852. There it was argued that appellant's truck was disabled in the sense that it was unable to go forward because the road in front of it was blocked by a slide. We there held that the word "disabled" as used in the Vehicle Code means that a vehicle is mechanically defective when it is in a condition which prevents it from being operated on its own power; or when it is difficult to do so on that account. Also see *Dillon v. Sterling Rendering Works*, 106 Colo. 407, 106 P.2d

358, 361, in which it was held that a vehicle was not disabled within the meaning of a similar statute because frost had entirely covered the windshield, materially affecting visibility.

As we find no error in the record justifying reversal, the judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



75 Cal.App.2d 925

**MYERS et ux. v. SUPERIOR COURT IN
AND FOR CALAVERAS COUNTY.**

Civ. 7271.

District Court of Appeal, Third District,
California.

Sept. 5, 1946.

Rehearing Denied Oct. 4, 1946.

1. Courts ⇨475(1)

Prohibition ⇨10(1)

Where two tribunals have concurrent jurisdiction over the same parties and subject matter, the tribunal in which jurisdiction first attached is entitled to retain it exclusively, and prohibition lies to restrain the other tribunal from taking any further proceedings pending the complete exercise of such jurisdiction. Code Civ.Proc. §§ 416, 1102.

2. Courts ⇨479

The "subject matter" of action by purchasers for specific performance of contract for sale of property, and of action subsequently commenced by vendor in another county to quiet title to property, was such property and the respective rights of the parties therein under alleged contract for sale thereof, and courts of both counties had concurrent jurisdiction of subject matter as respects purchasers' right to stay proceedings in quiet title action pending final determination of earlier action commenced by purchasers. Code Civ.Proc. §§ 416, 1102.

See Words and Phrases, Permanent Edition, for all other definitions of "Subject Matter".

3. Courts ⇨475(1)

Superior court of county in which property was located did not have exclusive jurisdiction of action to quiet title thereto where subject matter of action included both real and personal property and respective rights and interests of the parties therein under an alleged contract for sale of the property. Code Civ.Proc. §§ 392, 395, 416; Const. art. 6 § 5.

4. Venue ⇨4

The constitutional provision dealing with place for commencing certain kinds of action pertaining to realty, and statutory provision dealing with proper place for trying such actions, do not apply where subject matter of the action is essentially transitory, as where personal property is involved or a cause of action of a personal nature is in good faith joined with a local cause of action, in which case statutory provision covering "all other cases" governs the place of trial. Code Civ.Proc. §§ 392, 395; Const. art. 6 § 5.

5. Venue ⇨4

The subject matter of action by purchasers for specific performance of contract for sale of realty and good will and personal property of hotel business conducted thereon, and to enjoin defendants from asserting any title or interest therein and of action by vendor to quiet title to such real and personal property, was essentially transitory as respects proper place of trial of such actions. Code Civ.Proc. § 395.

6. Courts ⇨475(1)

Prohibition ⇨10(2)

When superior court assumed jurisdiction over subject matter of action by purchasers for breach of contract for sale of property as of time when summons was served on complaint therein filed and continued to maintain jurisdiction after filing of amended complaint seeking specific performance of contract, the jurisdiction of such court was exclusive, and prohibition to arrest proceedings in excess of jurisdiction would issue to stay proceedings in action to quiet title to such property commenced by vendor in another county after summons had been served in purchasers' action. Code Civ.Proc. §§ 395, 416, 1102.

7. Specific performance ⇐116

Vendor, though not entitled to proceed with action to quiet title to property pending final determination of action previously instituted by purchasers in another county for specific performance of contract for sale of such property, could obtain the relief she sought by filing, in action instituted by purchasers, her answer or cross-complaint.

8. Courts ⇐479

Superior court which first acquired jurisdiction over subject matter and parties to action by purchasers for specific performance of contract for sale of property had jurisdiction to bring in all necessary parties, and fact that other persons besides purchasers were made parties defendant in action to quiet title to such property subsequently commenced by vendor in another county did not affect purchasers' right to have proceedings in quiet title action stayed pending final determination of action for specific performance. Code Civ.Proc. §§ 395, 416, 1102.

9. Courts ⇐479

Superior court which first acquired jurisdiction of subject matter and parties to action for specific performance of contract for sale of property was charged with the duty of litigating all the issues and giving all the relief to which any of the parties might be entitled under the pleadings, and fact that remedy sought in action to quiet title to the property subsequently commenced by vendor in another county was not precisely the same did not affect purchasers' right to have proceedings in quiet title action stayed pending final determination of action for specific performance. Code Civ.Proc. §§ 395, 416, 1102.

10. Prohibition ⇐28

The propriety of issuing a writ of prohibition depends upon the situation as it exists at the time when writ would issue. Code Civ.Proc. § 1102.

11. Prohibition ⇐28

In determining whether writ of prohibition should issue to stay proceedings in action by vendor to quiet title to property pending final determination of action for breach of contract for sale of such property

previously commenced by purchasers in another county, amended complaint seeking specific performance of contract, though filed after commencement of quiet title action, must be taken as basis of comparison, particularly where amended complaint then on file was relied on by purchasers when they moved for stay of proceedings in quiet title action. Code Civ.Proc. §§ 416, 1102.

Petition by Edward Myers and wife for a writ of prohibition restraining the Superior Court of the State of California in and for the County of Calaveras from proceeding with trial of a quiet title action. On issues of law raised by respondent's general demurrer to the petition.

Peremptory writ issued.

Arthur De Beau Carr, of Sacramento, for petitioner.

Jos. H. Huberty, of San Andreas, for respondent.

PEEK, Justice.

Petitioners seek a writ of prohibition restraining respondent Superior Court of Calaveras County from proceeding with the trial of a quiet title action filed in said court and involving property located in said county.

Upon petitioners' amended petition an alternative writ was issued; and the cause is before this court on issues of law raised by respondent's general demurrer to said petition.

The facts as alleged in the petition, or admitted by stipulation, are as follows:

On or about October 25, and 31, 1944, in the County of Sacramento, petitioners entered into a written contract with Margaret Garaventa wherein she agreed to sell and petitioners agreed to buy certain real and personal property in the town of Mokelumne Hill, Calaveras county, for the sum of \$15,000, to be paid in installments. Possession was delivered to petitioners, but title to the real estate was retained by the vendor pending payment of the full purchase price, and on June 16, 1945, they tendered said amount or balance but Margaret Garaventa refused and still refuses

to accept said tender or to convey title to the premises in question.

Thereafter on June 20, 1945, petitioners filed in the Superior Court of Sacramento County a complaint against Margaret Garaventa and two fictitious defendants, and summons thereon was served on her on June 21. Said complaint alleged in substance the facts set forth and showed in addition that the agreement in question included the sale of the hotel business which was being conducted on said premises known as "Peek Inn," and of the fixtures, furniture and stock of liquors.

It was further alleged that defendant Garaventa not only refused to execute and deliver to the plaintiffs a warranty deed, bill of sale, and certificate of title insurance, but also that she wrongfully converted to her own use certain of the liquor stocks, arbitrarily and capriciously refused to arbitrate the differences which had arisen between the parties, and interfered with the attempts of petitioners to sell the premises, property and business to a third person. Petitioners asked for compensatory and exemplary damages and the value of the personal property wrongfully converted.

On July 16, 1945, defendant filed her demurrer to said complaint and made a motion that the venue of the proceedings be changed from Sacramento County to Calaveras County.

On August 24, 1945, before a hearing was had on said demurrer and motion, said defendant filed a complaint in the Superior Court of Calaveras County against petitioners herein, naming also as defendants one Otis Coen and two fictitious persons. Summons was served on petitioners and Coen on the same date. Said complaint alleges that plaintiff is the owner of the said premises in the townsite of Mokelumne Hill, County of Calaveras, and all of the personal property and hotel equipment thereon or used in connection therewith; that the defendants, including the said petitioners, claim an estate or interest in the land and property adverse to her, which claim is without right or validity; and prays for a judgment quieting her title to all of said property.

On September 12, 1945, petitioners filed an amended complaint in their action then pending in the Superior Court of Sacramento County, alleging substantially the same facts as those set out in the original complaint, and in addition that the defendant Otis Coen has or claims to have some interest in said property but that such interest is subject and inferior to the rights of petitioners therein. The amended complaint, however, while alleging that petitioners have been damaged in the sum of \$25,000, does not ask for damages, but concludes with the following prayer:

"That the defendant be required to execute to these plaintiffs a good and sufficient deed to the said real property free and clear of all encumbrances and that defendant be required to execute necessary and sufficient instruments conveying title to said personal property and good will of the said business known as Peek Inn, and that upon a refusal to so execute and deliver said deed and other indicia of title as above set out, a commissioner be appointed by this Court to execute such deed and indicia of title of said personal property and good will, and that such transfer shall operate as a transfer to plaintiffs of said premises and said personal property and good will; that it be adjudged and decreed that plaintiffs are the owners of said personal property, in fee simple of said premises, free and clear of all encumbrances and that plaintiffs are the owners of said personal property, fixtures, stock in trade and good will as hereinbefore set out, and that defendant and each of them be restrained and enjoined from asserting any right, title or interest therein or thereto; and for such other and further relief as may be just and equitable and for costs."

On October 4, 1945, petitioners filed their demurrer to the complaint of Margaret Garaventa on file in the Calaveras County action, and at the same time made a motion requesting that the proceedings therein be stayed pending a final determination of their Sacramento County action.

On October 31, 1945, the Superior Court of Sacramento County made an order de-

nying the motion of Margaret Garaventa for a change of venue, and, no appeal having been taken therefrom, said order has become final.

On February 16, 1946, the Superior Court of Calaveras County made an order denying petitioners' motion for a stay of proceedings, and overruled their demurrer to the Garaventa complaint. Petitioners further allege herein that the Superior Court in and for the County of Calaveras will, unless prohibited, proceed with the trial and determination of the cause therein pending, and that a decree in favor of the plaintiff therein would be a bar to petitioners' recovery in the action pending in Sacramento County.

[1] It is apparent that the foregoing facts present a case based on the rule that where two tribunals have concurrent jurisdiction over the same parties and subject matter, the tribunal in which jurisdiction first attaches is entitled to retain it exclusively, and prohibition lies to restrain the other tribunal from taking any further proceedings pending the complete exercise thereof. *Browne v. Superior Court*, 16 Cal.2d 593, 597, 107 P.2d 1, 131 A.L.R. 276; *Slinack v. Superior Court*, 216 Cal. 99, 106, 13 P.2d 670; *Lee v. Superior Court*, 191 Cal. 46, 49, 214 P. 972; *Milani v. Superior Court*, 61 Cal.App.2d 463, 466, 467, 143 P.2d 402, 935; *Wright v. Superior Court*, 43 Cal. App.2d 181, 183, 110 P.2d 529; *Gorman v. Superior Court*, 23 Cal.App.2d 173, 176, 177, 72 P.2d 774; *De Brincat v. Morgan*, 1 Cal.App.2d 7, 10, 36 P.2d 245.

[2] At the outset of the proceedings the courts of both counties had concurrent jurisdiction of the subject matter of the actions which properly may be said to constitute or include real and personal property situated in Calaveras county and the respective rights and interests of the parties in and to said property under an alleged contract for the purchase and sale thereof. *Crew v. Pratt*, 119 Cal. 139, 148, 151, 51 P. 38; 40 Words and Phrases, Perm.Ed., pp. 361-366, defining "subject matter".

[3,4] The circumstance that the action filed in the respondent court in Calaveras county was one to try title did not give said court exclusive jurisdiction over the

subject matter thereof. It is well settled that section 5 of Article VI of the Constitution dealing with the place for commencing certain kinds of actions pertaining to real estate, and section 392 of the Code of Civil Procedure dealing with the proper place for trying such actions, do not apply where the subject matter of the action is essentially transitory (*Neet v. Holmes*, 19 Cal.2d 605, 611, 122 P.2d 557), as in a case where personal property is involved (*Maguire v. Cunningham*, 64 Cal.App. 536, 543, 222 P. 838), or where there is joined with a local cause of action, in good faith and not merely incidentally, a cause of action of a personal nature. *Turlock Theatre Co. v. Laws*, 12 Cal.2d 573, 578, 86 P.2d 345, 120 A.L.R. 786. In such cases, as far as the place of trial is concerned, the provisions of section 395 of the Code of Civil Procedure covering "all other cases" are controlling. *Brown v. Happy Valley Fruit Growers*, 206 Cal. 515, 522, 523, 274 P. 977; *Smith v. Smith*, 88 Cal. 572, 576, 26 P. 356; *Vaughan v. Roberts*, 45 Cal.App.2d 246, 253, 256, 113 P.2d 884. In the *Maguire* and *Vaughan* cases, the constitutional section is expressly mentioned in connection with the problem.

[5] In the present case, the subject matter of both actions is of an essentially transitory and personal nature—the one, an action to quiet title to personal as well as real property (*Maguire v. Cunningham*, supra, 64 Cal.App. at page 554, 222 P. 838; 22 Cal.Jur., p. 140, sec. 24), the other an action for the specific performance of a contract relating to such personal and real property (*Sheeley v. Jones*, 192 Cal. 256, 258, 219 P. 744) and for other relief of a personal character. *Cohen v. Hellman Commercial T. & S. Bk.*, 133 Cal.App. 758, 766, 24 P.2d 960.

[6] When the Superior Court of Sacramento County assumed jurisdiction over the subject matter, as of the time when summons was served on the complaint therein filed (C.C.P. sec. 416; *De Brincat v. Morgan*, supra, 1 Cal.App.2d at page 10, 36 P.2d 245), and continued to maintain jurisdiction after the filing of the amended complaint, the jurisdiction of said court was exclusive, and the threatened invasion

thereof presented a case for prohibition under the provisions of section 1102 of the Code of Civil Procedure which authorizes the use of the writ of prohibition to arrest proceedings of any judicial tribunal which are "without or in excess of the jurisdiction of such tribunal." *Slinack v. Superior Court*, supra, 216 Cal. at page 105, 13 P.2d 670. Whether interference with the jurisdiction of another court having priority constitutes action in excess of jurisdiction by reason of statutory mandate (see, *San Jose Ice & Cold Storage Co. v. City of San Jose*, 19 Cal.App.2d 62, 64, 65, 64 P.2d 1099, 65 P.2d 1324), or by reason of judicial precedent based on a rule of necessity or convenience (see 21 C.J.S., Courts, § 492, p. 747), it is no longer an open question in California that prohibition is a proper remedy when such interference threatens. (See cases cited at the beginning of the discussion in this opinion.)

[7] However, this conclusion would not prevent Margaret Garaventa, the plaintiff in the quite title action, from obtaining the relief she seeks by filing in the Superior Court of Sacramento County her answer (*Smart v. Peek*, 213 Cal. 452, 454, 2 P.2d 380; *Hungarian Hill Gravel Mining Co. v. Moses*, 58 Cal. 168, 177), denial (*Brooks v. White*, 22 Cal.App. 719, 721, 136 P. 500; *Pitcairn v. Harkness*, 10 Cal.App. 295, 297, 299, 101 P. 809), or cross-complaint.

[8] The additional fact that the parties to the two actions are not entirely identical does not preclude petitioners from prosecuting their action to completion, because the court wherein the suit will be tried, the Superior Court of Sacramento County, has jurisdiction to bring in all the necessary parties, and that is all that is required under the rule in question. *Slinack v. Superior Court*, supra, 216 Cal. at page 106, 13 P.2d 670; *Gorman v. Superior Court*, supra, 23 Cal.App.2d at pages 176-178, 72 P.2d 774. And of course the difference in the relative positions which the parties occupied at the outset of the two proceedings does not alter the essential nature of the proceedings or the issues involved therein. *Gorman v. Superior Court*, supra.

[9] Likewise of little moment is the circumstance that the remedies sought by the two actions are not precisely the same. *Milani v. Superior Court*, supra; *Wright v. Superior Court*, supra. The significant fact is that the Superior Court of Sacramento County has the power and is charged with the duty of litigating all the issues and giving all the relief to which any of the parties may be entitled under the pleadings. See, *Wright v. Superior Court*, supra, 43 Cal.App.2d at page 183, 110 P.2d 529. And as far as identity of issues is concerned, it is apparent that what the plaintiff in the Calaveras action seeks is a declaration that the defendants therein, petitioners herein, have no right, title, or interest in the property involved, and that in order to quiet title against them it would be necessary for the court to determine that they have no rights as purchasers under the contract of sale, which rights are the very subject of the action in Sacramento County.

[10, 11] It may be observed that, in considering the questions involved herein, we have taken the amended complaint which petitioners filed in Sacramento County as the basis of comparison, and not the original complaint. This is due to the fact that the propriety of issuing a writ of prohibition depends upon the situation as it exists at the time when the writ would issue. *Slinack v. Superior Court*, supra, 216 Cal. at page 106, 13 P.2d 670; *People v. District Ct. of Appeal*, 207 Cal. 361, 362, 278 P. 439; 50 Cor.Jur., pp. 662, 663, sec. 18. It is particularly appropriate that this be done in the present case, since it is the amended complaint which was relied on by petitioners when they made their motion in the respondent court for a stay of proceedings, the amended complaint having theretofore been filed in the Superior Court of Sacramento County.

Counsel for respondent, in opposing the issuance of the writ, advances the contention that petitioners fail to show that injury would result to them if the Calaveras County action were tried, because they could file their cross-complaint therein and have all the issues that have been raised litigated in the court of that county. This is substantially the same argument that was

made in the case of *Gorman v. Superior Court*, supra, and found to be without merit. In that case the court stated, 23 Cal.App.2d at page 176, 72 P.2d at page 775:

"If both actions are allowed to proceed to trial and he (petitioner) files a cross-complaint in the other action, as suggested by respondents, the petitioner will be subjected to two trials over one controversy, which may result in his being found negligent and liable for all of the damage accruing from the accident in one court and found free from negligence and entitled to recover his own loss in the other. A similar result might obtain as to some of the other parties. A mere statement of the situation is sufficient to demonstrate that the entire matter should be heard and determined in one court and to indicate that the issuance of this writ is necessary to prevent an injustice to some of the parties, including the petitioner."

In support of his contention on this phase of the case, counsel quotes an excerpt from the opinion in *Hamm v. San Joaquin etc. Canal Co.*, 44 Cal.App.2d 47, 55, 56, 111 P.2d 940, 945, a case dealing with the question of abatement where two actions between the same parties are filed in the same court. The distinction between such a situation and the one with which we are here concerned is lucidly stated in the paragraph preceding the excerpt relied upon by counsel for respondent, wherein the court in distinguishing the case of *Gorman v. Superior Court*, supra, stated in part as follows:

"That case arose over a conflict of jurisdiction between the courts of two different counties in each of which counties suits between the identical parties involving the same automobile casualty were filed. * * * It was there properly held in accordance with section 416 of the Code of Civil Procedure that the court in which the summons and complaint were first served was entitled to retain and control all subsequent proceedings in the litigation. * * * That situation does not exist in the present case where both actions are pending in the same court, and they are consolidated for trial and the court retains, not only the jurisdiction, but the control of all pro-

ceedings in both cases. The last-mentioned procedure is not in violation of section 416 of the Code of Civil Procedure."

Let the peremptory writ issue as prayed.

ADAMS, P. J., and THOMPSON, J., concur.



75 Cal.App.2d 907

PEOPLE v. PARRISH.

Cr. 4009.

District Court of Appeal, Second District,
Division 2, California.

Sept. 4, 1946.

1. Insane persons ⇨86

In prosecution for a lewd or lascivious act upon a child under 14 years of age, evidence sustained judgment that accused was a sexual pervert who should be sentenced to the penitentiary, and that he was not a sexual psychopath for whom sentence could be suspended and accused committed to state hospital. Pen.Code, § 288; Welfare and Institutions Code, §§ 5500-5516.

2. Criminal law ⇨494

Court was not bound to a preponderance of professional opinion appointed according to statute to examine defendant and report in writing as to whether defendant was a sexual psychopath, but, upon examination of the facts stated in the several reports of the three physicians, court was at liberty to reach its own conclusion and to make its finding in accord with the opinion of only one physician. Pen.Code, §§ 288, 1127b; Welfare and Institutions Code, §§ 5500-5516.

3. Criminal law ⇨1159(3)

In prosecution for a lewd or lascivious act upon a child under 14 years of age, determination of trial court, upon conflicting medical testimony of three physicians appointed according to statute to examine defendant to determine whether or not defendant was a sexual psychopath, that de-

fendant was a sexual pervert and not a sexual psychopath, would not be disturbed on appeal. Pen.Code, § 288; Welfare and Institutions Code, §§ 5500-5516.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Ralph W. Parrish was convicted of willfully and lewdly committing a lewd or lascivious act, and was also adjudged to be a sexual pervert and not a sexual psychopath, and he appeals from both judgments.

Judgments affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged with having violated Section 288 of the Penal Code. He entered a plea of guilty, applied for probation and for a hearing under the sexual psychopath provisions of the Welfare and Institutions Code, secs. 5500-5516. Pursuant to the statute the court appointed three physicians who examined appellant and made their reports in writing. It was stipulated that the reports were to be considered as evidence by the court.

Probation was denied, appellant was sentenced to the state prison for the term prescribed by law, and the court found and adjudged that he is a sexual pervert and not a sexual psychopath. The appeal is from that judgment and from the judgment of conviction.

The only ground stated by appellant for a reversal is that the evidence does not sustain the finding and judgment that he is not a sexual psychopath. Each of the physicians made a separate report setting forth the facts ascertained by him upon his examination of appellant and stated his individual conclusions. Two of them expressed the opinion that appellant is a sexual psychopath and one was of the opinion that he is a sexual pervert.

[1-3] The court was not bound by a preponderance of the professional opinion but

upon examination of the facts stated in the several reports was at liberty to reach its own conclusions and to make its findings in accord with the opinion of one of the physicians. *People v. Driggs*, 14 Cal.App. 507, 510, 112 P. 577; *People v. Hales*, 23 Cal. App. 731, 735, 139 P. 667; *People v. French*, 12 Cal.2d 720, 763, 87 P.2d 1014; *People v. Sainz*, 162 Cal. 242, 245, 121 P. 922; Penal Code, sec. 1127b. The determination of the trial court reached on conflicting evidence will not be disturbed on appeal.

The judgments appealed from are affirmed.

MOORE, P. J., and McCOMB, J., concur.



75 Cal.App.2d 865

KIRMAN et al. v. BORZAGE.

Civ. 15093.

District Court of Appeal, Second District,
Division 3, California.

Aug. 29, 1946.

Rehearing Denied Sept. 30, 1946.

Hearing Denied Oct. 24, 1946.

1. Appeal and error ⇨1201(4)

Where District Court of Appeal reversed former judgment for plaintiffs foreclosing mechanic's lien for plumbing work for insufficiency of complaint for failure to allege that plaintiffs were licensed plumbers, further statement that court found it inadvisable to limit further proceedings in case to a discovery of the facts respecting issuance of a plumbers' license to plaintiffs permitted any pertinent amendment to complaint.

2. Pleading ⇨229

Great liberality should be used by the courts in allowing amendments to pleading.

3. Limitation of actions ⇨127(9)

In action to foreclose mechanic's lien, where amended complaint does not change cause of action, the time to which 90-day statute of limitations runs is the filing of original complaint. Code Civ.Proc. § 1190.

4. Limitation of actions ☞127(11)

The test in determining whether pleading can be amended after time for filing an original action has expired is, not whether under technical rules of pleading a new cause of action is introduced, but whether an attempt is made to state facts which give rise to a wholly different legal obligation against defendant, and power to permit amendment will be denied only if a change is made in liability sought to be enforced against defendant. Code Civ.Proc. § 1190.

5. Limitation of actions ☞127(9)

Where judgment foreclosing mechanic's lien for plumbing work was reversed for failure of plaintiffs to allege that they were licensed plumbers, amended complaint for identical relief, and alleging that one of the plaintiffs, as administratrix of her deceased husband's estate, entered into plumbing contract and was exempt from licensing requirements as an officer of the court and that thereafter the claim on contract was distributed to plaintiffs, stated a cause of action and was not wholly different from original cause of action so as to be barred by 90-day limitation period. Business and Professions Code, §§ 7031, 7041; Code Civ. Proc. § 1190.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Mary Kirman and G. Paul Kirman, copartners doing business under the fictitious firm name and style of George W. Kirman Company, against Rena B. Borzage, to recover for labor and materials furnished under a contract for plumbing work on defendant's premises and to foreclose a mechanic's lien. From a judgment of dismissal entered after defendant's demurrer was sustained without leave to amend, plaintiffs appeal.

Reversed and remanded.

Henry M. Lee and Warren E. Libby, both of Los Angeles, for appellants.

Charles Murstein, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Plaintiffs appeal from an order sustaining defendant's demurrer to their third amend-

ed complaint without leave to amend and from the judgment of dismissal entered therein.

The instant appeal is the second one in the above entitled action, the first having been decided by this court and reported in 65 Cal.App.2d 156, 150 P.2d 3.

The facts are these: On September 3, 1941, defendant entered into an agreement with George W. Kirman Company as follows:

"Kirman Plumbing TRinity 5456 #35460
"Customer's Order Blank and Agreement
with GEO. W. KIRMAN CO.

"Los Angeles, Calif. 9/3/41.

"Rena B. Borzage to Geo. W. Kirman Co. 756 Merchant St.

"I, the undersigned owner of (or tenant on) the property located at 3974 Wilshire 146 N. Rossmore Street, California hereby authorize you to do the following plumbing work on said premises, for which I agree to pay for same upon demand. In the event of it being necessary for the Geo. W. Kirman Co. to file suit to collect the amount of this bill or any unpaid balance of same I hereby agree to pay all attorney's fees and all costs. Do the work as follows:
Alter plumbing as ordered.

"Charge Signed Rena B. Borzage
"Plumber C. Diel."

The property described above as "146 Rossmore" was property owned by defendant, and that described as "3974 Wilshire" was property formerly owned by defendant and her former husband. "C. Diel" was a plumber regularly employed by the George W. Kirman Company.

Pursuant to the agreement, certain plumbing alterations were made on the two parcels of property, the work being completed on November 27, 1941. On February 17, 1942, plaintiffs Mary Kirman and G. Paul Kirman as "copartners doing business under the fictitious firm name and style of George W. Kirman Company" filed a mechanic's lien for the sum of \$3,382.63 on the North Rossmore property owned by defendant. On April 27, 1942, plaintiffs, as copartners, brought suit to foreclose the mechanic's lien and for money due on the contract. The original complaint contained two counts, the first for the foreclosure of the lien, and the sec-

ond for \$3,679.61, for money allegedly due on the contract. The complaint recited that the plaintiffs were copartners doing business under the fictitious firm name of George W. Kirman Company, their certificate showing that name as having been recorded on December 4, 1941; that defendant entered into an agreement whereby the plaintiffs agreed to furnish material and labor for defendant; that they furnished same and that defendant was indebted to them. Defendant answered, setting forth separate defenses and counterclaim. After trial, the court found that plaintiffs were entitled to recover from defendant the sum of \$2,000, plus \$500 for attorney's fees and ordered a decree of foreclosure on the North Rossmore property. Both parties prosecuted an appeal, plaintiffs claiming that the \$2,000 judgment was for a sum less than that required by the evidence, while defendant urged (for the first time on appeal) that the complaint did not state facts sufficient to constitute a cause of action in that plaintiffs did not allege that they were duly licensed contractors at all times during the performance of the work, as provided for in section 7031, Business and Professions Code. This court, in reversing the judgment (65 Cal.App.2d 156, at page 160, 150 P.2d 3, at page 5), made the following statement:

"To sum up, we are of the opinion that neither \$2,000 nor \$3,679.61 clearly appears to be the proper amount to be awarded, so that we find it inadvisable to limit further proceedings in this case to a discovery of the fact respecting the issuance of a contractor's license to plaintiffs.

"The judgment in plaintiffs' favor having been rendered contrary to the express provisions of a penal statute, is reversed, with directions to the trial court to permit the plaintiffs to amend their complaint, if they be so advised, to allege that they were licensed as contractors when they undertook to perform and performed the work for which they are seeking compensation. The judgment having been reversed on defendant's appeal, plaintiff's appeal is moot, and is dismissed."

After the filing of the remittitur, plaintiffs filed their "Amended Complaint," "Second Amended Complaint" and "Third

Amended Complaint," respondent demurring to each. The grounds of defendant's demurrer to the "Third Amended Complaint," which was sustained without leave to amend, were that (a) it "does not state facts sufficient to constitute a cause of action," (b) the "purported first cause of action does not state facts sufficient to constitute a cause of action," (c) the "purported first cause of action is barred by the provisions of Section 1190 of the Code of Civil Procedure," and (d) the "purported second cause of action does not state facts sufficient to constitute a cause of action."

Plaintiffs' third amended complaint seeks to foreclose the identical mechanic's lien which was mentioned in the original complaint, and in the second count seeks to recover the same amount of money on the contract of September 3, 1941, that was sought originally. The complaint also names the same parties as plaintiffs and defendant. It differs, however, from the original in that instead of alleging that *plaintiffs* entered into the contract of September 3rd and furnished the labor and materials for which recovery is sought, it is alleged that *plaintiff Mary Kirman, as administratrix* of her deceased husband's estate, entered into the contract sued upon and performed the work and supplied the materials on defendant's property. The complaint alleges, among other things, that for many years George W. Kirman conducted a plumbing business under the fictitious firm name of George W. Kirman Company; that he died on April 25, 1939; that thereafter plaintiff Mary Kirman, his widow, was appointed administratrix of his estate and continued as such "to and including the 27th day of November, 1941" [the date when the work on defendant's property was completed]; that plaintiff Mary Kirman was authorized by order of the Probate Court to carry on the business of George W. Kirman "until the further order of said court"; that prior to the expiration of the license to operate the plumbing business issued to George W. Kirman, plaintiff Mary Kirman, as administratrix, applied for a renewal thereof; that she was advised by the "Contractors State License Board that the Contractors License law at said time provided that the Act [sec. 7041, Bus. & Prof. Code] 'does not apply to

officers of a court [provided] they are acting within the scope of their office," and the license fee tendered by her was refunded with the advice that "since you are legally appointed as administratrix of the estate, it is unnecessary for you to secure a license"; that *plaintiff Mary Kirman*, as administratrix, and "as an officer of said court" operated the plumbing business as a plumbing contractor "for and during the entire months of September, October, and November, 1941"; that by reason of the exemption provided for in section 7041, Business and Professions Code, and because the labor and materials were supplied during the months of September, October, and November, 1941, "while said Mary Kirman * * * was acting as an officer of said court, she was not obliged to have a license"; that since December 4, 1941, *plaintiffs* have been copartners doing business under the fictitious firm name and style of George W. Kirman Company, having recorded their certificate therefor on said date; that *plaintiffs* were the sole heirs of George W. Kirman, deceased, being his surviving son and widow, and became the owners of the plumbing business subject to the administration of his estate; that by virtue of the decree of distribution made on November 4, 1941, the "plumbing business, together with all its assets and liabilities and accounts receivable, were formally distributed" to the *plaintiffs*, the claim and demand sued upon being one of the assets distributed to them; that on February 19, 1942, "plaintiffs having theretofore acquired all right, title and interest in and to said plumbing business * * * by virtue of the decree of distribution made and entered in said Probate Proceedings No. 185,567 * * * and being then and there the owners and holders of the claim herein sued upon, filed * * * their claim of Lien and Notice of Lien in writing, duly verified." The second cause of action incorporated certain paragraphs of the first cause and alleged that *plaintiff Mary Kirman*, as administratrix of her deceased husband's estate, entered into the contract of September 3, 1941, and that she "performed all of the conditions of said contract on her part to be performed"; that *plaintiffs*, being then and there the owners of the account sued upon, did, on the 14th day of

April, 1942, upon defendant, Rena B. Borzage's demand, furnish her with a full, complete and detailed statement of all material, supplies and labor furnished, together with a detailed statement of what work was done at her special instance and request, showing the total amount due from said defendant unto these plaintiffs to be the said sum of \$3,679.61." The prayer of the complaint asked for the same relief as prayed for in the original complaint.

Respondent makes the point that the complaint alleges "that the Decree of Distribution was made on November 4, 1941; the Complaint further alleges the furnishing of labor and materials continued to November 27, 1941. Hence, it is obvious that, even if we were to assume, without conceding or admitting that Appellant Mary Kirman did not require a license while operating the business under the order of Court, the operation of the business by the administratrix terminated and ended at the time of the making of the Decree of Distribution, to-wit, November 4, 1941; while the materials and labor were furnished until November 27, 1941. It is manifest that Mary Kirman was not operating the business under Court Order after the Decree of Distribution was made on November 4, 1941, and therefore not exempt from the mandatory license provisions during all of the time that the materials and labor were furnished, because materials and labor were furnished, as Appellants allege, until November 27, 1941." The point is not well taken since Mary Kirman did not file her receipts from distributees until November 29, 1941, and was not discharged, as administratrix, until December 5, 1941, eight days after the completion of the work.

[1-3] It was respondent's argument in support of her demurrer, and is likewise urged on appeal in support of the trial court's action in sustaining the demurrer, that the plaintiffs are proceeding upon "an entirely different cause of action" in that the third amended complaint alleges that *plaintiff Mary Kirman*, as administratrix, performed the work and furnished the materials, while the original complaint, as well as the first and second amended complaints, allege that *plaintiffs*, as copartners, fur-

nished the labor and materials; that, therefore, the plaintiffs have not amended their complaint in "conformity with the express and limited permission and authority granted them" in the former appeal. We have reread our opinion filed upon the former appeal and instead of finding permission and authority to amend expressly limited, we note, as we have already quoted, the following passage: "we find it inadvisable to limit further proceedings in this case to a discovery of the fact respecting the issuance of a contractor's license to plaintiffs." This language opened the gates for the introduction of any pertinent amendments. See *Ginsberg v. Faraone*, 126 Cal.App. 337, at page 343, 14 P.2d 777, at page 779, where the following appears: "In both the original and the amended complaints, it was sought to foreclose the identical lien, for the identical work, labor, and materials, arising out of the identical transaction and covering the same property." The opinion then refers to the case of *Frost v. Witter*, 132 Cal. 421, 424, 64 P. 705, 706, 84 Am.St.Rep. 53, to the effect that "great liberality should be used by the courts in allowing amendments." In the *Ginsberg* case, as in the instant appeal, the claim was made on demurrer that the action was barred by section 1190 of the Code of Civil Procedure, requiring the filing of an action to foreclose a mechanic's lien within ninety days after completion of the work. In that case the foreclosure suit was filed May 25, 1926, and did not go to trial until after August 26, 1929, when the second amended complaint was filed. The court held (126 Cal.App. at page 343, 14 P.2d at page 780): "Where the cause of action is not changed, the time to which the statute of limitations runs is the filing of the original complaint."

[4] In discussing the trial judge's power to permit amendment of pleadings, the court in *Klopstock v. Superior Court*, 17 Cal.2d 13, at page 20, 108 P.2d 906, at page 910, 135 A.L.R. 318 sets forth the test: "In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the

court says in the *Frost* case, supra, 132 Cal. at page 426, 64 P. [705], 84 Am.St.Rep. 53, for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; *the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant.*" (Italics ours.)

[5] We are satisfied that the third amended complaint stated a cause of action. The judgment is reversed and the cause remanded for further proceedings.

SHINN and WOOD, JJ., concur.



75 Cal.App.2d 917

LA LUMIA et al. v. NORTHERN CALIFORNIA PACKING CO. et al.

Civ. 7264.

District Court of Appeal, Third District,
California.

Sept. 4, 1946.

I. Venue ⇐41

A contract for sale and delivery of grapes to plaintiffs' winery in San Joaquin county was to be performed in San Joaquin county, in which suit for damages for breach of contract was properly commenced, and venue would not be changed to Stanislaus county in which one of defendants resided and in which the vineyard was located, notwithstanding provision in contract that plaintiffs would pay a designated sum per ton roadside at vineyard in Stanislaus county, where such provision related only to price of grapes and not to place of delivery. Code Civ.Proc. §§ 395, 473.

2. Venue ⇨16

An action for damages for breach of contract to sell and deliver grapes at plaintiffs' winery in San Joaquin county could be commenced in the county where the obligation was to be performed, or in the county where the contract was entered into or in the county where any of the defendants resided. Code Civ.Proc. § 395.

3. Contracts ⇨143

A contract must be construed, if reasonably practicable, so as to give effect to every provision and part thereof. Code Civ. Proc. § 1858; Civ.Code, § 1641.

4. Appeal and error ⇨1008(3)**Contracts** ⇨176(1)

The construction of language of contract, in absence of other evidence, is purely a question of law, and reviewing court is not bound by the trial court's construction, but must make the final determination in accordance with the applicable principles of law.

5. Contracts ⇨143

A court can neither add or reject material stipulations in contract.

6. Venue ⇨76

Defendants' affidavit, stating no probative facts, but merely that defendants had changed their mind regarding construction of contract which was the subject of the action, was insufficient to require granting of defendants' motion to vacate former order denying change of venue and to grant change of venue for mistake of facts or inadvertence. Code Civ.Proc. § 473.

7. Venue ⇨76

On motion to vacate former order denying change of venue and to grant change of venue for mistake of facts or inadvertence, applicant must state in his affidavit the probative facts showing the mistake of facts, and his mere conclusion regarding construction of a contract is insufficient. Code Civ.Proc. § 473.

8. Venue ⇨41

If action for breach of contract is properly filed in county in which contract is to be performed, trial court has no discretion to change place of trial from such county on account of the mere residence of

a defendant in another county. Code Civ. Proc. § 395.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Emanuel La Lumia and Ignatius Russo, partners under the firm name and style of Farmington Winery, against Northern California Packing Company; N. Ghiz and Frank Y. Khinoo, doing business under the firm name and style of Northern California Packing Company, and others, for damages for breach of contract to sell and deliver grapes. The action was begun in San Joaquin County. From an order granting a change of venue to Stanislaus County, the plaintiffs appeal.

Order reversed.

Darrah & Ellis, of Stockton, for appellants.

Donald B. Fowler and W. Coburn Cook, both of Turlock, for respondents.

THOMPSON, Justice.

This is an appeal by plaintiffs from an order of the Superior Court of San Joaquin County, (a) setting aside a previous order denying change of venue, and (b) granting change of venue to Stanislaus County.

The allegations of the complaint are to the effect that the plaintiffs are partners operating under the name of Farmington Winery; that defendants N. Ghiz and Frank Y. Khinoo are doing business as a partnership under the firm name of Northern California Packing Company; that on the 28th of September, 1944, by a written contract plaintiffs purchased from defendants approximately 800 tons of grapes produced during 1944, for the purpose of making wine or other products at \$105 per ton, roadside. It is also alleged that defendants agreed to deliver the grapes to the winery at Farmington, San Joaquin County; that at the time of making the contract the plaintiffs gave to defendants \$5,000 as advance payment; that defendants delivered only 15½ tons and failed to deliver the remaining 784½ tons of grapes; that during the period when the same quantity and quality of grapes could have been purchas-

ed on the market in San Joaquin County the price had increased \$35 per ton and the grapes so undelivered would have been worth \$27,457.50 more than the contract price. Accordingly the plaintiffs ask damages in that sum.

Defendants appeared by demurrer and filed notice of motion for change of venue to Stanislaus County, basing said motion on an affidavit by Frank Y. Khinoo, stating: That he is a bona fide resident of the City of Turlock, Stanislaus County; that N. Ghiz is a resident of the City of Glendale, County of Los Angeles; that under the terms of the contract the "Northern California Packing Company was to deliver to the Farmington Winery warehouse, all grapes purchased roadside in the County of Stanislaus; that said contract, according to the said terms, was to be performed in the County of Stanislaus." A counter affidavit was filed by Ignatius Russo, one of the plaintiffs, which alleges that the grapes were to be delivered at the winery or distillery at Farmington, San Joaquin County; that by reason of the fact said grapes were to be delivered to the winery of plaintiffs at Farmington in the County of San Joaquin the Superior Court of San Joaquin County is the proper court for the trial of the action.

The motion was, on September 12, 1945, denied by the court.

The defendants, on September 24th, filed a new notice of motion for change of venue, supported by two affidavits of Frank Y. Khinoo, the first one setting forth his residence and that of N. Ghiz and stating that the contract was entered into and was to be performed in the County of Stanislaus. The second affidavit states that affiant previously, through mistake and inadvertence, made the following statement: "The Northern California Packing Company was to deliver to the Farmington Winery warehouse all grapes purchased roadside in the County of Stanislaus"; that said statement does not represent the true facts or intention of affiant; that affiant intended to state that the grapes were sold according to the terms of the contract at \$105 per ton roadside; that all the grapes were situate in the County of Stanislaus; that buy-

er was to take possession of grapes in Stanislaus County and furnish transportation therefrom to Farmington in the County of San Joaquin.

The notice of motion incorporates a copy of the contract which specifically provides that "Said crop to be delivered at the winery or distillery at Farmington, California." The notice then concludes: "That there was inadvertence and mistake because the said Frank Y. Khinoo did not fully understand the statements made in said affidavit and did not intend to make such statement."

A counter affidavit was filed by one Joe Chiana, stating that at the time of the making of the contract he was the duly authorized agent of the plaintiffs and as such signed said contract on behalf of Farmington Winery; that the defendant Frank Y. Khinoo stated to affiant that the sellers would deliver the grapes to the winery of the Farmington winery and "that the sellers would take care of the trucking and that the Farmington Winery would pay for the hauling." A further affidavit was filed by plaintiff Emanuel La Lumia to the effect that 15½ tons of grapes were delivered to the winery at Farmington and plaintiffs thereafter paid defendants for hauling said grapes from roadside Stanislaus County to said winery.

On September 28, 1945, the court made an order that the order denying change of venue be set aside, and ordered that the motion for change of venue be granted. From these orders the plaintiffs have appealed.

[1,2] We are of the opinion the trial court inadvertently changed the place of trial to Stanislaus County since the contract, which is the basis of the action for damages for breach thereof, as the complaint alleges specifically provides that it is to be performed by delivery of the grapes in San Joaquin County wherein the suit was properly commenced. Under the circumstances of this case plaintiffs had the option to commence this action for damages for breach of contract to sell and deliver grapes at plaintiffs' winery in Farmington, San Joaquin County, in: (1) The county where the obligation was to be performed, (2) the county where the contract was entered into, or

(3) the county where the defendants, or any of them, reside. San Joaquin County was therefore a proper county in which to commence and maintain the action. Sec. 395, C.C.P.; 55 C.J. sec. 1110, p. 1120. Clearly, the written contract provides for performance thereof by delivery of the grapes by defendants to plaintiffs' winery at Farmington, San Joaquin County. The contract definitely states:

"Said crop to be delivered at the winery or distillery at Farmington [San Joaquin County], California. * * * It is understood that said grapes are purchased for the purpose of crushing for the making of wine or other products at the winery or distillery *where said grapes are to be delivered*, and said grapes shall be delivered at the time or times when the same can be crushed and utilized *at said point of delivery*. * * *

"Buyer shall have the option to refuse to accept any of said grapes that shall in any manner not come within the specifications of this contract *at the time of delivery*. * * * Said grapes shall be weighed * * * at the plant *where said grapes are to be delivered*. * * *"

It is true that the contract, with reference to the quantity, price and varieties of grapes to be purchased, further provides as follows:

Tons	Variety	Priced per	Sugar per
800 more	all variety	Ton	Cent
or less		\$105.00 road-	
		side	

The foregoing quoted language follows a preceding separate paragraph of the contract which specially declares that "Said crop to be delivered at the winery or distillery *at Farmington, California*." Clearly, the price per ton to be paid "roadside" is separate and distinct from the requirement to deliver the grapes "at the winery * * * at Farmington [San Joaquin County], California." It may be reasonably reconciled with numerous statements of the contract requiring delivery at Farmington, to mean that plaintiffs will pay per ton \$105.00 "roadside", at the vineyard in Stanislaus County where the grapes are produced, but

that defendants must deliver them at Farmington, and plaintiffs will pay in addition to the stipulated purchase price of \$105 per ton the cost of transporting them from "roadside" to the winery at Farmington. That is the exact construction placed upon the contract by both parties. The affidavits of appellants which were presented on the motion for change of venue, and which are not controverted, aver that it was agreed "sellers would deliver grapes to the winery * * * at Farmington, California; that the sellers would take care of the trucking and that the Farmington Winery *would pay for the hauling*," from the vineyard "roadside" to the winery at Farmington.

In support of defendants' recognition of that construction of the contract, plaintiff, La Lumia, further averred that, "defendants * * * did deliver about 15½ tons of grapes to the winery of the plaintiffs at Farmington, San Joaquin County, California, and that thereafter plaintiffs paid the defendants for hauling said grapes from roadside Stanislaus County to said winery."

The language of the contract that plaintiffs agreed to pay "\$105.00 road side" relates only to the price of the grapes and not to the place of delivery. It indicates that the net price to be paid defendants was \$105.00 per ton and that plaintiffs would agree to defray the cost of transporting them from "roadside" to the winery at Farmington any other construction would result in rejecting entirely the specific requirement to deliver them at the winery. The foregoing construction is necessary to give effect to both provisions.

[3] In view of the established rule that a contract must be construed if reasonably practicable, so as to give effect to every provision and part thereof (Sec. 1641, Civil Code; Sec. 1858, Code Civ.Proc.; 4 Cal.Jur. Ten Year Sup. 1943 Rev., pp. 111-112, sec. 165), we are impelled to hold that the written agreement to sell the grapes required defendants in performance thereof to deliver them at the winery in San Joaquin County at plaintiffs' cost of transportation; and that it was therefore a proper county in which to maintain the cause of action. It follows that the trial court therefore in-

correctly construed the contract and erroneously granted the motion for change of venue to Stanislaus County.

[4, 5] The construction of the language of a contract, in the absence of other evidence, is purely a question of law. Under such circumstances a reviewing court is not bound by the construction thereof by the trial court, but must "make the final determination in accordance with the applicable principles of law." Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, 830; 6 Cal. Jur. sec. 192, p. 326. A court may neither add nor reject material stipulations. A trial court has no such discretion on a motion for change of place of trial or otherwise.

In the present case the affidavit of defendants states no probative facts. It merely states their conclusion regarding the construction of the language employed, which is clearly wrong. Their affidavit shows that defendants' conclusion is based solely on the language of the contract. On the first application for change of venue, which was denied, affiant averred that "by the terms thereof, to-wit: and as more specifically *set forth in said contract*, the said Northern California Packing Company *was to deliver to the Farmington Winery Warehouse*, all grapes purchased roadside in the County of Stanislaus; that the said contract, *according to the said terms*, was to be performed in the County of Stanislaus." Based upon that language and upon the court's construction of the contract, the trial court correctly determined that the grapes were to be delivered at the winery in San Joaquin County, and denied the motion. Later, upon a renewal of that motion under Section 473 of the Code of Civil Procedure to vacate the former order and to grant the motion for change of venue on account of alleged mistake and inadvertence of the affiant Khinoo in construing the contract, it was merely stated that the former admission that the grapes were to be delivered "to the Farmington Winery warehouse" was erroneous and that affiant "intended to state, * * * that the buyer, the Farmington Winery, was to accept delivery of the grapes so purchased roadside in the County of Stanislaus."

[6] The respondents concede that the contract and the affidavits on motion for change of venue were the only evidence considered by the court. The final affidavit for relief under section 473 contains no statement of probative facts which would justify the court in assuming that the first order denying the change of venue was rendered on account of the mistake or inadvertence of defendants or the court. It contains no statement of facts except the conclusion of the affiant that the contract required delivery of the grapes at "roadside" instead of at the winery in Farmington. The final affidavit merely shows that affiant changed his mind regarding the construction of the contract. The construction of the contract was a pure question of law for determination of the court, and not one for the affiant to decide. We are of the opinion there was no showing of mistake of facts or inadvertence warranting the setting aside of the original order denying the change of venue and entering a contrary order based upon the same facts.

[7] To authorize a court to grant relief under section 473 for mistake or inadvertence, it is necessary for the applicant therefor to state in his affidavit the *probative facts* showing his mistake of facts. His mere conclusion regarding the construction of a contract is insufficient. California Bean Growers Ass'n v. C. H. & O. B. Fuller Co., 78 Cal.App. 522, 248 P. 967, 15 Cal.Jur. sec. 126, p. 25. In the preceding cited case an order changing the place of trial was reversed. The court said, 178 Cal.App. at page 524, 248 P. at page 968:

"The appellant claims that the statement in Mr. Fuller's affidavit is but the conclusion of the affiant. We think that that contention is correct. On the hearing of the motion to change the place of trial the very fact in dispute was the question as to where the contract was made. When such is the case, the witness should state the probative facts and leave the court or jury to draw its conclusion therefrom."

In the preceding case the question was in what county the contract was made. In the present case the question is in what county was the contract to be performed

or fulfilled. The principle governing both questions is the same. This case required a judicial construction of the contract. In 15 California Jurisprudence, page 25, section 126, it is said:

"The mistake or inadvertence which will justify equitable relief may be the mistake of the court; it cannot, however, be a mistake of law or an inadvertent conclusion as to what the law is, but must be a mistake or inadvertence in doing something not intended to be done."

[8] The court had no discretion to change the place of trial on account of the mere residence of one of the defendants, if the case was properly filed in the county in which the contract was to be performed. It was so filed.

The order for change of venue and the order setting aside an order denying defendants' motion to change the place of trial are reversed.

ADAMS, P. J., and PEEK, J., concur.



75 Cal.App.2d 906

PHOTOCHART et al. v. DEL RICCIO.

Civ. 15293.

District Court of Appeal, Second District,
Division 2, California.

Sept. 4, 1946.

Appeal and error ⇐1157

Where licensor granted licensees an exclusive license to use patented device for photographing finishes of horse races and agreed that he would not compete with licensees for five years after date of agreement, and licensees in suit against licensor obtained preliminary injunction restraining licensor from competing with licensees' use of the device at race tracks "pending the final determination of this action", and when licensor's appeal came before District Court of Appeal more than five years

had elapsed since date of agreement, order granting preliminary injunction was reversed as case was moot.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by the Photochart and others against Lorenzo Del Riccio to enjoin the defendant from violating agreement whereby defendant granted plaintiffs an exclusive license to use a patented device for photographing the finishes of horse races and agreeing not to compete with plaintiffs for a period of five years after the date of the agreement. From an order granting a preliminary injunction, the defendant appeals.

Order reversed.

B. E. Ahlport and Caryl Warner, both of Los Angeles, for appellants.

J. Wesley Cupp and Robert E. Sease, both of Los Angeles, for respondents.

WILSON, Justice.

By an agreement in writing dated June 25, 1941, appellant, as licensor, granted to respondents an exclusive license to use a patented device known as "photochart" or "photochart camera" for photographing the results or finishes of horse races and other forms of racing for a period of 17 years, upon the payment of royalties in the amounts stated in the agreement. Appellant agreed that he would not compete with respondents for a period of five years after the date of the agreement.

In their complaint, which was filed on October 11, 1945, respondents alleged that appellant was doing and threatening to do various acts which, in violation of the agreement, would be in competition with respondents' activities in the use of the device at race tracks throughout the world.

Upon respondents' application, and after a hearing at which affidavits were presented by both parties, the court issued a preliminary injunction on November 16, 1945, restraining appellant "pending the final determination of this action" from doing any of the acts complained of by respondents, from which order defendant has appealed. No brief has been filed nor

appearance made upon this appeal by respondents.

Since, by the terms of the agreement, appellant was not prohibited from competing with respondents after June 25, 1946, the order enjoining the acts detailed in the complaint for the indefinite period until "the final determination" of the action was beyond the power of the court. The term during which respondents were entitled to be safeguarded against competition having expired they are no longer entitled to the protection of the order.

The order granting the preliminary injunction is reversed.

MOORE, P. J., and McCOMB, J., concur.



75 Cal.App.2d 899

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. CHICHESTER TRANSP. CO.

Civ. 13079.

District Court of Appeal, First District,
Division 1, California.

Sept. 4, 1946.

1. Statutes ☞190

Taxation ☞539

The section of the Unemployment Insurance Act relating to time within which Employment Stabilization Commission could bring an action, as it was enacted in 1939, is unambiguous and it permits a suit for collection of unemployment contributions outside the period prescribed by limitation statute contained in Code of Civil Procedure regardless of intent of taxpayer, where no return has been filed. Gen. Laws, Act 8780d, § 45.2; Code Civ.Proc. § 338, subd. 1.

2. Constitutional law ☞53

The right to construe a pre-existing statute belongs to the judiciary, which cannot be forced to construe such statute in accordance with legislative interpretation,

although Legislature has a right to define terms of a statute for the future.

3. Constitutional law ☞186

The Legislature cannot revise the operation of an existing law in the form of an amendatory statute to affect past transactions.

4. Limitation of actions ☞6(10)

The 1943 amendment to Unemployment Insurance Act adding to the provision suspending application of limitation statute, where no contribution report is filed, the requirement of an intent to evade provisions of the act or an erroneous return and declaring that amendment is merely for clarification of original intention of Legislature and that section as amended should be construed as though it had always read as it was when amended, is not controlling on transactions prior to effective date thereof which are governed by statute as it was before amendment. Gen.Laws, Act 8780d, § 45.2; St.1943, p. 3054, § 4.

5. Appeal and error ☞949

Limitation of actions ☞6(10)

Any effect which can be given to legislative intent to affect existing causes of action for recovery of delinquent contributions due under Unemployment Insurance Act by the 1943 amendment respecting limitations, where no contribution report has been filed, has no application until a reasonable time has passed, and trial court's determination of what constitutes a reasonable time will not be reversed unless it can be said that its conclusion is an abuse of discretion. Gen.Laws 8780d, § 45.2; St. 1943 p. 3054, § 4.

6. Limitation of actions ☞6(10)

Where original act removed bar of limitations from an action to recover delinquent contributions under Unemployment Insurance Act if no contribution report had been filed, and 1943 amendment made removal of the bar contingent on intent to evade the act, six months was not, as a matter of law, an unreasonable time after enactment of amendment for Employment Stabilization Commission to bring an action under the original act for delinquent contributions, where intent to evade the act was not shown, and an action brought

within the six months' period was not barred by limitations. Code Civ.Proc. § 338, subd. 1; Gen.Laws, Act 8780d, § 45.2; St. 1943, p. 3054, § 4.

7. Appeal and error ⇐839(1)

Where appellant does not see fit to question a portion of judgment, correctness thereof will be assumed on appeal.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the California Employment Stabilization Commission, successor to the California Employment Commission, formerly Unemployment Reserves Commission, against the Chichester Transportation Company to recover unemployment insurance taxes. From an adverse judgment, defendant appeals.

Reversed with directions.

Fabian D. Brown, of San Francisco, for appellant.

Robert W. Kenny, Atty.Gen., and Clarence Linn and Doris H. Maier, Deputy Atty. Gen., for respondent.

WARD, Justice.

The defendant appeals from a judgment in an action to recover unemployment insurance taxes. The trial court concluded: "That the plaintiff is entitled to judgment against said defendant in the sum of One Thousand Six Hundred Fifty-Four and 34/100ths Dollars (\$1654.34) as and for contributions for the period from *January 1, 1936 to December 31, 1942*, together with penalty in the sum of Sixty-one Dollars (\$61.00) and interest to February 28, 1945, in the sum of One Thousand Seventy-six and 38/100ths Dollars (\$1076.38) plus interest from February 28, 1945, to date of judgment herein at the rate of one-half per cent per month or fraction thereof computed on such contributions of One Thousand Six Hundred Fifty-four and 34/100ths Dollars (\$1654.34) together with plaintiff's cost of suit in the amount of Six and 25/100ths Dollars (\$6.25)." (Italics added) The plaintiff is the California Employment Stabilization Commission, successor to the

California Employment Commission (formerly Unemployment Reserves Commission).

The primary question involved on this appeal concerns the effect of sec. 45.2 of the California Unemployment Insurance Act as added by chapter 630, page 2051, Stats.1939, and the effect of the amendment of said section by Stats.1943, chapter 1114, page 3054, Gen.Laws, Act 8780d. The defense to the action is based upon the provisions of sec. 338, subd. 1, of the Code of Civil Procedure, which in substance sets forth a three year statute of limitations on a liability created by statute other than a penalty or forfeiture. This action was filed February 28, 1944, and the commission relies on sec. 45.2 of the Unemployment Insurance Act as it was enacted in 1939 to support the judgment. The appellant taxpayer relies on sec. 45.2 as amended in 1943, effective August 4, 1943, to defeat the judgment. The Legislature in 1945 repealed the entire section. As amended in 1943 the section read: "No statute of this State shall limit the time within which the commission may enforce the payment of contributions by civil action or any other remedy provided by this act if *by reason of any intent to evade the provisions of this act no contribution report or an erroneous return* has been filed." (Italics added.) By the amendment in 1943 the italicized portions were added to the section as it read in 1939. It is apparently admitted by the commission that they did not prove an intent to evade the act.

The 1943 amendment further provided that the above italicized portion "is hereby declared to be merely a clarification of the original intention of the Legislature, rather than a substantive change, and such section shall be construed for all purposes as though it had always read as hereinabove set forth." Stats.1943, Ch. 1114, § 4.

[1-4] It is appellant's position that the latter provision is controlling in the present action; that the interpretation of the Legislature in 1943, if not controlling, should be persuasive of the intent of the original enactment. Citations have been submitted but they may be epitomized as follows: "Although the legislature cannot authoritatively fix the meaning of the constitution,

and its interpretation is not controlling upon the court, yet, where the meaning is doubtful, the contemporaneous and long-continued construction thereof by the legislature is entitled to great deference, and may be supposed to reflect the views of policy and modes of reasoning which prevailed among the framers of the constitution." 5 Cal.Jur., sec. 37, p. 604. Section 45.2 as enacted in 1939 is unambiguous and clear. It permitted suits for the collection of unemployment contributions outside the period prescribed in sec. 338, subd. 1, of the Code of Civil Procedure regardless of the intent of the taxpayer where no return had been filed. The right to construe a pre-existing statute belongs to the judiciary. Courts may not be forced to construe such a statute in accordance with legislative interpretation though the Legislature has a right to define the terms of a statute for the future. It may not revise the operation of an existing law in the form of an amendatory statute to affect past transactions. "The weight of authority supports what we think to be the true rule, i. e., that such declaratory or defining statutes are to be upheld, except with regard to past transactions, as an exercise of the legislative power to enact a law for the future." Matter of Coburn, 165 Cal. 202, 210, 131 P. 352, 355. The 1943 amendment relied upon by appellant is not controlling on transactions prior to the effective date—August 4, 1943—of that statute. Any money judgment herein requested or awarded as delinquent contributions, except interest, is based on a period prior to 1943. Appellant is unable to invoke the 1943 amendment to sec. 45.2 and is relegated to the provisions of the 1939 statute, which provided: "No statute of this State shall limit the time within which the commission may enforce the payment of contributions by civil action or any other remedy provided by this act if with respect to such contributions no return has been filed."

[5, 6] Assuming any effect can be given to the legislative intent to affect existing causes of action by its amendment of sec. 45.2 in 1943, it could not affect them until a reasonable time had passed, and the trial court's determination of what constitutes a reasonable time will not be reversed un-

less it can be said that its conclusion constituted an abuse of discretion. Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 118, 56 P.2d 950; Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 47 P.2d 716; Coleman v. Superior Court, 135 Cal.App. 74, 78, 26 P.2d 673; compare Wells Fargo & Co. v. City, etc., of San Francisco, 25 Cal.2d 37, 42, 152 P.2d 625. Six months should not be declared as a matter of law an unreasonable length of time within which to bring suit under the prior statute after the enactment of the amendment.

California Employment, etc., Comm. v. Smileage Co., 68 Cal.App.2d 249, 156 P.2d 454, held that sec. 338, subd. 1, of the Code of Civil Procedure, was inapplicable to tax periods which were not barred thereby prior to the enactment of sec. 45.2 of the Unemployment Insurance Act. At the time of oral argument it was stipulated that the item of \$212.48 covering contributions assessed for the period January 1, 1936 to June 30, 1936, a period of more than three years prior to the effective date of the 1939 amendment, was not a proper legal assessment and that it should be eliminated from the judgment.

[7] At the time of the oral argument the court questioned counsel as to the propriety of the judgment insofar as it includes contributions for the period July 1, 1936, to September 30, 1936, which contributions under the rules of plaintiff appear to have become delinquent on November 1, 1936. Counsel were requested to file additional briefs on this point. The respondent has filed its brief contending such contributions were properly included. The appellant has declined to file a brief on this issue. Inasmuch as appellant has not seen fit to question this portion of the judgment its correctness will be assumed, but only for the purposes of this appeal.

The judgment is reversed solely on the matter of computation. The trial court is directed to eliminate the sum of \$212.48 and recompute the amount of the judgment in accordance with the views herein expressed; respondent to recover costs.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

PALERMO v. STOCKTON THEATRES, Inc.
Civ. 7241; Sac. 5758.

District Court of Appeal, Third District,
California.

Sept. 6, 1946.

As Modified on Denial of Rehearing

Oct. 4, 1946.

Hearing Granted Oct. 31, 1946.

1. Statutes ⇨51, 142, 158

Where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, of the same or of another jurisdiction, such provisions are incorporated in the form in which they exist at time of reference and not as subsequently modified, and repeal of provisions referred to does not affect the adopting statute in absence of a clearly expressed intention to the contrary.

2. Treaties ⇨7

Treaties have the force and effect of federal statutes.

3. Statutes ⇨51, 142, 158

Where a statute adopts by specific reference the provisions of a treaty, such provisions are incorporated in form in which they exist at time of reference and not as subsequently modified, and repeal of treaty does not affect the statute in absence of clearly expressed intention to the contrary.

4. Statutes ⇨51, 142, 158

Where a statute adopts by general reference a system or body of laws or general law relating to the subject in hand, the statute takes the law or laws referred to, not only in their contemporary form, but also as they may be changed from time to time, and their repeal eliminates them altogether.

5. Aliens ⇨13

Statutes ⇨51, 158

Provision in Alien Land Law that aliens not eligible to citizenship may occupy and use realty in the state in manner, to extent and for purposes prescribed by treaty existing between the United States and the alien's nation, refers to a specific treaty, and therefore abrogation in 1940 of Treaty between the United States and Japan did not affect the Alien Land Law,

and lease of realty to corporation, the capital stock of which was almost wholly owned by nationals of Japan, was valid. Treaty with Japan April 5, 1911, 37 Stat. 1504; Gen.Laws, Act 261, §§ 1-3.

6. Constitutional law ⇨48

Where a statute is reasonably susceptible of two constructions, that construction which will save the statute's constitutionality is to be preferred to a construction of doubtful validity.

7. Aliens ⇨13

Constitutional law ⇨66

The Alien Land Act refers to treaties with the nations concerned only as such treaties existed at the time of the passage of the act, declares the law of the state and not the provisions of the treaty agreements between the United States and other nations, and is unaffected by abrogation or amendment of a treaty, and therefore the act does not unconstitutionally delegate to the treaty-making authority of the United States power to terminate or change the act. Gen.Laws, Act 261, §§ 1-3.

8. Statutes ⇨172, 173

The Alien Land Law is not temporary or emergency legislation, the operative effect of which, by reason of changed conditions, must be deemed to have terminated of its own limitations, or which should be declared obsolete because to enforce it would be inequitable. Gen.Laws, Act 261, §§ 1-3.

9. Treaties ⇨5

Commercial treaty between the United States and Japan providing that the treaty shall enter into operation on 17th of July, 1911, and remain in force 12 years or until expiration of six months from date on which either of contracting parties shall give notice of intention to terminate, considered as municipal law, must be deemed to have been permanent or perpetual. Treaty with Japan April 5, 1911, 37 Stat. 1508.

10. Statutes ⇨173

An interpretation of the Alien Land Law as being unaffected by abrogation in 1940 of the treaty between the United States and Japan did not deprive owner of

realty leased to corporation, the capital stock of which was almost wholly owned by nationals of Japan, of any constitutional right, and court therefore had no right to declare the Alien Land Law obsolete because of change in conditions under which the law was enacted. Treaty with Japan April 5, 1911, 37 Stat. 1504; Gen.Laws, Act 261, §§ 1-3.

11. Statutes ⇨173

In absence of a constitutional objection, courts generally have no right to declare a statute obsolete by reason of a supervening change in the conditions under which it was enacted.

12. Aliens ⇨10

The Alien Land Act is a definite exercise of the police power expressed by the people and the Legislature of the states. Gen.Laws, Act 261, §§ 1-3.

13. Aliens ⇨10

The Alien Land Act is liberally interpreted. Gen. Laws, Act 261, §§ 1-3.

14. States ⇨4

The action of a state, particularly in respect to matters within its police power, is ordinarily independent of that of the federal government.

15. Aliens ⇨10

Landlord and tenant ⇨29(1)

Lease of realty to corporation, the capital stock of which was almost wholly owned by nationals of Japan, was not invalid under the Alien Land Law because of void provision giving corporation option to purchase the realty, since the void provision was clearly a severable part of the lease and did not affect the remaining and valid portions thereof. Gen.Laws, Act 261, §§ 1-3.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action for declaratory relief by Emil Palermo against the Stockton Theatres, Inc., a corporation. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

See also 172 P.2d 109.

Freed & Freed, Eli Freed, William F. Cleary, and Guy C. Calden, all of San Francisco, for appellant.

Honey & Mayall and Forrest E. Macomber, all of Stockton (Garrett H. Elmore, of San Francisco, of counsel), for respondent.

PEEK, Justice.

This is an appeal by the defendant corporate lessee from a judgment in favor of the plaintiff lessor in an action for declaratory relief.

The record discloses substantially the following facts:

On January 3, 1930, respondent's predecessor leased to appellant's predecessors, who were nationals of Japan, certain premises situated in the City of Stockton, California, for theater purposes for a term of ten years, commencing January 1, 1931 under the provisions of the Alien Land Act of this state, Deering's General Laws, Act 261, and in accordance with the provisions of the commercial treaty which had been concluded between the United States and Japan on April 5, 1911, 37 Stat. at L. 1504. On December 22, 1934, respondent's predecessor gave the lessees an option for a term of ten years longer than the term of the original lease. Said option recited that it was given for a valuable consideration, and that it was attached to and became a part of the condition of said lease. On January 16, 1935, the lessees, with the consent of the lessor, transferred all their right, title and interest in said lease and option to the appellant, a corporation, the capital stock of which was almost wholly owned by nationals of Japan. On January 26, 1940, the treaty between the United States and Japan was abrogated. On February 14, 1940, appellant served respondent's predecessor with a written notice of its election to exercise said option for an additional term of ten years, commencing January 1, 1941, and on September 13, 1940, pursuant to said option the parties entered into a written agreement of lease for the additional term of ten years. On October 27, 1941, respondent's predecessor died, and respondent became the legal owner of the premises in question.

The record further discloses that on October 19, 1944, respondent, who had been employed by appellant in the operation of the theater from 1936 to the time the present action was filed, served on appellant a demand that the latter vacate the premises forthwith, on the ground that the occupancy thereof by appellant was illegal under the provisions of the Alien Land Act of California. On November 20, 1944, the present action was brought by respondent to have the rights of the parties adjudicated.

The trial court found generally in favor of respondent, and particularly that the lease of September 13, 1940, was "partially a new Lease and partially an extension of the pre-existing Lease," that no notice of appellant's election to exercise the option was served on respondent's predecessor until February 14, 1940, which was subsequent to the termination of the treaty between the United States and Japan, and that, while there was no proof of a conspiracy to violate the law, the said lease was void and of no force or effect whatsoever. In a written memorandum of decision the trial court predicated its holding on the ground that the treaty removed the lease from the operation of the California statute and that in the absence of a treaty, a Japanese alien cannot enter into a lease of commercial property in the State of California.

While other issues were raised in the proceedings in the trial court and are argued in the briefs on appeal, the basic question on which the correctness of the judgment herein turns is the effect of the abrogation of the treaty between the United States and Japan on the permissive provisions of the Alien Land Act with respect to the right of a corporation in which a majority of the issued capital stock is owned by noneligible aliens of Japanese nationality to acquire or enjoy an interest in real property in this state which could have been acquired or enjoyed under the terms of said treaty.

The pertinent provisions of the act in question, sections 1, 2 and 3 of the Alien Land Law, Deering's General Laws, Act 261, as adopted by the electorate of this state in 1920, and thereafter amended by

the act of the legislature approved June 20, 1923, Stats.1923, p. 1021, and as they read at the time herein involved, provided as follows:

"1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

"2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.

"3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in section one of this act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise. Hereafter all aliens other than those specified in section one hereof may become members of or acquire shares of stock in any company, association or corporation that is or may be authorized to acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of

the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Likewise the pertinent provisions of Article I of the Treaty of April 5, 1911, between the United States and Japan, provided in part:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

[1] It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified, and that the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary. *Rancho Santa Anita, Inc., v. City of Arcadia*, 20 Cal.2d 319, 322, 125 P.2d 475; *Brock v. Superior Court*, 9 Cal. 2d 291, 297, 298, 71 P.2d 209, 114 A.L.R. 127; *In re Burke*, 190 Cal. 326, 327, 328, 212 P. 193; *Don v. Pfister*, 172 Cal. 25, 28, 31, 155 P. 60; *Ramish v. Hartwell*, 126 Cal. 443, 447, 58 P. 920; *Ventura County v. Clay*, 112 Cal. 65, 72, 44 P. 488; *People v. Clunie*, 70 Cal. 504, 506, 11 P. 775; *People v. Whipple*, 47 Cal. 592, 593, 594; *Spring Valley Water Works v. City of San Francisco*, 22 Cal. 434, 439; 59 C.J., p. 937, sec. 548.

[2, 3] This principle applies to the adoption of a statute of another jurisdiction (*Brock v. Superior Court*, supra, 9 Cal. 2d at page 297, 71 P.2d 209, 114 A.L.R. 127; *In re Burke*, supra, 190 Cal. at page 328, 212 P. 193); and inasmuch as treaties have the force and effect of federal statutes (52 Am.Jur., pp. 807, 815, secs. 4, 17), it cannot

be doubted that it applies to a treaty to the same extent that it would to an act of Congress.

[4] It also may be noted that there is a cognate rule, recognized as applicable to many cases, to the effect that where the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time, and (it may be assumed although no such case has come to our attention) as they may be subjected to elimination altogether by repeal. *Kirk v. Rhoads*, 46 Cal. 398, 399, 403; *Bolton v. Terra Bella Irr. Dist.*, 106 Cal.App. 313, 322, 289 P. 678; *Thoits v. Byxbee*, 34 Cal.App. 226, 231, 167 P. 166; 50 Am.Jur., pp. 58-59; 59 C.J., pp. 1060-1061, sec. 624. And see, *Vallejo, etc., R. Co. v. Reed Orchard Co.*, 177 Cal. 24^c, 254, 170 P. 426.

[5, 6] The question whether the reference to the treaty contained in the California Land Act should be deemed specific or general within the meaning of the foregoing rules might, as an abstract proposition, admit of different opinions. The language is "any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject." However, in view of the fact that there is grave doubt whether our legislature could constitutionally delegate to the treaty-making authority of the United States the right and power thus directly to control our local legislation with respect to future acts, *Rancho Santa Anita, Inc., v. City of Arcadia*, supra, 20 Cal.2d at page 319, 322, 125 P.2d 475; *Brock v. Superior Court*, supra, 9 Cal.2d at page 297, 71 P.2d 209, 114 A.L.R. 127; *In re Burke*, supra, 190 Cal. at pages 328, 329, 212 P. 193, we are constrained to hold that the reference is specific and not general, since such a construction is at least a reasonable one, see, *In re Heath*, 144 U.S. 92, 93-95, 12 S. Ct. 615, 36 L.Ed. 358, and therefore to be preferred to one of doubtful validity. 11 Am.Jur., pp. 729-730, sec. 97; *Matthews v.*

Matthews, 240 N.Y. 28, 147 N.E. 237, 239, 38 A.L.R. 1079.

According to the text of the former of these two last cited authorities, "the duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score."

In the case last cited, the New York Court of Appeals said: "A like duty requires us to avoid a construction which raises grave and doubtful constitutional questions if the statute can reasonably be construed so as to avoid such questions."

The conclusion which this construction leads to, viz., that the Alien Land Act incorporated the then-existing provisions of the treaty and retained them after the treaty was abrogated, suggests a somewhat similar situation which apparently existed in some of the states when the Volstead Act, 27 U.S.C.A. § 1 et seq., the provisions of which many local prohibition laws either adopted or copied, was repealed. See, Annotation, 88 A.L.R., pp. 1365-1369. It seems that the general view was that the repeal did not automatically effect a termination of the local law. In our own state the question was not presented, for the Wright Act, St.1921, p. 79, was repealed prior to the repeal of the federal act; yet the decisions of our courts leave little doubt that had this not been done the state law would have remained unaffected by the repeal of the national law. *People v. Pagni*, 69 Cal.App. 94, 98, 99, 230 P. 1001; *People v. Wood*, 88 Cal.App. 621, 625, 264 P. 298; *In re Volpi*, 53 Cal.App. 229, 199 P. 1090. And see, *In re Burke*, supra, 190 Cal. at pages 328, 329, 212 P. 193.

Another interesting example of a reference statute is the so-called Assimilative Crimes Act which embodies section 468 of 18 United States Code, 18 U.S.C.A. § 468, and which, as enacted in 1898, 30 Stat. 717, provided in effect that a crime committed

in a place over which the United States had exclusive jurisdiction was punishable in the same way and to the same extent as it was punishable under the law of the state, territory or district within the territorial limits of which it was committed, and that "every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District."

In construing said section of the Act, the United States Supreme Court has held that the reference therein was to the law of the state, territory, or district only as such law existed at the time of the passage of the Act, *United States v. Press Publishing Co.*, 219 U.S. 1, 9, 10, 31 S.Ct. 212, 55 L.Ed. 65, 21 Ann.Cas. 942, that said section was designed and served to enforce federal law and not the law of a state, territory, or district, *People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 266, 58 S.Ct. 167, 82 L.Ed. 235, and that, inasmuch as the federal law would not be responsive to changes in the law of the state, territory, or district, whether they should occur by way of repeal or amendment, said section could not properly be deemed to constitute an unlawful attempt to delegate to local lawmakers the power to work a change in the federal law; *Franklin v. United States*, 216 U.S. 559, 568, 569, 30 S.Ct. 434, 54 L. Ed. 615.

[7] Likewise, it may be said that the California Alien Land Act refers to treaties with the nations concerned only as such treaties existed at the time of the passage of the Act (or of the amendments containing the same reference), that said Act declares the law of the state and not the provisions of the treaty agreements between the United States and said nations, and that, being unaffected by the abrogation or amendment of a treaty, said Act does not unconstitutionally delegate to the treaty-making authority of the United States the power to terminate or change the law of our state.

It should be noted that the section mentioned was substantially amended in 1940. However it was not such an amendment as

would affect our discussion of the question here presented.

Of course if there were an express provision in the Alien Land Act which unmistakably made the duration of the local provisions coterminous with those of the treaty, such a provision would have to be given effect according to its tenor and validity. An example of that kind of a provision is found in section 71 of Title 8 of the United States Code, 8 U.S.C.A. § 71, dealing with the subject of alien ownership of land. The language in that section is:

"The prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer."

The fact that similar language was not used by our legislature may be thought to constitute some evidence of the fact that such a result was not intended.

[8] Neither is this a case of temporary or emergency legislation the operative effect of which, by reason of changed conditions, must be deemed to have terminated of its own limitations or which should be declared obsolete because to enforce it would be inequitable. See for example *Nashville, etc., R. Co. v. Walters*, 294 U.S. 405, 415, 55 S.Ct. 486, 79 L.Ed. 949; *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547, 548, 44 S.Ct. 405, 68 L.Ed. 841. The treaty of April 5, 1911, was not of a temporary character, particularly at the time it was readopted in sections 2 and 3 of the Alien Land Act by the amendment of 1923. The duration provisions of the treaty were contained in Article XVII, which read as follows:

"The present Treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the Contracting Parties shall have given notice to the other of its intention to terminate the Treaty.

"In case neither of the Contracting Parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the Treaty, it shall continue operative until the expiration of six months from the date on which either Party shall have given such notice."

[9] It is apparent that the treaty considered as municipal law must be deemed to have been permanent or perpetual. 25 R.C.L. 765, secs. 10 and 11.

[10,11] Nor is there anything in the situation here which would deprive the respondent of any constitutional right if the law as it originally read were deemed to have been continued in effect subsequent to January 26, 1940. And in the absence of a constitutional objection it is generally held that the courts have no right to declare a statute obsolete by reason of a supervening change in the conditions under which it was enacted. *Benson v. Hunter*, 23 Ariz. 132, 202 P. 233, 234; *McKeown v. State*, 197 Ark. 454, 124 S.W.2d 19, 22, 23; *Corn Exchange Sav. Bank v. Smith*, 59 S.D. 182, 239 N.W. 186, 189; *Gulf Refining Co. v. City of Dallas, Tex.* Civ.App., 10 S.W.2d 151, 159. See also, *Painless Parker v. Board of Dental Exam.*, 216 Cal. 285, 299, 14 P.2d 67.

[12-14] Finally, the fact that, when amending the Alien Land Act in 1943 and again in 1945, the legislature was silent on the question of the effect of the abrogation of the treaty on corresponding provisions of the statute, seems to indicate in the opinion of that body that no change was effected. This is particularly true in view of the fact that this act is a definite exercise of the police power expressed by the people and the legislature of this state. *State of California v. Tagami*, 195 Cal. 522, 530, 531, 234 P. 102. However reluctantly such power may have been exercised in favor of non-eligible aliens, once it was exercised its intended scope and effect within the defined limits were given liberal interpretation by our courts. See *State of California v. Tagami*, supra, 195 Cal. at pages 529-532, 234 P. 102. This accords also with the general view expressed in

the decisions that particularly in respect of matters within the police power the action of the state is ordinarily independent of that of the federal government. *People v. Pagni*, supra, 69 Cal.App. at page 99, 230 P. 1001; *People v. Wood*, supra, 88 Cal. App. at page 625, 264 P. 298.

Since we have concluded that the abrogation of the treaty had no effect on the provisions of the Alien Land Act, it is obvious that the lease of September 13, 1940, was valid irrespective of such abrogation. It is unnecessary, therefore, to consider what effect on vested or contingent rights the repeal or annulment of those provisions would have had, nor the extent to which a private individual as distinguished from the state would have had the right to take advantage of such repeal or annulment, or questions concerning estoppel on the part of this respondent to attack the validity of the lease.

[15] We may notice, however, one other reason assigned by respondent for holding the lease invalid, viz., the fact that said lease contains an option provision permitting the lessee to purchase the property demised. While no doubt this provision is void insofar as it purports to confer any such right on a non-eligible alien, it is clearly a severable part of the lease and its invalidity could not affect the remaining and valid portions thereof. *Mott v. Cline*, 200 Cal. 434, 450, 253 P. 718.

The judgment is reversed.

ADAMS, P. J., concurs.

THOMPSON, Justice (concurring).

I concur in the judgment. When the lease was executed in 1930, the treaty with Japan was in force. It accorded reciprocal rights to "lease land for * * * commercial purposes." The California statute then provided that all aliens and corporations or associations composed of a majority of stockholders who are entitled to citizenship in the United States may acquire land "in the manner and to the extent and for the purposes prescribed by any treaty now existing between that government of the United States and the na-

tion or country of which such members or stockholders are citizens or subjects." The lease was executed originally for a term of ten years. In 1935 that term was extended for ten more years by a written document attached to the lease and signed by both parties. It was not a *renewal* of the lease, but, on the contrary, it was an *extension* only of the term. It therefore constituted a grant of title from its inception. 35 C.J. 1024, secs. 159 and 160. No new lease was required to convey title for the extended term. The treaty with Japan was not abrogated until January 26, 1940, after the extension of the lease. The abrogation of the treaty did not, and could not, affect the valid lease then in force. To do so would be impairing the obligations of a valid contract. For that reason the trial court erred in holding that the extended term of the lease was invalid.



PALERMO v. STOCKTON THEATRES, Inc.
Civ. 7281.

District Court of Appeal, Third District,
California.

Sept. 6, 1946.

Rehearing Denied Oct. 4, 1946.

Hearing Granted Oct. 31, 1946.

Aliens ⇐13
Statutes ⇐158

Provision in Alien Land Law that aliens not eligible to citizenship may occupy and use realty in the state in manner, to extent, and for purposes prescribed by treaty existing between the United States and alien's nation, was not affected by abrogation in 1940 of treaty between the United States and Japan, and therefore lease of realty to corporation, the capital stock of which was almost wholly owned by nationals of Japan, was valid, though executed after abrogation of treaty. Treaty with Japan April 5, 1911, 37 Stat. 1504; Gen. Laws, Act 261.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Unlawful detainer action by Emil Palermo against the Stockton Theatres, Inc., a corporation. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Freed & Freed, Eli Freed, William F. Cleary, and Guy C. Calden, all of San Francisco, for appellant.

Honey & Mayall and Forrest E. Macomber, all of Stockton (Garrett H. Elmore, of San Francisco, of counsel), for respondent.

PEEK, Justice.

This is an appeal from a judgment for plaintiff lessor in an unlawful detainer action based on the fact that the defendant corporation, of which a majority of the stockholders were alien nationals of Japan ineligible to citizenship in this country, was in possession under a lease which was executed subsequent to the abrogation of the treaty between the United States and Japan, 37 Stat. 1504, under the provisions of which and of the California Alien Land Act, Gen.Laws, Act 261, said nationals were given limited rights to take leases of land in California for commercial purposes.

It is a companion case to the one of the same name, Sac. No. 5758, Civ. No. 7241, 172 P.2d 103.

By stipulation of the parties it was agreed that this appeal would be submitted on the briefs on file in the aforementioned case, and that the decision therein likewise would be determinative of this cause. In that case we held that the lease did not violate the California Alien Land Act and was not otherwise invalid, and reversed the judgment as entered by the trial court.

For the foregoing reasons the judgment is reversed.

ADAMS, P. J., concurs.

THOMPSON, Justice (concurring).

I concur in the judgment for the additional reason assigned in my concurring

opinion in the companion case numbered 7241, and also entitled "Emil Palermo v. Stockton Theatres, Inc.," in which a decision of this court was this day filed.



76 Cal.App.2d 23

MONROE v. OWENS et al.

Civ. 7253; Sac. 5771.

District Court of Appeal, Third District,
California.

Sept. 6, 1946.

1. Estoppel ⚡68(4)

Where plaintiff who had contracted to pasture cattle belonging to defendants brought an action to recover rentals against defendants jointly and obtained a joint recovery, plaintiff could not deny that defendants' right in cross-complaint to recover damages for depreciation of value of the cattle was likewise joint and that the cattle were owned by defendants severally and not jointly.

2. Animals ⚡25

Where plaintiff who had contracted to pasture cattle belonging to defendants brought action to recover rentals against defendants jointly, the character of title which defendants as bailors had was not in issue and their right to joint recovery was not barred by plaintiff's allegation that the cattle were severally owned. Civ.Code §§ 1431, 1659.

3. Appeal and error ⚡877(4)

Where plaintiff who had contracted to pasture cattle belonging to defendants brought action to recover rentals against defendants jointly, plaintiff had no cause for complaint when a joint recovery was had by defendants on a cross-complaint for damages for depreciation of value of the cattle, although plaintiff alleged that defendants' ownership was several and not joint, since payment of the judgment would

extinguish plaintiff's obligation to both defendants. Civ.Code, § 1475.

4. Animals ⇨23(2)

Where contract to pasture cattle gave owners right to buy hay and have it fed to cattle at agistor's expense if owners should decide that feed on agistor's range was insufficient, evidence warranted a finding that defective condition of the animals at termination of the pasture period was due to agistor's failure to make sufficient feed available to owners' cattle, although agistor had sufficient feed available.

5. Animals ⇨23(1)

Where agistor contracted to pasture cattle and contract gave owners right to buy hay and have it fed to cattle at agistor's expense, to what extent owners were justified in relying on agistor's promises to make more feed available was for jury.

6. Animals ⇨23(2)

In action for breach of contract of agistment, evidence justified an award of \$2,750 to owners of cattle for poor condition of cattle due to poor treatment by agistor.

7. Damages ⇨6

Generally, while a plaintiff must show with certainty that he suffered substantial damages by the wrongful acts of defendant, once this has been done, certainty as to the precise amount of the damages is relatively unimportant, and this is true as to actions for breach of contract as well as to tort actions.

8. Animals ⇨23(2)

Trial ⇨234(7)

In action for rent due under contract of agistment wherein owners filed a cross-complaint for damages for depreciation of the value of the cattle, instruction in regard to the shifting of the burden of proof where a prima facie case had been made, and a "formula" instruction dealing with the rights and remedy of the agistor generally under his contract of agistment were proper.

Action by N. H. Monroe against Roy Owens and Elwood Owens for unpaid balance due under contract of agistment wherein defendants filed cross-complaint against plaintiff and Frank McArthur. From separate judgment for defendant for the damages sustained by them for depreciation in value of their cattle from alleged improper treatment in the amount of \$2,750, N. H. Monroe and Frank McArthur appeal.

Affirmed.

John L. McNab, of San Francisco, and Charles Lederer, of Alturas, for appellants.

Curtiss E. Wetter, of Red Bluff, for respondents.

PEEK, Justice.

On March 31, 1944, appellants N. H. Monroe and Frank McArthur, doing business in the name of Corporation Ranch, owned or controlled, under government permits, extensive grazing lands in Lassen and Modoc counties, and on that day entered into a written contract of agistment with respondents Roy and Elwood Owens, father and son, to pasture certain cattle belonging to the latter, including yearlings and cows, at a specified monthly rental. Among the provisions of the contract were the following:

"The parties of the first part agree to pasture all yearling steers and heifers in fenced fields on pasture lands under the control of the said Corporation Ranch [a fictitious name under which appellants were conducting a partnership or joint venture].

"It is further understood and agreed that all cows delivered to the parties of the first part shall be pastured in common with stock owned by the Corporation Ranch, either on lands owned by the Corporation Ranch, or upon public domain, and under grazing permits held by the Corporation Ranch.

"It is mutually agreed that the parties of the first part will at all times and at their own expense take proper care of said yearling steers, heifers, and cows and shall keep said cattle on good feed and in a thrifty growing condition, and if at any time the parties of the second part shall

Appeal from Superior Court, Modoc County; A. K. Wylie, Judge.

decide that the feed available for said cattle is insufficient they shall have the right to purchase hay from the parties of the first part to feed said cattle, the price of said hay to be ten and no/100 dollars (\$10.00) per ton, and may, at their option, keep said cattle on Corporation Ranch property until December 15th, 1944. If and when the parties of the second part shall decide that the feed on said range is insufficient for said cattle and shall begin to feed hay, as aforesaid, the cash pasture rental of one and 75/100 dollars (\$1.75) per head shall terminate on such cattle as they determine shall be fed hay. The cost of feeding the above mentioned hay shall be paid for by the parties of the second part."

Pursuant to this contract, in May and June, 1944, respondents delivered to appellants for pasturage approximately 800 yearlings and cows. In the following months of November and January the animals were returned. When appellants rendered their bill in the amount of \$7969.15, representing the unpaid balance of the rentals due under the agreement, respondents refused to pay the same. Thereupon appellant Monroe, who had acquired by assignment all of appellant McArthur's right, title and interest in the contract, brought suit for the recovery of said amount, and respondents filed a cross-complaint against both appellants for damages in the sum of \$10,000 for the depreciation in value of their cattle resulting from what was alleged to be improper treatment received at the hands of appellants. At the conclusion of the hearing the jury returned separate verdicts, one for appellants for the agreed rental of \$7969.15, the other for respondents for the damages sustained by them in the amount of \$2750, and separate judgments were rendered accordingly. This appeal is by plaintiff Monroe and cross-defendant McArthur from the judgment for respondents on their cross-complaint.

[1] Appellants' first assignment of error is of a technical nature and is based on certain testimony which showed that the cattle in question were not the joint or common property of both respondents but

were made up of different groups some of which belonged wholly to one of the respondents and some wholly to the other, and that they were distinctively branded according to ownership. From this appellants argue that the case discloses a fatal failure of proof and a judgment which is defective because it provides for a joint instead of a several recovery.

We find no merit to the objection on either ground. With respect to the first, the allegation of ownership as contained in the cross-complaint is as follows:

"* * * on the 31st day of March, 1944, the Cross-Complaints [respondents], Roy Owens and Elwood Owens, were the owners of 813 head of cows and yearling steers and heifers."

The contract, which was made a part of the cross-complaint and was also introduced in evidence, recites that all of the livestock which is subject thereto "is now owned by the parties of the second part [respondents]."

It is apparent that the above statements do not purport to describe the precise character of the ownership, and that they are not inconsistent with the proof of a several ownership, or with the conclusion that the respondents had a joint or joint and several right to performance under the contract. See Civ.Code, secs. 1431, 1659. On the other hand, appellants, by bringing their action for rentals against the respondents jointly and obtaining a joint recovery, have recognized respondents' obligation under the contract as a joint one, and they will not be heard to deny that the corresponding right is likewise joint.

[2] In the second place, under the general rule governing actions between bailor and bailee, the character of the title which respondents, as between themselves, had in the subject matter of the contract of agistment was not in issue (4 Cal.Jur., p. 13, sec. 9; *Brown v. Rowland*, App.Dept. Super.Ct., 40 Cal.App.2d (Supp.) 825, 827, 104 P.2d 138), and could not affect the sufficiency of the proof or the judgment.

[3] In the third place, the appellants have not been injured by reason of the

joint form of the award, as a payment of the judgment will extinguish appellants' obligation to both respondents thereunder (Civ.Code, sec. 1475), and therefore they have no cause for complaint. *De Arman v. Connelly*, 134 Cal.App. 173, 181, 25 P.2d 24; *Fairchild v. Bay Point etc. Ry. Co.*, 22 Cal.App. 328, 330, 134 P. 338.

[4] Next, appellants contend that the evidence is insufficient to show a breach of the contract. They argue that the extent of their obligation was to keep the cattle on good feed, and that, because the contract authorized respondents, if at any time they decided that the available feed was insufficient, to buy hay and have it fed to the animals at appellants' expense, their failure to do so constituted a waiver of the right to complain of the insufficiency of the feed.

In advancing this contention, appellants have failed to consider that the contract not only required that the cattle be given good feed, but also that proper care be taken of them generally and that they be kept in a thrifty condition. The proof was sufficient to warrant a finding that the defective condition of the animals was due to causes other than insufficient feed generally, such as the inadequacy or bad repair of the fences, thereby allowing the animals to stray, or the fact that appellants' own stock was run ahead of respondents' and permitted to consume the best feed. In other words, the respondents might have concluded, and the jury could have found, that there was sufficient feed available at all times but that appellants failed to make it accessible to respondents' cattle.

Again waiver depends upon knowledge; and because of the scattering of respondents' stock, due to the fault of appellants and the large area covered by said ranch, it was difficult if not impossible for respondents to determine the precise condition of their cattle or of the feed available at the places they were grazing.

[5] The record shows also that when respondents made complaint in particular instances, appellant Monroe would promise to remedy the condition, although he never did. To what extent respondents were justified in relying on such promises was

a matter for the jury to determine, and not an appellate court.

[6] Appellants' third assignment of error relates to the alleged insufficiency of the evidence to sustain the verdict and judgment on the question of damages. They do not contend that an incorrect rule for measuring damages was applied, nor do they maintain that the evidence was insufficient to show that substantial damage was caused by their negligent acts or omissions. Their sole ground of objection is the asserted uncertainty in the evidence relating to the amount of the damages sustained.

While a great deal of evidence was adduced to show that respondents were substantially damaged, the evidence as to the amount of the damages was less extensive. It consisted for the most part of testimony by Roy Owens that when stock is shipped to summer pastures it is not customary to weigh all of the cattle but merely to obtain averages; that cattle such as his, if kept in fenced fields, on good feed and in a thrifty growing condition, would have a normal gain during such a period of from 200 to 240 pounds per head; that cattle which he had grazing in another location and which he weighed in and out gained as indicated; that the stock pastured with appellants did not make a normal gain; that the cattle he did not weigh would average out at approximately the same figures as those which were weighed; that independent of weight the cattle were dried out and shrunken; that buyers do not want "drought cattle"; that if they did buy any they would pay from two to three cents per pound less than for cattle in good condition; that in the spring his cattle were worth 13 to 15 cents per pound; and that when they were returned they were worth only 11½ cents per pound although cattle were then selling for considerably more. Therefore, we are constrained to conclude that there is a tenable basis for the award of \$2750 given by the jury in this case. See, *McCargo v. Matul*, 73 Cal.App.2d 349, 166 P.2d 297.

The rules governing the sufficiency of the proof of damages, where damage appears, are not unduly exacting on the question of certainty.

Section 3300 of the Civil Code provides:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

Section 3301 of the said code declares that "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Nothing is said as to amount.

The jury in this case was instructed that:

"* * * upon such failure the said cross-complainants would be entitled to such damages as would reasonably compensate said cross-complainants for the failure of said cross-defendants to so reasonably pasture the yearling steers, heifers, and cows of said cross-complainants in the manner and during the period as herein set forth and described; said damages, if any, to be the difference of the market value, if any, of said yearling steers, heifers, and cows, * * *."

[7] It appears to be the general rule that, while a plaintiff must show with certainty that he suffered substantial damages by reason of the wrongful acts of defendant, once this has been done, certainty as to the precise amount of the damages is relatively unimportant. 25 C.J.S., Damages, § 28, pp. 493-496.

It has been tersely said:

"Uncertainty as to the fact is fatal to recovery, but not uncertainty as to the amount. Many cases have recognized this distinction. * * *." See Annotation, 78 A.L.R., p. 858.

In *Pye v. Eagle Lake Lumber Co.*, 66 Cal. App. 584, 588, 590, 227 P. 193, 195, the court stated:

"In cases where substantial damage is shown, where the amount is entirely uncertain or extremely difficult of ascertainment, the sum to be awarded is a question for the jury, in the exercise of a sound discretion. The fact that the full extent of the damages must be a matter even of

speculation is not ground for refusing all damages. 17 Corpus Juris 756."

The foregoing case was one involving a breach of contract. In citing that decision, the Eighth Circuit, in the case of *Calkins v. F. W. Woolworth Co.*, 8 Cir., 27 F.2d 314, 320, observed:

"While these rules have been more generally applied to torts, they also apply to actions for breach of contract, and a party who had broken his contract ordinarily will not be permitted to escape liability because of uncertainty as to the amount of damages resulting therefrom [citing authorities]."

In the case of *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 93, 94, 66 P. 72, an action for negligence in which the impairment of plaintiff's earning power was an element of the damages alleged, the Supreme Court, in holding that the evidence was sufficient to sustain a verdict for substantial damages—and to warrant an instruction relating to earning capacity—stated:

"The objection of the appellant that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable. * * * It needs no evidence to show that a plaintiff in full health and vigor, who has lost an arm or a hand by reason of the negligence of the defendant has had his earning power greatly impaired; and in such a case a jury would not be limited to nominal damages, although there should be no evidence that he was in receipt of wages at the time of the injury, but would be authorized to give substantial damages [citing cases]. The rule for measuring damages is, however, the same, whatever may be the extent of the injury, but the measure of damages in any particular case will depend upon the facts in that case."

[8] The final objection raised by appellants to the proceedings herein relates to certain instructions given by the trial court based on general rules pertaining to the law of bailments and agistment. Both of these instructions appear to state the law

correctly—the one, in regard to the shifting of the burden of proof where a prima facie case had been made for the bailor (4 Cal.Jur., p. 42, sec. 24; 3 Cal.Jur.Supp., pp. 31–32, sec. 24; Annotation, 23 A.L.R., pp. 276–286; Smith v. Maher, 84 Okl. 49, 202 P. 321, 324, 23 A.L.R. 270; Nutt v. Davison, 54 Colo. 586, 131 P. 390, 391, 44 L.R.A.,N.S., 1170), the other, a “formula” instruction dealing with the rights and remedy of the bailor generally under his contract of agistment. Mitchell v. Excelsior Water & Min. Co., 41 Cal.App. 240, 246, 247, 182 P. 326; Vaughn v. Bixby, 24 Cal.App. 641, 643–645, 142 P. 100. Appellants do not challenge the correctness of

the instructions when properly applied, but maintain that this is not such a case. However, their sole reason for so contending is the provision in the contract which gives to respondents the privilege of buying feed for their animals if they determine that the feed available is not sufficient. We have heretofore considered this same argument when addressed to another question, and find it equally without merit as it is sought to be applied here.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.

28 Cal.2d 820

ROEDDER v. ROWLEY et al.**L. A. 19716.**

Supreme Court of California, in Bank.

Sept. 11, 1946.

1. Damages ⇐26

In a personal injury action, plaintiff is entitled to recover such damages as will compensate him for loss incurred up to the time of trial and also loss reasonably certain to occur in the future.

2. Damages ⇐95

In a personal injury action, jury in assessing general damages should consider all relevant circumstances, including age and sex of the injured person, his physical condition before and after injury, extent, severity, and duration of bodily and mental suffering caused by the injury, and any impairment of earning capacity resulting therefrom.

3. Damages ⇐97

Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved in determining amount of damages in personal injury actions are not capable of exact proof in terms of dollars and cents; hence the only standard is such an amount as a reasonable person would estimate as fair compensation.

4. Appeal and error ⇐1004(1)

In a personal injury action, determination of the amount of damages is, in the first instance, left to exercise of a sound discretion by jury, and a verdict will not be disturbed unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment.

5. Appeal and error ⇐1004(3)

On appeal from judgment in an action for personal injuries, conclusion of trial court on motion for a new trial that amount awarded was not excessive is persuasive in determining whether the verdict is based upon passion or prejudice.

6. Damages ⇐132(3)

Award of \$9,756.56 damages in action for personal injuries was not excessive where plaintiff, who was 41 years old at time of accident, sustained a serious injury to his back resulting in pain, physical discomfort, and impaired earning power.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Alfred Carl Roedder against Clayton W. Rowley, Howard L. Lindsley and another for damages sustained as the result of motor vehicle accident. From an adverse judgment, defendants Howard L. Lindsley and another appeal.

Judgment affirmed.

Prior opinion 166 P.2d 292.

Spray, Davis & Gould and Charles Perry Gould, all of Los Angeles, for appellants.

Tripp, Callaway, Sampson & Dryden and Dewitt Morgan Manning, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

The sole question involved on this appeal is whether an award by a jury of \$9,756.56 general damages for injuries to plaintiff, caused by a collision between two trucks, is excessive.

At the time of the accident plaintiff was 41 years old and was engaged in hauling sand and gravel for construction companies, using his own dump truck. When the collision occurred his dump truck turned over and caught fire but he succeeded in extricating himself from the wreckage. Immediately following the accident plaintiff appeared to be dazed and suffering from shock, but he refused to go to a hospital saying he did not think he was hurt. His clothing was torn and people at the scene of the accident noticed a bruise or abrasion on his back. When he arrived at his home, plaintiff complained of a prickly sensation in his back, a headache and a numb feeling in his arm and leg. The following day he consulted his family physician who testified that plaintiff was suffering from a spasm of the back muscles and

"lumbo-sacral sprains." During the next few weeks, the doctor administered massage, heat and light treatments to plaintiff's back.

About two months after the accident, plaintiff resumed his work of hauling sand and gravel, but he continued to suffer from headaches, pains in his back and leg, and numbness in his arm, and was able to work only a few hours a day. Two days after he returned to work he consulted another physician who took X-ray pictures which disclosed that the bony structure of plaintiff's back was abnormally small, "predisposing [him] to a strain injury above that of the average person." He had never experienced any difficulty or suffered pain with his back before the injury. The doctor testified that plaintiff was suffering from a sprain and strain of the muscles and the bony structure of his back, and prescribed complete immobilization of plaintiff's back for a period of four to six months by the use of a cast to quiet "the active inflammatory process," after which further treatment was to be administered to restore the normal movement lost during the period of immobilization. The doctor stated that there were evidences of contusions and bruises on plaintiff's back and other parts of his body, and gave as his opinion that the back injury was due to trauma, and that plaintiff would continue to suffer pain for an indefinite time with or without the suggested treatment.

Plaintiff did not take the prescribed treatment but resumed his work with the dump truck in which work he was engaged at the time of the trial. He stated that although his condition had improved since the accident he still suffered from headaches, numbness in his leg and pain in his back and arm, and that he stopped work whenever he became tired or the pain became unbearable. Before the accident, plaintiff, in addition to driving a truck, had worked at night as a plasterer in order to augment his income. After the accident, he was unable to work as a plasterer or do any extra work in the evening. In the 10 months' period between the accident and the trial, plaintiff's average monthly income was approximately \$200 less than it

had been for the 11 months preceding the accident.

[1-3] In a personal injury action, the plaintiff is entitled to recover such damages as will compensate him for the loss incurred up to the time of trial and also the loss reasonably certain to occur in the future. In assessing general damages, the jury should consider all relevant circumstances, including the age and sex of the injured person, his physical condition before and after the injury, the extent, severity and duration of bodily and mental suffering caused by the injury, and any impairment of earning capacity resulting therefrom. Since there is no exact correspondence between money and physical or mental injury and suffering, the various factors involved are not capable of exact proof in terms of dollars and cents, and the only standard is such an amount as a reasonable person would estimate as fair compensation.

[4] Hence, necessarily, the determination of the amount of damages is, in the first instance, left to the exercise of a sound discretion by the jury, and a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment. *Deevy v. Tassi*, 21 Cal.2d 109, 120, 121, 130 P.2d 389; *Loper v. Morrison*, 23 Cal.2d 600, 610, 145 P.2d 1; *Turnipseed v. Hoffman*, 23 Cal.2d 532, 535, 144 P.2d 797.

[5,6] The trial court concluded, on the motion for new trial, that the amount awarded was not excessive, and its conclusion in that regard is persuasive in determining whether the verdict was based upon passion or prejudice. *Deevy v. Tassi*, supra, 21 Cal.2d 109, 121, 130 P.2d 389; *Ostertag v. Bethlehem, etc., Corp.*, 65 Cal. App.2d 795, 805, 151 P.2d 647. The evidence showed that plaintiff sustained a serious injury to his back and that the pain, physical discomfort and impaired earning power resultant therefrom were reasonably certain to continue into the future. The question of what may be reason-

able compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion (Bellman v. San Francisco High School Dist., 11 Cal.2d 576, 586, 81 P.2d 894), and we cannot say that the amount awarded by the jury in this case is so large as to indicate that it was the result of passion or prejudice.

The judgment is affirmed.

S H E N K, E D M O N D S, C A R T E R,
T R A Y N O R, S C H A U E R, and S P E N C E,
J J., concurred.



ORLOFF v. LOS ANGELES TURF CLUB,
Inc., et al.
Civ. 15445.

District Court of Appeal, Second District,
Division 2, California.
Sept. 6, 1946.

Hearing Granted Oct. 31, 1946.

1. Theaters and shows ☞2

While Legislature has authority to modify common law in matter of regulating citizens' rights to enjoyment of places of amusement, statute creating such rights and providing special remedy for its enforcement must be strictly construed.

2. Injunction ☞94

The statutory provisions, declaring refusal to admit to race course any adult presenting ticket of admission unlawful and giving person unlawfully refused admission to place of amusement right to recover actual and punitive damages from proprietor thereof, prescribed exclusive remedy, so as to preclude action by adult, twice ejected from race course after paying admission price, for injunction against repetition of such acts. Civ.Code, §§ 53, 54.

3. Injunction ☞94

One twice ejected from race course after paying admission price was not en-

titled to injunction against repetition of such acts in order to prevent multiplicity of suits, in absence of allegation that he had brought statutory suit for damages and penalty, especially as claims for each of such acts could be included in one action. Civ.Code, §§ 53, 54.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Morris Orloff against the Los Angeles Turf Club, Incorporated, and others for an injunction against ejection of plaintiff from defendant's race track premises. From a judgment of dismissal, plaintiff appeals.

Affirmed.

William Katz and David S. Smith, both of Los Angeles, for appellant.

Victor Ford Collins, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question posed by this appeal is whether injunction is an available remedy for an adult person and taxpayer of the state who, without having committed any offense against a race track, its proprietor or patrons, has been twice arbitrarily ejected from the premises having paid each time for admission.

In his complaint appellant alleged that on January 31, 1946, he visited Santa Anita Park in Los Angeles County where corporate appellees operate a horse racing course to which the general public is invited for the purposes of viewing horse races and of gambling upon the outcome thereof; that on that day and again on February 2 he purchased and received a ticket and was admitted to the park, but that on both days he was, "without cause or provocation" and while conducting himself in a proper manner at all times, ejected by appellees against his will and without his consent and was ordered not to return to the race course on penalty of being forcibly removed therefrom. As a result of such treatment he alleged that he has suffered "great anguish of mind and irreparable injury to his reputation and

character." His prayer was that defendants be enjoined from repeating such acts.

The court below sustained a demurrer "with leave to plaintiff to amend said complaint from one for injunction to an action for damages" and appellant having declined so to amend his complaint and a judgment of dismissal having been entered, this appeal is from such judgment.

Appellant argues that such ruling was error in that it does not afford adequate relief. The contention is obviously animated by a desire to defeat his antagonists rather than to cause a triumph of the law. Section 53 of the Civil Code provides that "It is unlawful for any * * * race course * * * to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission * * * to such place * * *". Section 54 provides that "Any person who is refused admission to any place of amusement contrary to the provisions of the last preceding section, is entitled to recover from the proprietor * * * his actual damages, and one hundred dollars in addition thereto."

[1,2] While the legislature has the authority to modify the common law in the matter of regulating the rights of citizens to the enjoyment of places of amusement (*Greenberg v. Western Turf Association*, 148 Cal. 126, 128, 82 P. 684, 113 Am.St. Rep. 216), yet a statute which creates such right and provides a special remedy for its enforcement must be given a strict construction. *Cook v. Superior Court*, 12 Cal. App.2d 608, 611, 55 P.2d 1227; *Swing v. Lingo*, 129 Cal.App. 518, 526, 19 P.2d 56. It follows that since the cited sections create a right which was unknown to the common law, provide for a penalty and prescribe a remedy for its violation, such remedy is exclusive and therefore an action for injunction cannot be maintained. *County of Alameda v. Freitas*, 8 Cal.App. 2d 653, 655, 48 P.2d 165; *Woolcott v. Shubert*, 169 App.Div. 194, 154 N.Y.S. 643, 646; *White v. Pasfield*, 212 Ill.App. 73, 75.

Appellant argues at length that *Stone v. Board of Directors of City of Pasadena*,

47 Cal.App.2d 749, 118 P.2d 866, is authority for his contention. It is readily distinguishable. The plaintiff there instituted a mandamus proceeding to compel the city's officials to permit a Negro to enjoy a public plunge; i. e., "to compel the admission of a party to the use and enjoyment of a right * * * to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." Code Civ.Proc. sec. 1085. Stone's rights to enter and enjoy the public plunge were already fixed by law. His exclusion from such privilege was a discrimination against him on account of color, forbidden by Article XIV of the federal Constitution and by Article I, section 21, Constitution of California, as well as by section 51 of the Civil Code. As section 51 was not a necessary support for the Stone action it has no relevancy to the action at bar. Appellant Orloff made no allegation that he was the victim of a racial discrimination or that he had been ejected under a void ordinance, which fact makes inapplicable the other cases cited by him, to wit: *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; *Morris v. Williams*, 8 Cir., 149 F.2d 703; *Thomas v. Hibbitts*, D.C., 46 F.Supp. 368; *Favors v. Randall*, D.C., 40 F.Supp. 743; *Mendez v. Westminster School District*, D.C., 64 F.Supp. 544.

[3] The final assignment is that the remedy by injunction is necessary to prevent a multiplicity of suits. In the absence of an allegation that a suit for damages and the penalty had been brought the contention is baseless. *Woolcott v. Shubert*, supra; *Troy & Boston Railroad Company v. Boston, H. T. & W. R. Co.*, 86 N.Y. 107, 127. Until appellant has recovered damages his right has not been established. Furthermore, under our practice if he had had such a claim for each day of the year he could have included them all in one action.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

76 Cal.App.2d 46

CITY OF PACIFIC GROVE v. IRWIN,
City Clerk.
Civ. 13282.

District Court of Appeal, First District,
Division 2, California.
Sept. 11, 1946.

DOOLING, Justice.

By this proceeding in mandamus the petitioner City of Pacific Grove seeks to compel the respondent, who is the city clerk of petitioner, to sign certain improvement bonds of said city aggregating \$120,000 in face value.

It is undisputed that at a special election called by the city council of said city for that purpose and held on July 10, 1945, more than two-thirds of the voters voting at said election voted in favor of the issuance of such bonds. In the procedure leading up to such election the city council was governed by the Bond Act of 1901, Deering's General Laws, Act 5178, and the respondent's refusal to sign the bonds is rested upon the claim that the city council failed to take the following steps required to be taken by the provisions of the governing statute: 1. The adoption of a resolution of public interest or necessity. 2. The ordinance calling the election did not state the estimated cost of the proposed improvements. 3. The ordinance calling the election did not provide the manner of holding the election and of voting for and against the indebtedness.

It may be admitted that in respect to these three procedural requirements there was not a literal compliance with the provisions of section 2 of the governing statute, although it might be held (a matter which we are not deciding) that the steps taken by the city council constituted a substantial compliance with the law.

On July 19, 1944, the council by more than a two-thirds vote adopted a resolution accepting the report of a post war planning committee, which report contained the recommendation that the two projects, contemplated to be constructed by the proceeds from the sale of the bonds here in question, be undertaken. This report recited among other matters that "these projects will have to be paid for by bond issues, as our study of the city's post war needs shows that the city has no moneys available in its treasury at this time for any of these projects" and further recited that "we unanimously believe that the first four matters are absolute necessities" (included among the first four

1. Municipal corporations ⇨935

Defects in procedural steps leading to the incurring of bonded indebtedness by municipal corporations and other political subdivisions may be cured by subsequent validating statutes.

2. Constitutional law ⇨193

The Legislature by subsequent validating statutes may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance.

3. Municipal corporations ⇨935

Where proposals that city incur bonded indebtedness in stated amounts for specified improvements were clearly put to voters at election called for that purpose and more than two-thirds of voters gave their assent, failure of city council to adopt resolution of public interest or necessity and to include statement of estimated cost of improvements and provide for manner of holding election and voting for or against indebtedness in ordinance calling election in strict compliance with statute did not constitute jurisdictional defects, and subsequent curative act was effective to validate election. Gen.Laws, Act 5178, § 2; St.1946, 1st Ex. Sess., c. 17, §§ 5, 7(a); Const. art. 11, § 18.

Proceeding in mandamus by the City of Pacific Grove, a municipal corporation, against John D. Irwin, as Clerk of the City of Pacific Grove, to compel respondent to sign improvement bonds of the city.

Peremptory writ of mandate issued.

Reginald E. Foster, City Atty., of Pacific Grove, for petitioner.

Orrick, Dahlquist, Neff, Brown & Herrington, of San Francisco, for respondent.

matters were the two projects here involved). By its acceptance of this report by resolution so adopted it might be argued that the council by resolution passed by a two-thirds vote of its members did determine that the public necessity demands the construction of these projects and that their cost will be too great to be paid out of the ordinary annual income and revenue of the municipality, thus satisfying the requirements of the statute in those particulars. The report recited the estimated cost of the two projects and it might further be argued that by its action in accepting the report the council adopted these estimates as its own. The statute, it should be noted, requires this estimate to be included in the ordinance calling the election, rather than in the preliminary resolution. Subsequently on May 16, 1945, by more than a two-thirds vote, the council adopted a resolution providing in detail for an election to be held on July 10, 1945, for the purpose of submitting the following propositions to the qualified voters of the city:

"Proposition No. 1. Shall the City incur a bonded indebtedness of \$85,000 for the purchase of a site and for the erection thereon of a new fire house, for the purchase of new fire equipment, and for the installation of a fire alarm system?

"Proposition No. 2. Shall the City incur a bonded indebtedness of \$35,000 for the erection of a new bath house, salt water tub baths, and volley ball courts, at the municipal beach on the site of the present bath house?"

Thereafter, on June 6, 1945, the council by more than a two-thirds vote adopted an ordinance calling said election. The ordinance was not in the same detail as the previous resolution but adopted the resolution by reference in the following language:

"All of the contents of Resolution No. 3756 are hereby adopted and incorporated in this ordinance, the same as if they were a part hereof."

Enough has been recited to show the steps actually taken by the council and the particulars in which the procedure departed from a literal compliance with the requirements of section 2 of the Bond Act of 1901.

Whether what was actually done constituted a sufficiently substantial compliance to make the procedure valid under that act need not be decided because we are satisfied that the bond election was validated by subsequent act of the legislature.

At the special session of the legislature held at the call of the Governor from January 7 through February 19, 1946, Senate Bill No. 13 was enacted and became a law on February 12, Chapter 17, Chapters 1946, Fifty-Sixth (First Extraordinary) Session.

The portion of that statute here relevant reads:

"All acts and proceedings heretofore taken by any public body under any law, or under color of any law, for the issuance, sale, or exchange of bonds of any such public body for any public purpose are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the issuance, sale, or exchange of such bonds." Section 5.

[1] It is settled law in this state that defects in procedural steps leading to the incurring of bonded indebtedness by municipal corporations and other political subdivisions may be cured by subsequent validating statutes enacted by the legislature. *City of Redlands v. Brook*, 151 Cal. 474, 478, 91 P. 150; *Clark v. City of Los Angeles*, 160 Cal. 30, 43, 116 P. 722; *City of Sacramento v. Adams*, 171 Cal. 458, 463 et seq., 153 P. 908; *Cole v. City of Los Angeles*, 180 Cal. 617, 624, 625, 182 P. 436; *City of Venice v. Lawrence*, 24 Cal.App. 350, 353 et seq., 141 P. 406. Cf. *Miller v. McKenna*, 23 Cal.2d 774 and the cases cited on page 781, 147 P.2d 531, on page 535.

[2] The extent to which such curative legislation is effective has been stated by the supreme court as follows in *Miller v. McKenna*, supra, 23 Cal.2d at pages 781, 782, 147 P.2d at page 535:

"The legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance. This rule is quoted

from Cooley on Constitutional Limitations, at page 457, as follows: 'If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by subsequent law.'

The constitutional limitation upon the power of municipalities to incur a bonded indebtedness is found in the following language contained in Article XI, section 18, of the constitution of California:

"No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose
* * *"

[3] It is beyond argument that the legislature would have satisfied this constitutional requirement by providing in advance for the precise procedure followed by the city council in calling this particular election, and under the rule last above quoted it may with equal force ratify it after it has been taken. The propositions were clearly put to the voters at an election held for that purpose and more than two-thirds thereof gave their assent. None of the claimed defects in the steps leading up to the election was jurisdictional in the sense that the constitution made it mandatory upon the legislature to require the things to be done which it is claimed were omitted, and the curative statute was therefore effective to validate the election.

The curative act contains the following provision:

"Sec. 7 (a) This act shall be limited to the correction of defects, irregularities, omissions, and ministerial errors in complying with statutory requirements which the

Legislature originally could have omitted from the law under which such acts or proceedings were taken."

In so providing the legislature did no more than to declare that it intended to follow the recognized limitations upon its powers. In this case the curative act may properly be applied without exceeding those limitations.

Let a peremptory writ of mandate issue as prayed.

NOURSE, P. J., and GOODELL, J.,
concur.



76 Cal.App.2d 1

**VALENTIN v. LA SOCIETE FRANCAISE
DE BIENFAISANCE MUTUELLE DE
LOS ANGELES.**

Civ. 15228.

District Court of Appeal, Second District,
Division 2, California.

Sept. 6, 1946.

Rehearing Denied Sept. 24, 1946.

Hearing Denied Oct. 31, 1946.

1. Judgment ⇐199(3)

A court should grant a judgment notwithstanding a verdict only after the court has disregarded contrary evidence, has accorded to the prevailing evidence and all its legitimate implications the full value to which they are entitled, and has found no substantial evidence in support of the verdict.

2. Judgment ⇐199(3)

If, at time action against hospital for wrongful death of patient was submitted to jury, there was any substantial evidence in record to prove that hospital was negligent in its treatment or in its care of patient and that such negligence was the proximate cause of patient's death, then court erroneously granted hospital's motion for judgment notwithstanding verdict for plaintiff.

3. Hospitals ⇐7

Any hospital that undertakes treatment of an ill person has duty to use reasonable

care and diligence, not only in operating on and treating but also in safeguarding him, and such care and diligence is measured by the patient's capacity to care for himself.

4. Hospitals ⇐7

A hospital must observe the progress of a patient in his recovery from a major operation with such care and diligence as his condition reasonably requires for his comfort and safety and promptly to employ such agencies as may reasonably appear necessary for the patient's safety and whether a hospital has exercised such reasonable care is for the jury.

5. Physicians and surgeons ⇐15

"Malpractice" is the neglect of a physician or a nurse to apply that degree of skill and learning in treating a patient that is customarily applied in treating and caring for the sick or wounded similarly suffering in the same community.

See Words and Phrases, Permanent Edition, for all other definitions of "Malpractice".

6. Physicians and surgeons ⇐18(8)

Though proof of malpractice is customarily made by the testimony of experts and though the law makes allowances for human weaknesses in the application of skill and learning, the facts of each case must be judged according to their own merits.

7. Hospitals ⇐8

If the alleged neglect of a hospital with respect to a patient relates to matters or conduct reasonably within the ken of the average layman, the jury may determine the culpability of the person charged therewith without the aid of experts; but, if it relates solely to the exercise of judgment in the application of skill and learning, then proof of negligence must be made by experts.

8. Hospitals ⇐8

In action against hospital for death of patient who died from tetanus after hernia operation, evidence was sufficient to establish that private hospital's employees were negligent in failing to exercise ordinary care in application of skill, learning, and diligence reasonably required in a

private hospital in the locality, and in refusing to take steps for protection of patient or to act when evidence of a pathological condition and of a progressive deterioration was brought to their attention.

9. Hospitals ⇐7

A private hospital is required to give its patients the character of treatment customarily administered for the same disease or symptoms by similar hospitals in the same locality and at the time in question.

10. Hospitals ⇐8

In action against private hospital for death of patient from tetanus after successful operation for hernia, evidence was sufficient to establish that hospital was negligent in failing to discover presence of tetanus or to prevent its development following a definite diagnosis and that such negligence was the proximate cause of the patient's death.

11. Hospitals ⇐7

For a supervisory nurse to permit a patient recovering from a major operation to suffer symptoms indicating tetanus for three days without medical care, merely because attending physicians were not available, is a type of conduct that is negligence for which a private hospital is liable.

12. Hospitals ⇐8

In action against private hospital for death of patient from tetanus after successful hernia operation, whether nurses were negligent in failing to call in any physician for about 11 hours after resident physician of hospital stated that it looked like patient had tetanus, and instructed supervisor of nurses to call attending physician who could not be located by supervisor, was for jury.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Marin M. Valentin against La Societe Francaise de Bienfaisance Mutuelle de Los Angeles, a corporation, to recover for the wrongful death of plaintiff's son, who died from tetanus after an operation in defendant's privately owned hospital. From an order granting defendant judg-

ment notwithstanding verdict for plaintiff, the plaintiff appeals.

Order reversed and court below instructed to enter judgment for plaintiff in accordance with verdict.

Frank J. Barry, of Los Angeles, for plaintiff-appellant.

Gibson, Dunn & Crutcher, by Philip C. Sterry, all of Los Angeles, for defendant-respondent.

MOORE, Presiding Justice.

Plaintiff's son, August, underwent a successful operation for hernia August 19, 1940, in defendant's privately owned hospital in Los Angeles. His condition remained normal for eight days, after which for three days he exhibited distressing symptoms of a disease which turned out to be tetanus. After a definite diagnosis he was moved to the county hospital September 1, at 12:15 a. m. for antitetanic treatments and expired at 9:10 p. m.

Basing his action upon the wrongful death of his son, appellant demanded damages. At the conclusion of the trial defendant's motion for an instructed verdict was denied. After a verdict had been returned in appellant's favor for ten thousand dollars, defendant's motion for judgment notwithstanding the verdict was granted on the ground that there was no evidence proving or tending to prove negligence proximately causing the death. Following a denial of his motion for a new trial plaintiff appealed.* The question for decision is whether the court committed prejudicial error in granting defendant's motion.

The Court Exceeded Its Power.

[1,2] The trial court's power to grant a judgment notwithstanding a verdict has been repeatedly defined. It is only after it has disregarded contrary evidence, accorded to the prevailing evidence and all

of its legitimate implications the full value to which they are entitled and has found no substantial evidence in support of the verdict that the court should enter a contrary judgment. *Card v. Boms*, 210 Cal. 200, 202, 291 P. 190; *In re Estate of Green*, 25 Cal.2d 535, 546, 154 P.2d 692; *Blake v. Hearst Publications Incorporated*, 75 Cal. App.2d 6, 170 P.2d 100. If at the time the case was submitted to the jury there was any substantial evidence in the record to prove that defendant was negligent in its treatment or in its care of decedent and that such negligence was the proximate cause of the death, the court erroneously granted the motion.

Substantial Evidence.

[3] Defendant was bound by express contract to furnish decedent with the services of competent, learned, skillful physicians and surgeons and with the care of trained nurses. It is the duty of any hospital that undertakes the treatment of an ill or wounded person to use reasonable care and diligence not only in operating upon and treating but also in safeguarding him, and such care and diligence is measured by the capacity of the patient to care for himself. *Robertson v. Charles B. Towns Hospital*, 178 App.Div. 285, 165 N. Y.S. 17. It has been held negligence (1) for a surgeon to fail to discover a hemorrhage which he had caused or for him to refuse to suture the operative wound (*Gilstrap v. Osteopathic Sanitorium*, 224 Mo.App. 798, 24 S.W.2d 249); (2) for nurses to allow a patient to be burned by an electric heating pad (*Hamilton v. Corvallis General Hospital Association*, 146 Or. 168, 30 P.2d 9); (3) for the management of a hospital to allow the continued use of a lamp after the insulation on its key used for turning on the light had broken off, exposing the metal (*Baker v. Board of Trustees of Stanford*, 133 Cal. App. 243, 23 P.2d 1071); (4) for a sani-

* The action was at first brought also against Doctors Lopizich, Hull, and Hawkins as physicians and surgeons employed by defendant to render medical and surgical services to the patients of defendant. At the first trial, January, 1943, the action was dismissed by plaintiff as to the first two physicians and a verdict was re-

turned in favor of Doctor Hawkins by direction of the court. After judgment against the hospital based on a verdict the court granted a new trial. The verdict on the second trial was returned March 27, 1945. The judgment appealed from was entered April 13, 1945.

tarium in caring for alcoholics to leave a window unguarded through which a delirious patient might plunge (*Robertson v. Charles B. Towns Hospital*, *supra*). Whether the hospital or its nurse should have foreseen the casualty and have protected the patient by timely warning of a known danger are questions ordinarily for the jury. 30 C.J. 470, paragraph 31, 41 C.J.S., Hospitals, § 10; *Welsh v. Mercy Hospital*, 65 Cal.App.2d 473, 480, 151 P.2d 17.

[4] If a hospital is obliged to maintain its premises and its instrumentalities for the comfort of its patients with such care and diligence as will reasonably assure their safety, it should be equally bound to observe the progress of a patient in his recovery from a major operation with such care and diligence as his condition reasonably requires for his comfort and safety and promptly to employ such agencies as may reasonably appear necessary for the patient's safety. Whether a hospital has exercised such reasonable care under the circumstances of a case is for the determination of the jury. *Ward v. St. Vincent's Hospital*, 39 App.Div. 624, 57 N.Y.S. 784; *Robertson v. Charles B. Towns Hospital*, *supra*; *Hamilton v. Corvallis General Hospital Association*, *supra*. It follows that if the record shows substantial evidence of defendant's negligence and that such negligence was the proximate cause of decedent's death the judgment must be reversed.

[5-9] Malpractice is the neglect of a physician or a nurse to apply that degree of skill and learning in treating a patient which is customarily applied in treating and caring for the sick or wounded similarly suffering in the same community. See *Webster's International*, Oxford and Bouvier's Dictionaries; C. J., Am.Juris. While proof of it is customarily made by the testimony of experts, *Rasmussen v. Shickle*, 4 Cal.App.2d 426, 430, 41 P.2d 184; *Perkins v. Trueblood*, 180 Cal. 437, 443, 181 P. 642; and while the law makes allowances for human weakness in the application of skill and learning, *Rice v. California Lutheran Hospital*, Cal.Sup., 163 P.2d 860, 862, the facts of each case must

be judged according to their own merits. If the alleged neglect relates to matters or conduct which are reasonably within the ken of the average layman the jury may determine the culpability of the person charged therewith without the aid of experts. If it relates solely to the exercise of judgment in the application of skill and learning then proof of the negligence must be made by experts. Viewing the facts of this case from either angle it is inescapable that in the treatment and nursing of decedent by defendant there is substantial evidence that the servants of defendant were negligent in failing to exercise ordinary care in two respects, namely: (1) In the application of the skill, learning and diligence reasonably required in a private hospital in Los Angeles in 1940, and (2) in refusing to take steps for the protection of decedent or to act when evidence of the presence of a pathological condition and of a progressive deterioration was brought to their attention. A private hospital is required to give its patients the character of treatment customarily administered for the same disease or symptoms by similar hospitals in the same locality and at the time in question. It must exercise such reasonable care in treating a patient as his known condition may require. *Rice v. California Lutheran Hospital*, Cal.Sup., 163 P.2d 860, 862.

Plaintiff's Evidence Was Substantial.

The complaint alleged (1) that the tetanus infection resulted from negligence in the operation or from the subsequent negligent care of the patient, or (2) in failing to discover its presence or to prevent its development following a definite diagnosis. Inasmuch as the record discloses positive evidential support of the second allegation, a discussion of the claim of negligence in the operation will be omitted.

On entering the hospital August Valentin was 20 years of age. He was in good health except for the hernia. Following the operation on August 19 his condition was normal until August 27, when his temperature of 101 degrees and a pleuritic pain in his right side were diagnosed as broncho-pneumonia. On the 28th and 29th his fever registered 102.6 degrees and he was

flushed and dyspnoeic. On the 30th at 5 p.m. Mrs. Broguiere, whose son occupied the same room where she had called frequently, observed that August was not reading and was less talkative than usual. Although his temperature showed a decline on Saturday the 31st, he complained of soreness in his chest and of his inability to chew. At noon, on request of the bedside nurse that he be examined, Doctor Hawkins, the resident physician, found him suffering a tight feeling in his throat and pain on attempting to open his mouth. Doctor Hawkins reported to the supervisor of nurses that it looked to him "like this might be a case of tetanus" and instructed her to call the attending physician. He then left for the day. As to the operating surgeons, Doctor Lopizich was on vacation; Doctor Hull did not arrive before 11 p.m., after a diagnosis of tetanus had been made definite by Doctor Bennett and the boy faced eternal sleep.

The nurse's chart for that Saturday afternoon showed a progressive deterioration; pain and stiffness in the neck, tightness in the chest, difficulty in opening the mouth and in swallowing; poor appetite much expectoration, drowsy. At 7:30 p.m. Mrs. Valentin arrived and was alarmed to find the marked change in her son for the worse. She reported her observations to the head nurse, expressed her extreme anxiety and demanded that some physician be called at once. During more than three hours she continued her remonstrances in vain. She reminded the night supervisor of nurses that there were many doctors and insisted that one be called. Just after her departure at 10:30 p.m. Doctor Bennett, on leaving a patient upon whom he had called, at the request of the night supervisor examined young Valentin, announced him to be suffering from tetanus and advised that he be at once transferred to the county hospital. After his arrival there at 1:50 o'clock Sunday morning antitetanic treatments were vainly administered throughout the day.

[10,11] In the light of the foregoing rules governing the proof of malpractice and the responsibilities of private hospitals the proof of defendant's negligence and

that it was the proximate cause of the death of August Valentin is substantial. It is established by evidence of the inaction of the nurses in the presence of signals of danger which would have moved a reasonably intelligent attendant promptly to import a competent physician for the purpose of taking necessary precautions to prevent the development of the disease. For a supervisory nurse to permit a patient recovering from a major operation to suffer symptoms indicating a growing pathology for three days without medical care merely because the attending physicians were not available is a type of conduct that is negligence.

In addition to the appeal to the lay mind by the occurrences detailed by the witnesses, the testimony of Doctor Webb fills all of the essential requirements for an expert to prove malpractice of the hospital. Doctor Webb had been chief autopsy surgeon of Los Angeles County for many years, and served for fourteen years as assistant to his predecessor. Following his graduation from Columbia College of Physicians and Surgeons in 1902 he served in a government hospital in the District of Columbia and in New York City in the treatment of pathological diseases until 1912. He then served a Canadian railroad in the treatment of personal injuries, which required a knowledge of tetanus, of its symptoms and mode of treatment. After locating in Los Angeles in 1915 he taught in a local university until 1923. During the latter five years of that period he was instructor in histology and pathology, which "pertained directly to tetanus," its diagnosis, prevention and treatment. Having been licensed to practice while teaching he became an assistant autopsy surgeon in 1923 and took the post of autopsy surgeon in 1937. He had read many clinical reports on tetanus cases with special attention to the advantage gained over the disease by early treatment. He had kept informed as to the methods of treating tetanus patients by conferring with attending physicians and hospital authorities prior to August, 1940, and was thereby made familiar with the methods in vogue in Los Angeles in August, 1940, having performed post mortem examinations in

many cases which had come from prominent, private, well-managed hospitals of Los Angeles. Also, he was familiar with the literature on the care of tetanus and with hospital histories of cases and had learned of the procedure and usage of such hospitals from such histories. Furthermore, he was familiar with the reports of the county hospital on 100 cases of tetanus treated in that institution and knew that the antitetanic serum is "the only recognized remedy for cure."

Upon his qualifications as shown by this testimony the court below allowed the doctor to testify that tetanus is curable; that medical science has a specific cure which when promptly applied is effective in the great majority of cases; that such remedy was commonly known and available and was usually applied by physicians and surgeons in the practice of their profession in and around Los Angeles in the summer of 1940; that it is imperative that such antitetanic treatment be administered promptly upon the appearance of the symptoms of tetanus and that if so applied 80 per cent of those afflicted will probably recover. His testimony was supported by the record kept by the Los Angeles county hospital during 1940 and 1941 of 100 consecutive cases of tetanus treated there. Such record concludes with the declaration that the application of the same cure in an identical manner resulted in the reduction of the gross mortality rate of 56.5 per cent in past years to a current rate of 29 per cent, and that if the patients who had succumbed during the first 24 hours of hospitalization be excluded from the calculation the series presents a net mortality rate of but 19.3 per cent among 88 patients.

[12] Upon such proof the jury were warranted in finding that with a specific and efficacious cure available its merits were necessarily known to the resident physician and to the supervising nurses of defendant, and that they were negligent (1) in not making it available promptly to decedent when Doctor Hawkins declared that the disease might be tetanus, (2) in not employing other physicians as soon as decedent's symptoms indicated a constant deterioration, and (3) in not proceeding as

diligently with the care of him as the prevailing usage, procedure and practice of well ordered hospitals in Los Angeles in 1940 required under such circumstances. On the occurrence of such changes ordinary care would have impelled the nurse in charge to call another physician if the attending physicians were not available. While the symptoms manifested by decedent were in themselves sufficient to stimulate a nurse of ordinary prudence to energetic action, those in attendance had the additional alarms sounded by Mrs. Broguiere on Friday and by Mrs. Valentin on Saturday evening that August was desperately ill. But not an effort was made to procure another physician until 10:40 p. m. Saturday, when by chance the diagnosis of Doctor Bennett was announced. Whether such behavior of nurses who had knowledge of the progressive deterioration of decedent constituted negligence was properly a question for the jury.

Objections were made to much of the evidence prior to its admission but none of it was ever stricken. It accompanied the jury to their deliberations and upon it the verdict in favor of plaintiff was returned. From it they could and evidently did find that had defendant caused an examination by a physician on Friday at 5 p.m. when decedent displayed the first symptoms of tetanus the virus would then have been found and the patient might have had 49 hours of antitetanic treatments before 9 p.m. on Sunday instead of only 19. They could and evidently did find that had defendant effected an intelligent examination of decedent at noon on Saturday, when it appeared to Doctor Hawkins like a case of tetanus, the boy would then have had 31 hours of expert care and antitetanic treatments instead of only 19 hours before 9 p.m. Sunday. Finally, the jury could find, as indeed they must have found from the records of the county hospital, that decedent was in a dying condition during his 19 hours there.

It follows that the jury had substantial evidence from which it could determine that the delay in causing the appropriate medical treatment to be given decedent was the proximate cause of his death.

The order granting the judgment notwithstanding the verdict is reversed and the court below is instructed to enter a judgment in favor of plaintiff in accordance with the verdict.

McCOMB and WILSON, JJ., concur.



76 Cal.App.2d 16

ROGERS v. SMITH et al.
Civ. 15331.

District Court of Appeal, Second District,
Division 3, California.

Sept. 6, 1946.

Rehearing Denied Oct. 1, 1946.

Hearing Denied Oct. 31, 1946.

1. Receivers ⇨ 1, 6

Receivership is an extraordinary remedy to be applied cautiously and only in cases of apparent necessity and where other remedies would be inadequate.

2. Receivers ⇨ 6

Receivership is not a substitute for attachment and may not be resorted to because attachment would be more expensive.

3. Partnership ⇨ 210

In action against co-partners and others for amount due for services rendered by plaintiff as consulting and managing engineer in securing source of supply for construction of electric motors by partnership and for accounting and receivership of defendant's property, complaint and supporting affidavits were insufficient to state grounds for appointment of receiver. Civ. Code, § 3439.10 et seq.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Mel E. Rogers against Walter E. Smith and others for money had and received, an amount due for services rendered to defendants, accounting, appointment of a receiver of defendants' property,

sale thereof, and payment of plaintiff's claims from the proceeds. From an order confirming an ex parte appointment of a receiver and continuing the appointment pendente lite, defendants appeal.

Reversed for further proceedings.

J. G. Moser, of Los Angeles, for appellants.

Forrest A. Betts and William J. Curren, Jr., both of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal from an order confirming the ex parte appointment of a receiver and continuing the appointment pendente lite. The action is against Walter E. Smith, Thelma I. Smith, individually, and also as copartners doing business as Keystone Tool & Supply Company, as well as certain defendants sued under fictitious names. The first cause of action was for money had and received in the sum of \$36,800. The second cause of action was for the same amount alleged to have become due plaintiff for services rendered to defendant. It was alleged in the third cause of action that in February, 1944, defendants employed plaintiff "as a consulting and managing engineer, for the purpose of securing for defendant copartnership a source of supply for the construction of electric motors to be used as ammunition booster units for .50 caliber machine-guns for sale to the United States Government"; that pursuant to said agreement plaintiff secured said source of supply and "continued to maintain a liaison relationship between defendants and said source of construction and supply of said motors, and thereafter and during the month of January, 1945, the plaintiff continued, as a part of his services as a consulting engineer and manager, and in accordance with the contract between the parties, to assist in managing the business relationships relative to said electric motor and ammunition booster equipment so as to accomplish a maximum production on behalf of defendants of said equipment for sale to the United States Government." It was alleged that defendants agreed to pay plaintiff three dollars for each electric motor purchased by them during the con-

tinuance of the relationship, that the same existed to the 15th day of June, 1945, and that they also agreed to pay him the amount of his living and traveling expenses while he was away from California in his work. It was alleged on information and belief that during the life of the contract defendants purchased and sold to the United States Government approximately 17,500 motors, and that by reason thereof they became indebted to plaintiff in the sum of \$52,000, of which they had paid only \$16,700, leaving a balance of \$36,800. It was further alleged that defendants deny all liability to plaintiff. The fourth cause of action was for money had and received in the amount of \$2,000. A fifth cause of action was for the sum of \$1,700 due under an alleged agreement of defendants to pay plaintiff \$100 per month for the use of his car and \$300 as the expense of a trip he made to New Jersey. It was alleged in the complaint on information and belief that the defendants Walter E. Smith and Thelma I. Smith are insolvent and that the copartnership has no cash capital. The prayer of the complaint was for an accounting for the purpose of disclosing the number of electric motors purchased by defendants, that a receiver be appointed of the property of defendants, that defendants be enjoined from collecting any debts owing to the Keystone Tool & Supply Company or from investments made by the copartnership; that the property of the copartnership be sold, and that from the proceeds plaintiff's claim be paid. The prayer also sought a declaration of the rights of the parties under the agreement. The complaint listed properties alleged to belong to the defendants Walter E. Smith and Thelma I. Smith, who constituted the partnership, and alleged the same to be of the value of about \$50,000. An affidavit of plaintiff was filed in support of the application for appointment of a receiver, which stated that plaintiff was informed and believed and upon that ground alleged that unless a receiver were appointed, defendants Smith would transfer and dissipate their property so as to render any judgment that might be rendered unenforceable. It was alleged upon information and belief that during the past two years, and at times

unknown to plaintiff, Walter E. Smith had transferred to himself partnership funds; that he caused a corporation to be organized and, on information and belief, the following: that he transferred to it some \$40,000 without consideration, a part of which he had received from the partnership and the remainder from other sources, although the corporation had issued no stock; that the partnership had also transferred to Walter E. Smith some \$50,000 without consideration, and had manipulated the corporation and the partnership so that at times there were cross accounts between them; that Walter E. Smith had used \$10,000 of the partnership money for the purpose of promoting a rodeo and made large profits therefrom which he did not pay over to the partnership; that the partnership during the year ending July 31, 1944, had net sales of \$5,561,736.87 and should have made \$600,000 as profits, but only admitted making approximately \$135,000 and that the difference of some \$465,000 was money which Walter E. Smith had taken in the guise of expenses and expense accounts which were never incurred. There were extended allegations that Walter E. Smith had promised plaintiff various other attractive jobs without any intention of providing them for him. It was alleged that the assets of the partnership had been transferred and handled by Walter E. Smith as stated for the purpose of cheating, wronging and defrauding creditors of the partnership, and particularly the plaintiff. As to the moneys alleged to have been drawn from the partnership, it was alleged that said defendant "has disposed of, used, *or* transferred *or* concealed the said funds." It was stated in the affidavit that Walter E. Smith had planned to take a business trip to New York, but that when he learned the present action had been instituted he went to San Francisco to avoid service of papers and from there to New York, and that defendant Thelma I. Smith had left town at a time or times unknown to plaintiff, and it was represented to the court that unless a receiver be appointed immediately, the assets of the defendants would be dissipated and transferred beyond reach of the process of the court. It was also alleged in the complaint as a

reason for the appointment of a receiver that the defendants "are incapable of properly managing and settling said copartnership business." Upon this showing a receiver was appointed *ex parte*.

At the hearing for confirmation of the appointment, affidavits were filed by the attorney and the accountant of defendants. It was shown in the affidavit of the attorney that Walter E. Smith had gone East on a business trip arranged at least 10 days prior to the filing of the complaint herein, and that Mrs. Smith had been in Los Angeles and in her home where she could have been served with process at any time prior to the appointment of the receiver. The affidavit of Paul P. Hertz stated that he had been employed since September, 1943, as accountant for defendants and was presently so employed and thoroughly familiar with the business; that defendants Walter E. and Thelma I. Smith are the sole owners of the partnership; that a corporation was organized to conduct some of the business of the partnership and \$50,000 was transferred to the corporation, but that the defendants decided to retain all business in the partnership and all funds which had been received by the corporation were retransferred to the partnership; that the partnership was then doing a business of between \$400,000 and \$500,000 a month and meeting its obligations as they fell due, and that the net profits for the year ending July 31, 1944, amounted to \$155,000. The affidavit listed the assets of the defendant substantially as they were listed in the complaint and placed a value upon each of them. The assets included a 37 per cent interest in a restaurant in Hollywood, an interest in Taylor-Smith Sales Company, handling metal furniture and luggage, a residence in Los Angeles, a Cadillac automobile, an Oldsmobile automobile, capital stock of the Western Harness Racing Association, a claim against the United States Government of \$100,000, also horses, sulkies, saddles, and equipment, moneys due, and a license manufacturing right, the total value of the assets being stated as in excess of \$394,500, not taking into account any sums due from debtors of the partnership. It was denied that any sums had been transferred in any manner for

the purpose of defrauding creditors, and it was denied that it was contemplated to transfer funds for that purpose or for any other purpose whatsoever. Attached to the affidavit was a photostat of a contract of employment of plaintiff, as consulting engineer, under which he was to receive \$1.50 per motor purchased from a certain manufacturer and 25 percent of any savings on the purchase price below \$25 per motor. He was to receive \$1,000 per month during the time he was in the East, to be charged against his commissions, and also his expenses while in the East, expediting delivery of the motors. It was alleged that under the agreement plaintiff had been paid over a period of 18 months \$35,668.08; that the defendants owed plaintiff nothing, and that plaintiff was indebted to the defendants in the amount of approximately \$12,800.

At the time of the hearing defendants had not answered the complaint, but before notice of appeal was given, for the purpose of aiding the court in fixing the amount of the bond on appeal, the affidavit of Walter E. Smith was filed, in which he denied any indebtedness to plaintiff, denied all of the allegations of the complaint, listed the assets of the defendants as of the value of between \$300,000 and \$400,000, exclusive of sums due the partnership, and stated that the total obligations of the partnership were less than 10 percent of the total worth of defendants Smith.

The *ex parte* order appointing a receiver, and which was later confirmed, authorized the receiver to take, care for, and keep possession of all property of the defendants, as described in the complaint, namely, the residence of defendants, their automobiles, their bank accounts, their interests in the restaurant and other business, their horses, the \$100,000 claim against the government, and the accounts receivable of the Keystone Tool & Supply Company.

Respondent cites as support for the order, section 3439.10 and allied sections of the Civil Code, which deal with fraudulent conveyances, and the allegations of his complaint and affidavit that the defendants are insolvent, that they have made and are contemplating conveyances in fraud of

their creditors and are incapable of managing their business.

[1,2] Plaintiff's entire argument, as we shall point out, is predicated upon a non-existent state of facts and it would be idle for us to discuss principles of law that would be applicable to a purely hypothetical case. The attempt to make out a case of equitable cognizance was wholly unsuccessful and the action must be viewed as one at law for the recovery of a debt in which the remedy of attachment was available to plaintiff and would have been adequate. It would have given plaintiff security if it was security he sought. Receivership is an extraordinary remedy, to be applied with caution and only in cases of apparent necessity, and where other remedies would be inadequate. It is not a substitute for attachment, and may not be resorted to for the reason urged by plaintiff, in his oral argument, that an attachment would have been more expensive. Only a nominal bond of \$1,000 was required on the appointment of the receiver, which would have been an insufficient amount for an attachment bond if plaintiff had proceeded as vigorously through attachment as he has through the use of the receivership, and had attached all the defendants' property. The saving of expense is a poor excuse for the oppressive measures which were taken for the ostensible purpose of obtaining security, nor is it at all certain that the methods used will eventually prove the less expensive.

[3] The showing made by plaintiff furnished no ground for the appointment of a receiver. He alleged upon information and belief that defendants are insolvent, but his further sworn allegations proved the contrary. In addition to listing in the complaint assets which he valued at \$50,000, and which defendants valued at nearly \$400,000, plaintiff in his affidavit alleged that during the year ending July 31, 1944, the copartnership had made a profit of \$600,000, \$135,000 of which the corporation retained and \$465,000 of which was taken by Walter E. Smith personally as reimbursement for expenses which had not been incurred, and it was alleged that Wal-

ter E. Smith had received from the partnership further sums amounting to some \$60,000. Neither the complaint nor the affidavit of plaintiff alleged that the defendants were indebted to anyone except himself. Defendants denied their indebtedness to him and at the time of the hearing there was no evidence before the court that they had any other creditors. The affidavit of Walter E. Smith that the indebtedness of the partnership did not exceed \$30,000 or \$40,000 was not before the court at the time of the hearing. Although plaintiff's sworn statements specifically stated that large sums of money had been accumulated by defendants and that they were possessed of numerous valuable properties, there was no allegation, even on information and belief, that defendants had placed a single dollar or any item of property beyond their control or beyond the reach of creditors. Plaintiff seemed to know pretty well what properties defendants owned and where they were located. Walter E. Smith and Thelma I. Smith were the copartnership, Keystone Tool & Supply Company; the corporation which held \$50,000 for a time and then returned it to the partnership was a corporation in name only, and a mere instrument of the defendants. If partnership funds were shifted to Walter E. Smith, the real owner of the business, and plaintiff's alleged debtor, it would have been of no more concern to creditors of the partnership than the transfer by a debtor of a roll of bills from one pocket to another. The intangible and elusive nature of plaintiff's accusations is illustrated by the allegation that defendant Walter E. Smith had received large sums from the partnership and "has disposed of, used, *or* transferred *or* concealed the said funds for the purpose and with the intent of hindering, delaying, and defrauding his creditors and the creditors of said Keystone Tool & Supply Company." The allegations of the complaint, "that the defendants are incapable of properly managing and settling said copartnership business" and that the assets of the partnership and the partners "will be lost, destroyed, dissipated, re-invested or otherwise wasted" would have been more appropriate if the application

had been one for the appointment of guardians for defendants Smith and, in view of plaintiff's specific allegations as to the successful operation of their business, should be ignored.

It is unnecessary to discuss additional reasons urged by appellants for a reversal of the order.

The order is reversed for the reason that the appointment of the receiver was wrongful and without probable cause and for further proceedings and the settlement of costs in conformity with our holding.

DESMOND, P. J. concurs.



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MANN v. MANN.

Civ. 13050.

District Court of Appeal, First District,
Division 2, California.

Sept. 11, 1946.

As Amended on Denial of Rehearing

Oct. 11, 1946.

Hearing Denied Nov. 4, 1946.

1. Divorce ⇨172

An interlocutory decree, granting wife divorce from husband who pleaded special defense that parties' reconciliation agreement, resulting in husband's execution of note to wife, after previous interlocutory decree obtained by her, was procured through her fraudulent representations, was final adjudication of issues of fraud and undue influence, set up as defenses in wife's subsequent action on note, so far as such issues related to reconciliation and resultant execution of note.

2. Husband and wife ⇨229(6)

In wife's action on husband's note, plaintiff need not allege and prove that note was given her by husband for valuable consideration and that confidential relation between spouses was not abused, as note does not indicate trust, but is ordinary written contract, for which law presumes sufficient consideration. Civ.Code, §§ 158, 2235.

3. Appeal and error ⇨884

On husband's appeal from judgment for wife in her action on husband's note,

trial judge's ruling, concurred in by husband, striking his special defense that wife had no legal right to sue husband on ground that common-law rule that notes between spouses are void has been abrogated, is not open to attack, though appellant, in opening brief, lays greater stress on argument that plaintiff must allege and prove valuable consideration and nonabuse of confidential relationship.

4. Appeal and error ⇨884

In wife's action on husband's note, error, if any, in pretrial order, striking defense of want of consideration for note because of parties' marriage status, was cured by their stipulation that such defense and defenses of fraud and undue influence should be deemed interrelated and husband's offer of proof, disclosing that only evidence supporting plea of no consideration was that which went to prove charges of fraud and undue influence.

5. Judgment ⇨349(2)

In wife's action on note executed by husband as result of parties' reconciliation after interlocutory decree granting wife divorce, husband's plea of wife's estoppel from proceeding on note because she was awarded alimony pendente lite and counsel fees, paid by husband, on averments in divorce action that she had no funds or property, was sham, as husband's obligation under note was separate from his obligations, fixed in divorce proceeding, to pay alimony and counsel fees.

6. Evidence ⇨43(3)

A wife's divorce proceedings were brought to superior court's judicial notice in her subsequent action on husband's note by allegations in his answer that he was made defendant in divorce action and discovered from testimony therein the falsity of wife's representations, through which she procured reconciliation resulting in execution of note after previous interlocutory divorce decree.

7. Appeal and error ⇨837(11)

Where record on appeal from judgment on directed verdict for plaintiff in wife's suit on husband's note shows that trial court and both parties treated record of proceedings in wife's previous divorce

suit as having been properly received in evidence, reviewing court will not look for technical reasons to exclude divorce proceedings from consideration, though record thereof was not formally offered in evidence.

8. Evidence ⚭52

Judicial notice is a form of "evidence."

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

9. Appeal and error ⚭884

A husband, tendering evidence of his wife's divorce proceeding by his answer in her action on note, executed by husband as result of reconciliation agreement, claimed by him to have been fraudulently procured, after interlocutory decree granting wife divorce, cannot complain, on appeal from judgment on directed verdict for plaintiff, because fact issue as to whether court determined validity of such agreement in divorce proceeding was not submitted to jury, where question of such former adjudication was settled on showing and stipulations at hearing, on husband's pretrial motion to limit issues to effect of interlocutory divorce decree as determining validity of reconciliation agreement.

10. Divorce ⚭172

A provision of interlocutory divorce decree, reserving jurisdiction to determine extent and existence of parties' community property, did not affect finality of decree as to determination that parties' prior reconciliation agreement was not procured by wife's fraud or undue influence, as alleged by husband in divorce proceeding and wife's subsequent action on note executed by husband as result of such agreement, in view of adjudication by decree that wife was entitled to divorce and award of not less than half of community property.

11. Appeal and error ⚭846(6)

Where fact findings were waived in wife's action on husband's note, executed as result of parties' reconciliation agreement after interlocutory decree granting wife divorce, District Court of Appeal must presume, on appeal from judgment on directed verdict for plaintiff, that such findings would have been adverse to husband's pleas of wife's fraud and undue influence in procuring reconciliation agreement.

12. Divorce ⚭172

Where court found, in wife's divorce suit, that parties' reconciliation agreement, resulting in husband's execution of note to wife, was not procured by fraud and undue influence, as alleged by husband therein, his attack on note, as stemming from reconciliation agreement so procured, in wife's subsequent action on note, must fail.

13. Divorce ⚭172

An interlocutory divorce decree, determining necessary issues, becomes conclusive determination of such issues.

14. Appeal and error ⚭984(5)

Bills and notes ⚭534

Where note sued on provides for payment of reasonable attorney's fee, trial court may fix amount thereof in its discretion, without introduction of direct evidence on matter, and ruling will be reversed on appeal only for abuse of discretion.

15. Husband and wife ⚭278(3)

A note, executed by husband to his wife in consideration of money loaned husband by wife after full payment of note previously executed by him to her in accordance with antenuptial agreement, providing for husband's payment to wife of amount of such note in settlement of all her claims, if she obtained divorce, and after parties' remarriage following interlocutory decree granting wife divorce, was not invalid as executed pursuant to contract for dissolution of marriage contract.

16. Husband and wife ⚭278(1)

A mutual property settlement agreement between spouses incidental to contemplated divorce is valid.

17. Estoppel ⚭3(3)

A husband alleging, in his answer in his wife's action on note executed by him pursuant to reconciliation agreement after interlocutory decree granting wife divorce, that she insisted in divorce action that she was entitled to greater pecuniary award than proceeds of husband's antenuptial agreement to pay wife specified amount if she obtained divorce, but that court sustained such contract and awarded wife such amount in full of all claims, foreclosed himself from raising question of validity of antenuptial agreement.

On Petition for Rehearing.

18. Appeal and error ⇨832(4)

An argument, first made in appellant's petition for rehearing, that trial court was without jurisdiction to entertain pretrial motion to delimit issues will not be considered.

19. Appeal and error ⇨832(4)

Appellant's argument, in petition for rehearing that he did not consent to hearing of pretrial motion to delimit issues will not be considered, where appellant's only objection in trial court was to hearing of motion before full panel of jury and court and all counsel then agreed that jury of twelve should be first selected and all others excused before motion was heard.

'Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action on a note by Vivian H. Mann against George M. Mann. Judgment for plaintiff, and defendant appeals.

Affirmed.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for appellant.

Knight, Boland & Riordan, F. Eldred Boland, John H. Riordan, Burton L. Walsh, Oswald A. Hunt, and John H. Riordan, Jr., all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued upon a promissory note. The cause was tried to a jury and at the close of the trial the court directed a verdict in favor of the plaintiff.

The note in suit was executed by defendant on December 22, 1939. The complaint pleads it in haec verba. It calls for the payment on demand of \$25,000 with interest at six per cent, and, in case of suit for collection, the payment of "a reasonable attorney's fee to be fixed by the court." The defendant in his answer admitted the execution of the note and set up seven special defenses which were attacked by the plaintiff in a pre-trial motion to strike and to debar defendant from presenting evidence in support of them. Payments on

principal and interest were admitted which reduced the debt to \$16,238.54. Judgment was entered for that amount plus attorney's fees fixed at 20 per cent of the recovery.

The facts are without material conflict. Plaintiff and defendant were married in November, 1931. Preceding the marriage they entered into a written contract settling their property rights. Defendant agreed that if plaintiff should obtain a divorce from him he would pay her the sum of \$25,000 in full settlement of all claims. Plaintiff agreed to accept such sum in full satisfaction and discharge of all rights acquired by the marriage. In October, 1936, plaintiff obtained an interlocutory decree of divorce and defendant paid to her the sum of \$25,000 in accordance with this agreement. In 1937 the parties were reconciled and another agreement was executed under which plaintiff was restored to her community property rights, given a joint tenancy in a home valued at \$170,000, and "permitted * * * to retain the said sum of \$25,000." In December, 1939, defendant executed the note in suit after plaintiff "restored" to him \$19,000 in cash, the balance remaining of the original payment of \$25,000. This transaction the defendant alleges was made on this basis: The plaintiff agreed to restore to defendant the sum of \$19,000 "on a loan basis" "for his usage on a purported loan basis" on condition that he would execute a new note for the sum of \$25,000.

In June, 1943, the plaintiff filed a complaint for divorce. The complaint in the present action was filed in December, 1944. In March, 1945, the defendant herein filed his answer and cross-complaint in which he alleged: "Whereafter, in the month of June, 1943, without cause of provocation, plaintiff Vivian H. Mann left defendant and separated herself from his person, and George M. Mann, defendant herein, was made a defendant in a second action for divorce, the same being numbered 321,467, in the Superior Court of the State of California in and for the City and County of San Francisco; in the months of June and July, 1944, and continuing up to and including the present time, testimony was taken and is currently being taken in the premises of said action for divorce; from and out of the matters and things revealed

by the testimony in said action, defendant George M. Mann has discovered the falsity of the representations so made by plaintiff Vivian H. Mann as aforesaid. Defendant, George M. Mann, therefore alleges that the obligation which is purportedly evidenced by the document set forth in haec verba of paragraph II of plaintiff's complaint herein was an obligation created and obtained by the fraud of said Vivian H. Mann upon him and that the instrument of December 1939 was signed by him upon his continued reliance upon said false and fraudulent representatives of said Vivian H. Mann."

Upon these allegations the defendant grounds his first defense of fraud, his second of no consideration, and his fourth of undue influence. His third defense is the statute of limitations, his fifth is incapacity of a wife to sue her husband, his sixth is estoppel of the wife to sue because of the award of alimony and counsel fees in the divorce proceeding, and his seventh is non-ownership of the note because of her assignment to a bank for collection.

At the hearing of the pre-trial motion to delimit the issues the court, upon stipulation of the parties, considered the first and fourth defenses, fraud and undue influence, as interrelated and dependent upon the validity of the reconciliation agreement. It was then agreed by counsel for the defendant: "that if the validity of the reconciliation agreement was determined in that other case, the prior divorce case, * * * that would be a bar to opening that up in this case now. * * *"

With the issue thus defined the argument on the pre-trial motion was directed to the question of the effect of the decree in the divorce case as determining the issue of the validity of the reconciliation agreement. Before the submission of this cause to the jury the defendant, in the presence of the jury, offered to prove by evidence discovered in the divorce case that the reconciliation agreement was procured by the fraud of plaintiff in order to restore her interest in the community property and to extract from him his promise to build her an expensive home. To the offer of proof plaintiff objected on the ground "that the matter of alleged fraud has already been adjudicated and made an express issue in the answer and cross-complaint in the divorce case,

and in the judgment of his Honor Judge Conlan in the interlocutory decree of divorce." To this statement counsel for defendant made no objection. Thereupon counsel for plaintiff asked that it be stipulated that in ruling upon the motion to delimit the issues the court had before it the full record in the divorce case. No stipulation was made, but the trial judge stated: "that in offering the motions heretofore passed upon, the mover, the plaintiff, offered to the Court for consideration the complete file in the case of 'The People for the Best Interest and Protection of George Richard Mann, Vivian Joye Mann and Virginia Diana Mann upon the petition of George M. Mann and Concerning Controversies between Petitioner and Vivian Mann, wife of Petitioner, Respondent. Vivian Mann, Plaintiff and Cross-Defendant versus George M. Mann, Defendant and Cross-Complainant.' No. 321,467 in the Superior Court of the City and County of San Francisco, State of California. And the Court had in mind at the time of passing on the motion, the matters presented in said action, as well as the arguments presented and the citations of authority." To this statement counsel for the defendant made no objection. In his answer in the divorce action the defendant herein pleaded as a special defense that the reconciliation of 1937 was procured through the false promises of this plaintiff, that: "Said promises on plaintiff's part were not made in good faith, and said return and resumption of marital relations by plaintiff were made in order to gain a financial advantage and without intent on the part of plaintiff to continue said marital relations except so long as it might suit plaintiff's convenience so to do."

[1] On this showing the trial court herein granted plaintiff's motion to strike the first, second and fourth defenses. They are all related and all rest on the basis of prior adjudication. These pleas are the gravamen of appellant's case and they will be treated as presenting one question. Appellant's preliminary objection to the ruling is that the interlocutory decree was not a final judgment and could not therefore create an estoppel. This requires a statement of the history of the divorce proceedings. The interlocutory decree was entered

May 21, 1945, "nunc pro tunc" as of July 26, 1944. The final decree was entered July 27, 1945. No appeal was taken from either decree. The cause herein was tried to the jury and the verdict returned on August 23, 1945. The interlocutory decree was accordingly a final adjudication of the issue of fraud and undue influence at the time the ruling complained of was made in so far as those issues relate to the reconciliation of 1939 and the resultant execution of the promissory note in suit. This disposes of appellant's attack upon the ruling, assuming that the record in the prior proceeding was properly before the court, a question which we will discuss later.

[2] The first attack made on the judgment is that the wife had no legal right to sue her husband. This was pleaded in his answer as his fifth separate defense. Appellant relies upon the ancient common law rule that promissory notes between husband and wife were void, on the California cases of *White v. Warren*, 120 Cal. 322, 49 P. 129, 52 P. 723; *Dolliver v. Dolliver*, 94 Cal. 642, 30 P. 4; and *Williamson v. Williamson*, 41 Cal.App. 721, 183 P. 301, and sections 158 and 2235 of the Civil Code emphasizing the confidential relations existing between husband and wife. No one of the cases holds that in a suit upon a promissory note given by husband or wife to the other the plaintiff must allege and prove that the note was given for a valuable consideration and that the confidential relation was not abused. *Dimond v. Sanderson*, 103 Cal. 97, 37 P. 189 holds to the contrary. There the court said (103 Cal. at page 101, 37 P. at page 191): "The giving of the promissory note in question does not indicate a trust. It is an ordinary contract. Being in writing, the law presumes a sufficient consideration, though it may be in fact wholly without consideration." The *Dimond* case was cited with approval, with other authorities, in *Donovan v. Security First Nat. Bank*, 67 Cal.App.2d 845, 854, 155 P.2d 856, 861 to the point that the presumption of a consideration arising from the written instrument is not overcome by the presumption in section 2235 of the Civil Code "unless it is shown that the relationship was used by the trustee to obtain an unfair advantage."

[3] But we do not understand why the point is raised at this time. On the pre-trial argument to strike this special defense the trial judge stated to counsel for appellant that, before ruling on the motion to strike, it appeared to him that the point was well taken. Counsel for appellant replied, "Yes, I think in view of the cases he cites, that the common law has probably been abrogated in that respect." The appellant thus concurred in a ruling which was sound and not now open to attack. And this is true notwithstanding that, in presenting the issue in his opening brief appellant lays greater stress on the argument that, in a suit on a promissory note given by husband or wife to the other, the plaintiff must allege and prove valuable consideration and nonabuse of the confidential relationship.

[4] Allied to this issue is the second separate defense—that the note was based upon no consideration. It is the theory of appellant that because the parties were husband and wife there could be no consideration for the note. The answer does not contain any allegation of facts offsetting the presumption of consideration from the written instrument, and, unless supported by the allegations in the other special defenses of fraud and undue influence, it is no more than the pleader's conclusion. At the hearing of the motion, by stipulation of the parties, the first, second and fourth defenses were deemed to be interrelated and the ruling on one was to cover all three. On the face of the answer the allegations of the first and fourth defenses are not incorporated in the second defense. But by the agreement of the parties they were to be deemed interrelated so that the allegation of no consideration became one of a plea that the consideration failed because of the fraud and undue influence alleged in the other defenses. Hence, if error occurred in the pre-trial order striking this defense it was cured by appellant's stipulation and his offer of proof to the jury disclosing that his only evidence in support of the plea was that which went to prove the charges of fraud and undue influence.

Appellant's third special defense pleaded the bar of the statute of limitations. His seventh pleaded that respondent was not the holder of the note. Neither of these

pleas were stricken out. The respondent went to trial to the jury and proved payments on the note by appellant up to and subsequent to the filing of the complaint. She also proved that she was the true holder and owner of the note—that it had at one time been assigned to a bank for collection but returned to her.

[5] In his sixth special defense appellant pleaded:

"In the proceedings under Action No. 321,467 herein said Vivian H. Mann, in order to obtain awards of alimony pendente lite and counsel fees pendente lite, averred and represented to the court that she was without funds or property and upon said averments and representations the Honorable the Superior Court awarded said Vivian H. Mann alimony pendente lite at the rate of \$1200 per month, counsel fees, pendente lite, in the further sum of \$3500 and a general award of counsel fees on account of \$7500, all against said defendant, George M. Mann; said alimony, pendente lite, has been paid currently by defendant George M. Mann to plaintiff Vivian H. Mann from approximately June, 1943, up to and including the present time and each of the counsel fees above mentioned have been paid by him as well; from and out of said premises George M. Mann alleges that Vivian H. Mann is estopped to declare against him the purported indebtedness, as set forth."

Appellant makes no special argument directed to this plea. It does not appear whether it was stricken out except that during the argument of the pre-trial motion it was stated and apparently conceded that only the third and seventh defenses were to go to the jury. It is manifest however that this plea of estoppel is sham. Payments of alimony and counsel fees under the divorce decree were payments of appellant's obligations as fixed in the divorce proceeding. The obligation under the promissory note was a separate and unrelated obligation. There is no logic in a plea that because respondent was able to enforce the one obligation she was estopped from proceeding on the other.

[6] In his preliminary attack upon the order directing a verdict the appellant asserts that the divorce proceedings were not properly before the court and that the jury

should have been permitted to pass on the evidence. The divorce proceedings were brought to the judicial notice of the court by the allegations in appellant's answer reading:

"Thereafter, in the month of June, 1943, without cause or provocation, plaintiff Vivian H. Mann left defendant and separated herself from his person, and George M. Mann, defendant herein, was made a defendant in a second action for divorce, the same being numbered 321,467, in the Superior Court of the State of California in and for the City and County of San Francisco; in the months of June and July, 1944, and continuing up to and including the present time, testimony was taken and is currently being taken in the premises of said action for divorce; from and out of the matters and things revealed by the testimony in said action, defendant George M. Mann has discovered the falsity of the representations so made by plaintiff Vivian H. Mann as aforesaid. Defendant, George M. Mann, therefore alleges that the obligation which is purportedly evidenced by the document set forth in haec verba of paragraph II of plaintiff's complaint herein was an obligation created and obtained by the fraud of said Vivian H. Mann upon him and that the instrument of December 1939 was signed by him upon his continued reliance upon said false and fraudulent representations of said Vivian H. Mann."

In *Roberts v. Roberts*, 81 Cal.App. 499, 501, 253 P. 1112, 1113, a similar question arose on similar facts and the court said: "Such reference (the pleading of the former action in defendant's answer), however, was sufficient to warrant the trial court in taking judicial notice thereof (*Sewell v. Johnson*, 165 Cal. 762, 134 P. 704, Ann.Cas.1915B, 645); and we must presume that the implied finding as to its effect, which was adverse to the allegations of the affidavit, was sustained by the terms of the judgment (*In re Estate of Young*, 149 Cal. 173, 85 P. 145; *Fonner v. Martens*, 186 Cal. 623, 625, 200 P. 405; *Western California Land Co. v. Welch*, 41 Cal.App. 435, 183 P. 169."

Appellant cites and relies upon *Willson v. Security-First National Bank*, 21 Cal.2d 705, 134 P.2d 800, where the defense of *res judicata* was raised by demurrer only.

There is nothing in the Willson case holding that when the former proceeding is specially pleaded the court is not thereby given notice of it. The rule applicable here is found in the Roberts case. And see *Sewell v. Johnson*, 165 Cal. 762, 134 P. 704, Ann.Cas.1915B, 645; *Nordin v. Bank of America*, 11 Cal.App.2d 98, 52 P. 2d 1018.

[7] The authorities cited should be a sufficient answer to the argument that the divorce proceedings were not properly before the court. But it may be added that, though the record was not formally offered in evidence, counsel for appellant acquiesced in the use of the record in the argument on the pre-trial motion to limit the issues, and it is manifest that all parties and the court believed that the record was properly before the court. This is indicated by the remarks of counsel for respondent near the close of the argument on the motion asking that the record should show that these proceedings were before the court and had been read and examined in passing upon the motion. The trial court at the time stated that respondent had offered the complete file of the divorce proceedings and that the record had been fully considered in passing upon the motion. No objection was made by the appellant to either of the statements of court or counsel and it is fair to assume that he acquiesced in these statements as to the course of procedure. The record thus shows that the trial court and both parties treated the record of the proceedings in the divorce case as having been properly received in evidence on the hearing of the motion. When such is the state of the record in the trial court a reviewing court will not look for technical reasons to exclude from consideration any part of the record which was before the trial court. See generally when an exhibit will be deemed to have been properly admitted, 24 Cal.Jur. 759; *Wright v. Roseberry*, 81 Cal. 87, 22 P. 336; *Dodson v. Greuner*, 28 Cal.App.2d 418, 423, 82 P.2d 741.

[8,9] The argument of appellant in relation to this issue that he was denied his constitutional right of due process is not sound. Judicial notice is a form of evidence. In *re Samaha*, 130 Cal.App. 116, 19

P.2d 839; *Gayton v. Pacific Fruit Express Co.*, 127 Cal.App. 50, 15 P.2d 217. Having tendered the evidence of the former proceeding by his answer the appellant cannot complain because the issue of fact was not submitted to the jury for the determination whether the court in the divorce proceeding actually determined what there appears on the face of the record. That record presented a former adjudication that there was no fraud or undue influence behind the reconciliation agreement. Upon the showing and stipulations made at the hearing of the pre-trial motion the question of the former adjudication was settled and no question of fact—either of the existence of such former judgment, or of the scope of the issues there involved—was left for a jury to determine.

[10,11] But appellant argues that the decree in the divorce proceedings was not final and cites from the exhibit filed herein:

"The Court expressly reserved for later determination all questions relating to property rights of the parties hereto, if any, and in this respect found and decreed that Vivian Mann, was entitled to an award equal to not less than one-half of the community property, if any, of the parties, said award to be reduced to judgment when the extent and/or existence of said community property, if any, is determined, and the Court expressly, and with the consent of the parties, reserved jurisdiction to make such a determination and award."

This reservation of jurisdiction to determine the character and value of the community property does not affect the finality of the interlocutory decree in so far as it becomes *res judicata* with respect to the determination adverse to this appellant that the reconciliation was not procured by the fraud or undue influence of Mrs. Mann as alleged here and in the divorce proceeding. It will be noted that the court adjudged that Mrs. Mann was entitled to a divorce and also that she "was entitled to an award equal to not less than one-half of the community property, if any. * * *" Findings of fact having been waived we must presume here that, if findings had been made, they would have been adverse to the pleas of fraud and undue influence, otherwise Mrs. Mann would not have been entitled to a divorce.

[12, 13] Appellant argues further that since the promissory note was not in issue in the divorce proceeding the court would not have jurisdiction to determine his liability in that proceeding. But the court did not do so. It impliedly found on the issues raised that the reconciliation agreement was not procured by fraud and undue influence. Here the execution of the promissory note in suit is attacked on the ground that it stemmed from the reconciliation agreement which in turn was procured by fraud and undue influence. If the reconciliation agreement was not tainted with fraud, as it was found in the divorce case, this attack on the promissory note must fall because the charges of fraud and undue influence here made are directed specifically to that agreement. It is manifest that this agreement was in issue in the divorce case. The pleading of fraud and undue influence in that case is almost identical in language to that used here. The necessity of a determination of that issue is apparent. When necessary issues are thus determined in an interlocutory decree of divorce the decree becomes a conclusive determination of those issues. *Leupe v. Leupe*, 21 Cal.2d 145, 148, 130 P.2d 697, where many authorities are cited.

[14] Finally appellant argues that the award of attorney's fees was error since no evidence was offered to prove their value. He cites several cases from other jurisdictions which are wholly out of harmony with the rule followed in this state. He also cites *Miller v. Ambassador Park Syndicate*, 121 Cal.App. 92, 9 P.2d 267, 270, to the effect that an award of attorney's fees was improper because the complaint contained no allegations regarding such fees and "no claim was made on the trial." That case is also somewhat out of harmony with the California rule, but, even so, it has no bearing here because the complaint pleaded the note and prayed for a reasonable fee, and the "claim" was made to the court before the cause was submitted. However, the applicable rule is stated in *Baker v. Eilers Music Co.*, 175 Cal. 652, 654, 166 P. 1006, 1007, as follows: "Where a promissory note so provides for the payment of a reasonable attorney's fee, it is the province of the court to fix that amount in its discre-

tion and without the introduction of direct evidence upon the matter, and only for an abuse of discretion—which does not here appear—will the court's action be reversed. *Woodward v. Brown*, 119 Cal. 283, 51 P. 2, 542, 63 Am.St.Rep. 108; *Patten v. Pepper Hotel Co.*, 153 Cal. 460, 461, 96 P. 296."

[15-17] Appellant contends that the whole proceeding is wrong because the antenuptial agreement of 1931 was contrary to good morals since it undertook to compensate Mrs. Mann if she obtained a divorce. The note in suit was executed in consideration of money loaned appellant by respondent; it was not conditioned upon a subsequent divorce; and it bore no relation to the previous agreement and separation. Hence *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488, 23 L.R.A., N.S., 880, 134 Am.St.Rep. 107, and similar cases which denounce a contract between husband and wife having for its object the dissolution of the marriage contract are not applicable to a case of this kind. The modern and accepted rule which recognizes a mutual property settlement agreement incidental to a contemplated divorce is found in *Hill v. Hill*, 23 Cal.2d 82, 93, 142 P.2d 417. Furthermore the appellant has foreclosed himself from raising the question of the validity of the antenuptial agreement by the allegation in his answer that in the first divorce action the plaintiff herein insisted that she was entitled to a greater award than the proceeds of the \$25,000 agreement, but that the court sustained the contract and awarded the plaintiff the sum of \$25,000 "in full of all claims." The appellant has thus pleaded a final determination of the validity of the prenuptial agreement and that question is not open to further argument.

From the allegations in the answer it appears that the validity of the prenuptial agreement and of the reconciliation agreement has been finally determined adversely to the appellant. During the argument of the motion to limit the issues the court stated that since the validity of the reconciliation agreement had been determined in the prior divorce case it seemed that the only issue then before the court was whether that decree would be a bar to opening up the same issue here. To this

counsel for appellant replied: "That is exactly the way I perceive it, your Honor." The validity of that agreement having been adjudicated and the record of the divorce proceedings having been brought to the knowledge of the court by appellant's pleadings, it necessarily follows that, the issues of fraud and undue influence having been determined by the prior decree, there was nothing in relation to those issues left to be determined by the jury.

For the reasons stated we are satisfied that appellant was not denied any legal right of trial by the ruling complained of since he had theretofore been accorded all the due process of law to which he was entitled when the same issues were tried in the divorce proceeding.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

On Petition for Rehearing.

PER CURIAM.

In his petition for a rehearing counsel for appellant criticizes as incorrect and inaccurate certain statements of fact found in the opinion. Those statements were taken verbatim from counsel's statements to the trial court found in the certified transcript.

[18] The argument first made in his petition for a rehearing that the trial court was without jurisdiction to entertain the pre-trial motion to delimit the issues was not considered in the opinion because it was not made an issue in the trial court and was not raised on the appeal.

[19] The same is true of the argument made for the first time in his petition for a rehearing that he did not consent to the hearing of the pre-trial motion. His only objection was to the hearing before the full panel of the jury. The court and all counsel then agreed that a jury of twelve be first selected and all others excused before the motion was heard.

The petition for a rehearing is hereby denied.

Hearing denied; CARTER, J., dissenting; SCHIAUER, J., not participating.

In re PHILLIPI'S ESTATE.
PHILLIPI et al. v. WILSON.
Civ. 3433.

District Court of Appeal, Fourth District,
California.

Sept. 16, 1946.

1. Attorney and client ⇨123(1)

Where confidential relationship exists between client and attorney, who profits from transaction with client, a rebuttable presumption of fraud or undue influence arises, and such presumption can be overcome only by clear and satisfactory evidence that transaction was fair and equitable, that attorney took no advantage of such relationship, and that client was fully informed of all matters relative to transaction.

2. Appeal and error ⇨1011(1)

Conflicts in evidence are addressed to trial court.

3. Appeal and error ⇨1010(1)

The questions as to what constitutes clear, convincing, and satisfactory evidence overcoming presumption, and when such presumption is overcome, are ordinarily and primarily addressed to trier of facts, whose conclusions thereon should not be disturbed on appeal except in case of abuse of discretion or absence of sufficiently substantial evidence supporting them.

4. New trial ⇨157

On hearing of motion for new trial, trial judge may weigh evidence, resolve conflicts therein, judge witnesses' credibility, and reject any testimony which he doubts or accept testimony of witness whom he believes.

5. Appeal and error ⇨1015(2)

Ordinarily, appellate court is bound by trial judge's decision on motion for new trial, where evidence is conflicting and there is reasonably substantial evidence or reasonable inferences from evidence supporting decision.

6. Wills ⇨166(1)

Evidence established that will was not result of undue influence.

7. Wills ⇨384

On appeal from order granting will proponent's motion for new trial after judgment denying probate of will on jury's ver-

dict of proponent's undue influence over testator, construction of will and later will, claimed by contestants to have revoked earlier will, and rights of testator's children, pretermitted by original will, cannot be considered.

Appeal from Superior Court, San Bernardino County; Atwell Westwick, Judge.

Proceeding by Fred A. Wilson for probate of the will of Lorenzo Phillipi, deceased, contested by Domenico Phillipi and another. From an order granting proponent's motion for a new trial after entry of a judgment denying probate on a jury's verdict, contestants appeal.

Affirmed.

Francis J. Gabel and M. C. Schrager, both of Los Angeles, for appellants.

Fred A. Wilson, in pro. per., of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from an order granting a motion for new trial on the ground that the special verdict of the jury and the judgment were not supported by the evidence, and were contrary to the evidence, and on the additional ground of errors of law occurring during the trial. The only question argued in the briefs is the sufficiency of the evidence to sustain the verdict and judgment so we will confine ourselves to its consideration.

Lorenzo Phillipi died about August 8, 1943. For a number of years prior thereto, Fred A. Wilson, an attorney at law, had been his attorney and had performed various professional services for him, including the preparation of the will in question here.

On April 23, 1943, Phillipi executed the will in question in which he named Mr. Wilson as executor without bond and bequeathed all of his estate "unto Fred A. Wilson, who may devote the same or such portion thereof to worthy persons, institutions and causes, or distribute the same or any portion thereof to such persons, institutions and causes in such proportions and in such manner as in his judgment exclusively shall insure that my estate will not be dissipated, but on the contrary will be used for worthy purposes."

The will disinherited the two children of the testator.

Mr. Wilson filed this will with a petition asking its admission to probate and his appointment as executor. The two children filed their contests and a jury returned a special verdict finding that the will had been executed under undue influence exercised by Mr. Wilson. Judgment was entered on the verdict denying probate. The trial judge granted Mr. Wilson's motion for new trial and this appeal followed. Other facts in connection with the case may be found in *Re Estate of Philippi*, 71 Cal.App.2d 127, 161 P.2d 1006.

[1] That Mr. Wilson was the attorney of the testator and that a confidential relationship existed between them is not questioned. Where such a situation exists the rebuttable presumption of fraud or undue influence arises where the attorney profits from his dealings with his client. That presumption can only be overcome by clear and satisfactory evidence that the transaction between the attorney and his client was fair and equitable and that the attorney had taken no advantage of the relationship and that the client was fully informed as to all matters relative to the transaction. In *re Estate of Witt*, 198 Cal. 407, 245 P. 197.

Mr. Wilson was the only witness who testified in detail concerning the circumstances and conferences leading up to the preparation and execution of the will. We find the following in his testimony:

"Mrs. Wilson drove me by his place, and I went in and I said, 'Mr. Phillipi, what is the trouble?' 'Well,' he said, 'I have had a very bad night, I had to sit up all night, could not sleep, could not get my breath, and the will must be changed right away.' I said, 'Well I haven't in mind anybody to give it to. Do you know whom you want to give it to?' He said 'No, I will have to give it to you and then you give it to somebody you think where it would be some good and would not waste it.' I said 'Mr. Phillipi, that is asking considerable of me. That isn't in my line of work. I just practice law. Isn't there some friend or relative you can think of who would undertake this job for you?' He said 'No,' and said he was anxious to get the will prepared

right away and said he wanted me to undertake the work for him, and I did. I said 'Well, if that is the way you want it, I will do it.' So I went out to the car and Mrs. Wilson and I went down to the office and I drafted this will and went back to his place where I read the will over to him in the presence of Mrs. Wilson and Miss Smith (the secretary of Mr. Wilson). When we arrived that morning, the three of us, he asked if Amelia (the housekeeper) was around, and I looked out the window and I said, 'No, she is out there in the chicken corral.' I read it over to him and explained what I had in mind in writing it and asked him if that was the way he wanted it, and he said, 'Yes, it was,' and the will was then executed." Mr. Wilson also testified that he did not claim for himself, personally, any interest in the estate property.

The foregoing was not contradicted by any testimony but contestants argue that it is not that clear and convincing evidence of fair dealing necessary to overcome the presumption of undue influence.

[2,3] In cases of this kind, as in all others where conflicts in the evidence exist, those conflicts are addressed to the trial court. Here we have the presumption on the one hand supporting the verdict and judgment, and the testimony of Mr. Wilson in conflict with it. While, in cases of this kind, the presumption can be overcome only by clear, convincing and satisfactory evidence, the question of what constitutes such evidence, and when the presumption is overcome ordinarily and primarily, are questions addressed to the trier of fact. His conclusions on them should not be disturbed on appeal except in cases of an abuse of discretion or where there is no sufficiently substantial evidence supporting them.

[4,5] On hearing a motion for new trial the trial judge sits as a thirteenth juror. He may weigh the evidence, resolve conflicts in it, judge the credibility of the witnesses and reject the testimony of any witness whose testimony he doubts, or accept that of a witness he believes. An appellate court has no such power. Ordinarily we are bound by the decision of the trial judge where the evidence is conflicting and

there is reasonably substantial evidence or reasonable inferences to be drawn from the evidence supporting the decision of the trial court. *Sassano v. Roullard*, 27 Cal. App.2d 372, 81 P.2d 213; *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A.L.R. 123.

[6] Here the testimony of Mr. Wilson supports the inference (evidently drawn by the trial judge) that the plan for the testamentary disposition of his property originated in the mind of the testator and that he was not influenced by his attorney in making the will or executing his plans for the disposal of his estate. While it would have been better to have had an independent and disinterested attorney called in to prepare the will, with Mr. Wilson entirely out of the picture, we cannot say that the conclusions of the trial judge so lack evidentiary support that we may reverse the order granting a new trial.

[7] In their reply brief the contestants argue that the order granting the motion for new trial was an idle gesture and therefore should be reversed because the will of April 23, 1943, had been revoked by a later will executed on August 5, 1943, which has been admitted to probate. In *re Estate of Philippi*, 71 Cal.App.2d 127, 161 P.2d 1006.

The argument that the earlier will had been revoked may or may not be sound depending on the effect of the August will if both should be admitted to probate (In *re Estate of Kaufman*, 25 Cal.2d 854, 155 P. 2d 831) and the rights of the two children who were pretermitted heirs under the August will.

The question now before us is the propriety of the order granting the motion for new trial which leaves open the question of the admission to probate of the April will, and not its construction, nor that of the August will, nor the rights of the pretermitted children of deceased. Those questions will be properly presented during the later stages of the probate proceedings and are not for consideration at this time. In *re Estate of Hickman*, 101 Cal. 609, 36 P. 118; In *re Estate of Martin*, 31 Cal.App.2d 501, 88 P.2d 234; In *re Estate of Philippi*, *supra*.

The order is affirmed.

GRIFFIN, Acting P. J., concurs.

76 Cal.App.2d 10

PEOPLE v. WALKER.

Cr. 4020.

District Court of Appeal, Second District,
Division 2, California.

Sept. 6, 1946.

1. Homicide ☞250

Evidence disclosing a deliberate and malicious homicide sustained conviction of murder.

2. Homicide ☞51

When a person voluntarily without cause provokes a quarrel and, without first attempting in good faith to withdraw from the conflict, kills his adversary, he is guilty of murder.

3. Homicide ☞290

Instruction on presumption that defendant intended death or great bodily harm by assault with a deadly weapon was not prejudicial on ground that language has no application where killing of a person is admittedly fortuitous and that there was no evidence of an assault upon deceased, where there was no admission that discharge of revolver was fortuitous, but it was contended that defendant assailed deceased either through inadvertence or mistake and killed deceased with a deadly weapon.

4. Homicide ☞17

Instruction stating that, where a person purposely and with deliberate malice attempts to kill one person but by mistake or inadvertence kills another, the law transfers the felonious intent from the object of his assault and makes the homicide a murder, correctly stated the law.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Sherman Walker was convicted of murder, and he appeals.

Judgment affirmed.

Leola Buck Kellogg, of Los Angeles, (Montgomery G. Rice, of Los Angeles, of counsel), for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

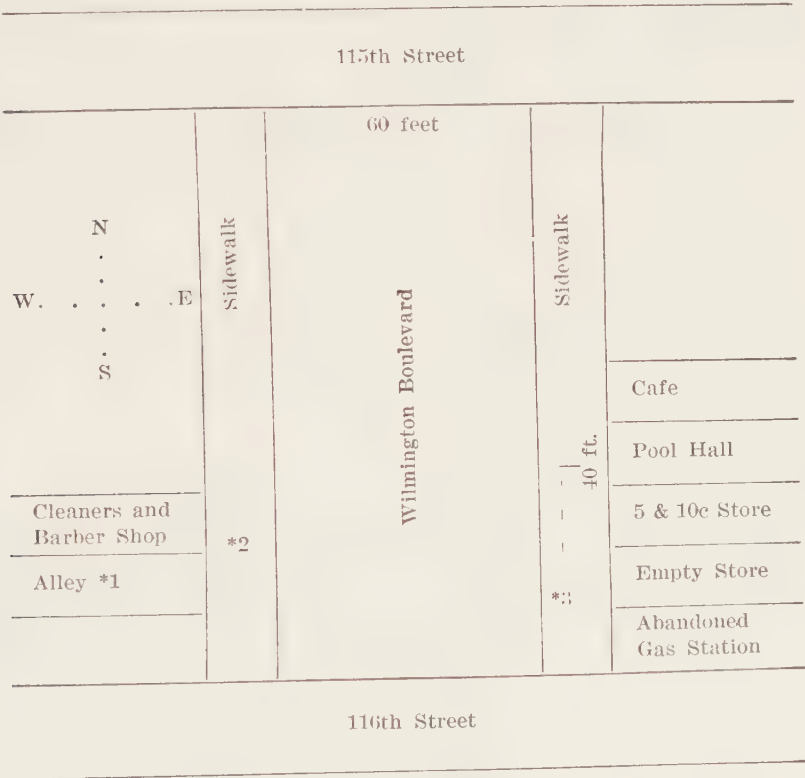
Having been convicted of murder by a jury, appellant assigns as prejudicial errors (1) the insufficiency of the evidence and (2) misleading instructions. The arguments for a reversal revolve around the fact that the homicidal victim was an innocent bystander while the latter's brother had been the object of appellant's wrath in an immediately recent brawl.

About 9:30 o'clock in the evening of September 15, 1945, while Alfred Shaw and a boy were playing pool in a hall on the east side of Wilmington boulevard near its intersection with 116th street in the city of Los Angeles, appellant entered and promptly placed his hand over the pocket at which the boy was aiming. Addressing appellant, Alfred said, "Lean off the table, daddy, don't lean on the table." Thereafter, when Alfred inclined over the table to pay for the game, he was accosted by appellant who with a vile oath said, "Don't tell me not to lean on the table," and struck the young man on the nose. As the latter retreated around the room appellant pursued him saying, "Grey eyes, you have been messing with me a lot of times." At that moment Alfred's brother-in-law, Coy Collins, entered the pool hall, prevented appellant's further pursuit of Alfred and conducted him from the premises while urging him to desist from his undeclared purpose. But as he was in the act of crossing the threshold appellant muttered: "I've got something to fix all you son-of-a-bitches." Spurning Collins' interference as they proceeded, he walked about 70 feet directly to his automobile in the entrance to an alley on the west side of the boulevard. Immediately on arrival he took his revolver therefrom. Sam Walker, perceiving the futility of Collins' admonitions, took his brother by the arm just before the latter fired the first ineffective shot. Following Sam's immediate release of him and Collins' hasty departure, appellant fired a second discharge into the body of Vernal Shaw,

the brother of Alfred. Vernal had been conversing with two women in front of the pool hall prior to the moment appellant and Collins proceeded across the street. While appellant was searching for his gun Vernal followed the same course and stopped in front of the barber shop which adjoins the twenty-foot alley in which appellant's car was parked. As he fired the second time appellant stood near his automobile in the alley and approximately fifteen feet from Vernal. A sketch attached to respondent's brief and reproduced herewith is a fairly accurate representation of the premises and of the positions of the parties:

ward on the east side of the boulevard. He had reached a point almost directly opposite the position of appellant when the first shot sounded. During the same time Vernal had walked from the pool hall to the point where he died.

From such facts it was a reasonable inference that appellant at the time of or before entering the pool room became enraged at Alfred Shaw. The vile epithet he uttered and the stroke by which he caused the boy's nose to bleed were evidence of his malice. His frustration in his attempts to continue the fight further angered him as he was held by Collins. His intent to take life or to do bodily harm



*1 — Approximate location of defendant at time of shooting.
*2 — Approximate location of deceased.
*3 — Approximate location of Alfred Shaw.

While appellant walked to his automobile and searched for his revolver, Alfred was retreating to a place of safety. He had heard appellant's threat as Collins pulled him through the door. As soon as he could retrieve his hat he emerged from the pool hall and directed his course south-

ward as a reasonable inference from his threat that he had something with which to "fix" his prey, followed by his direct march to the place of concealment of his deadly weapon. Not only is there no evidence that he had abandoned the fight with Alfred but his entire behavior reasonably

warrants the inference that his heart was filled with hatred and his mind was surcharged with an unquenchable resolution to destroy the object of his hate. The total time consumed from appellant's blow upon Alfred's nose until Vernal fell dead is indicated by the time required for Alfred to walk some 60 feet to escape danger. Appellant did not hesitate in the execution of his threat, but immediately upon conceiving and uttering his direful resolution he set forth to achieve it, rejecting friendly persuasions to desist. With his loaded revolver he would be avenged. Having hastily arrived at the place of its concealment he promptly opened fire.

In attempting to show the inadequacy of the evidence to support the verdict appellant argues that he was a nonbelligerent; that he walked out of the pool room as Collins talked; that there was no evidence that he was compelled to leave or that he entertained a malicious intent to injure anyone but that he was peaceably withdrawing from the scene of an abandoned conflict without reason for revenge. He forgets, however, that the jury as the triers of facts heard in detail the narrative above recited. From the acts of appellant, from his words addressed to Alfred and from the declaration of his purpose to "fix," followed by his immediately obtaining, aiming and firing his gun, the jury were warranted in inferring that he was inspired by a long cherished grudge to be avenged.

[1] No evidential basis appears for appellant's contention that he was wholly innocent of any intention to commit a crime. The suggestion that he fired his gun to induce Collins to cease annoying him or that he discharged it for any purpose other than to carry on the fight he had started in the pool hall is not a reasonable inference from the facts which the jury impliedly found. While the direction of his aim for the second shot was not directly toward the pool hall, there is no claim that he intended to shoot that institution. Resolved to maim or kill Alfred Shaw he aimed at the nearest person that might gratify his lust for revenge or at one he mistook for Alfred. Both the darkness and his own excitement were

factors calculated to render his vision imperfect, but they made his intent no less zealous or his weapon no less deadly. While the evidence discloses no enmity between appellant and deceased it reveals that the former's "blood lust had been aroused" to the extent that he desired to take life without the slightest provocation. From the success of his venture it was a fair deduction that his act was a deliberate and malicious homicide. *People v. Sainz*, 162 Cal. 242, 244, 121 P. 922. If he aimed to shoot Alfred and by accident hit Vernal, or if he mistook Vernal for Alfred, in either event his murderous intent was by law transferred to the victim. *People v. Pivaroff*, 138 Cal.App. 625, 628, 33 P.2d 44; *People v. Suesser*, 142 Cal. 354, 367, 75 P. 1093.

[2] Appellant's plea that the discharge of the revolver, if aimed at a particular individual, was done in the heat of passion arising from a quarrel at the time and could therefore have resulted only in manslaughter is also without justification. When a person voluntarily and without cause provokes a quarrel and, without first attempting in good faith to withdraw from the conflict, kills his adversary, he is guilty of murder. *People v. Montezuma*, 117 Cal.App. 125, 130, 3 P.2d 370, 4 P.2d 285.

Instructions Proper.

Appellant assigns the following instruction as prejudicial: "A person is presumed to intend to do that which he voluntarily and wilfully does in fact do and must also be presumed to intend all of the natural, probable and usual consequences of his own acts. Therefore, if you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant did assail on the date mentioned one Vernal Cecil Shaw violently with a dangerous weapon likely to kill and which did in fact destroy the life of said Vernal Cecil Shaw, the natural presumption is that such assailant intended death or great bodily harm and in the absence of evidence to the contrary, this presumption must prevail."

[3] It is contended that such language has no application where the killing of a person by the discharge of a gun is admit-

tedly fortuitous, and that appellant was prejudiced because there was no evidence of an assault on Vernal. Neither the facts proved nor the language of the instruction supports such contention. There is no admission that the discharge was fortuitous. The position of the prosecution was that appellant either aimed at Vernal, believing him to be Alfred, or that in attempting to shoot Alfred he accidentally shot Vernal. Since the proof was without contradiction that appellant "assailed" Vernal through inadvertence or by mistake and with a deadly weapon slew him, it would be contrary to reason to say that he did not intend all the natural and probable consequences of his act. The facts (1) that appellant provoked a quarrel with Alfred Shaw, (2) struck him without cause, (3) threatened to "fix" him, (4) straightway proceeded to get his loaded revolver, and (5) with it fired twice, hitting Vern-

al at close range, render unavoidable the inference that he purposed to commit a homicide, and that he was impelled by a felonious intent. That he did "assail" Vernal was not only fairly to be inferred but it was established beyond a reasonable doubt.

[4] The second instruction criticized is that which directed the jury that where a person purposely and with deliberate malice attempts to kill one person but by mistake or inadvertence kills another the law transfers the felonious intent from the object of his assault and makes of the homicide a murder. By that instruction the law was correctly declared. *People v. Suesser, supra*; *People v. Pivaroff, supra*.

Judgment and order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. MORRIS.

L. A. 19368.

Supreme Court of California, in Bank.

Sept. 11, 1946.

Rehearing Denied Oct. 10, 1946.

1. Taxation ⚡347

Unemployment insurance contributions may be assessed only upon amounts paid to employees, and a principal for whom services are rendered by an independent contractor does not come within the scope of the Unemployment Insurance Act. Gen. Laws, Act 8780d, § 1 et seq.

2. Brokers ⚡3

Taxation ⚡59

The Real Estate Act relating to licensing of real estate brokers and salesmen does not establish as a matter of law the status of every salesman as being "in employment" within Unemployment Insurance Act, but the purpose of the Real Estate Act is the protection of the public, and the primary function of the act is to allow only those persons to operate as real estate brokers and salesmen who are honest, truthful, and of good reputation. Business and Professions Code, §§ 10131-10133, 10150-10152, 10154; Gen.Laws, Act 8780d, § 1 et seq.

3. Brokers ⚡3

The Real Estate Act relating to licensing of real estate brokers and salesmen operates in a comparatively narrow field and should not be interpreted so as to give a meaning beyond its realm and scope. Business and Professions Code, §§ 10131-10133, 10150-10152, 10154.

4. Taxation ⚡59

The Real Estate Act does not expressly give the employer the right to control the manner and means of accomplishing the result desired, and does not conclusively negative all of the other factors to be considered in determining whether one is an independent contractor, and accordingly the occupation of real estate salesman, insofar as the Unemployment Insurance Act is concerned, is one that may be classified as that of an employee, or an independent contractor, depending on facts of the par-

ticular case. Business and Professions Code, §§ 10132, 10137, 10139, 10150-10152, 10154, 10160-10162; Gen.Laws, Act 8780d, § 1 et seq.

5. Taxation ⚡593(3)

Evidence that licensed real estate broker did not control manner and means by which lots were sold by brokers and salesmen working in his office, and that he did not bear any of their expenses, warranted finding that salesmen and brokers were "independent contractors" and not "employees" within Unemployment Insurance Act, notwithstanding that contract of employment was at will, and that licensed broker had right to discharge salesmen and brokers at any time without cause. Business and Professions Code, §§ 10131, 10132, 10151, 10160; Gen.Laws, Act 8780d, § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action for unemployment insurance contributions by the California Employment Stabilization Commission against Everett Marshall Morris. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Prior opinion 165 P.2d 503.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Eugene L. Wolver and Maurice Gordon, both of Los Angeles, for respondent.

Milton Marks and Morris Lowenthal, both of San Francisco, amici curiae on behalf of respondent.

EDMONDS, Justice.

The California Stabilization Commission asserts that in 1940 and 1941, certain salesmen and brokers associated with Everett Marshall Morris, a licensed real estate broker, were "in employment" within the meaning of the Unemployment Insurance Act, Stats.1935, p. 1226, as amended, 3

Deering's Gen.Laws, Act 8780d, and sued for contributions assessed accordingly. The appeal from the judgment in favor of Morris presents for decision the question as to the status of these persons.

There is no conflict in the evidence. During the period for which contributions are claimed, Morris, doing business under the fictitious name of "State Development Company," engaged the services of six licensed salesmen and two licensed brokers to sell land owned by him. Before the salesmen began their work, Morris, on behalf of each of them, signed either an application for a salesman's license or an application for the transfer of the salesman's license to himself as broker. He also aided prospective associates in reinstating dormant licenses. Each applicant paid his own license fee.

Morris had no formal written or oral agreement with any of his salesmen, except as to the amount of commissions payable upon each transaction. The brokers associated with Morris operated in the same manner as did the salesmen and they received the same commissions. Morris had an office which the salesmen used in making sales, but they had no particularly assigned space, nor did any one of them have a desk exclusively for his own use. It was the practice of a salesman to bring his prospects to the office, or to ask them to call there. But Morris did not bear any of the expenses of the salesmen in selling, and the only compensation paid to them was a commission based upon the amount of the transaction. The salesmen furnished their own telephones and paid for their own stenographic work, stationery, postage, and business cards. At times, stenographers regularly employed by Morris worked at their own homes after regular hours for the salesmen; some salesmen employed other persons as secretaries. Telephone messages for salesmen were recorded by an employee of Morris and later given to them in writing or by telephone.

The salesmen carried cards bought by them bearing the words "State Development Company" and the address and telephone number of its place of business. However, Morris supplied the salesmen

with contract blanks for use in making sales.

No sales instruction manuals or rules directing the manner in which the salesmen were to perform their duties were ever issued, but they were instructed not to make any misrepresentation concerning the property offered for sale. The salesmen were not required to be present at any specified place for any given number of hours. None of them agreed to continue with Morris for any definite period of time. No specific territory was assigned to any of them, and they were not required to follow any sales route, to adhere to any schedule of calls or to call upon any particular number of prospects. Each salesman obtained his own leads. At least three of the salesmen worked on transactions for the purchase or sale of land other than that owned or listed by Morris.

The salesmen were not required to submit, nor did they submit, any written report as to their activities for any given period of time. They were not required to report personally to the office of Morris or at any other place, nor were they required to make collections, investigations, or to perform any duties of that kind. They were not required to attend sales meetings, conferences, or consultations, and no such meetings were held. Salesmen wrote letters in regard to pending matters but Morris did not supervise their correspondence or sign the letters. They were not written in the name of "State Development Company" or "E. M. Morris" and the letterheads used did not bear either of these names.

Each salesman closed his own deals and he was authorized to receive the down payment from the prospect, but all sales were subject to confirmation by Morris within 10 days. Morris made no advances upon commissions. All amounts received from a purchaser were turned into the Morris office, which paid the salesman his commission. One-half of each installment payment was credited to the salesman until he had received his commission in full. Termination of the relationship did not terminate the salesman's rights to commissions. No salesman was ever discharged by Morris,

but frequently a member of the selling staff, following a letter or other notice, would transfer his license to some other broker. Morris signed transfers of salesmen's licenses as a matter of courtesy.

Upon this evidence, the trial court found that the salesmen and brokers were independent contractors, and as Morris had only one employee during the taxable period in controversy, he was not subject to the Unemployment Insurance Act.

The attorney general contends that the Unemployment Insurance Act is social legislation and as such must be liberally construed to the end that its purpose may be accomplished. The court may not accept the common law definition of master and servant as the measure of the relationship of the parties herein, he says, but must apply the definition which will accomplish the purposes for which the legislation was enacted. Under the statutory definition the salesmen and brokers performing services for Morris were "in employment." The attorney general also relies upon the requirements of the California Real Estate Act, Stats.1919, p. 1252, as amended, Deering's Gen.Laws, 1937, Act 112; now Bus. & Prof.Code, §§ 10000-10221, and argues that its provisions clearly gave Morris the right of control over the salesmen sufficient to meet all of the tests of an employer-employee relationship even under the common law. Finally, it is argued, there being no conflict in the evidence, as a matter of law, the salesmen and brokers working for Morris were his employees.

Morris takes the position that it was neither the intent nor the purpose of the Legislature to include an independent contractor within the purview of the Unemployment Insurance Act, and the common law concepts of independent contractor are controlling. The Real Estate Act was not promulgated for the purpose of establishing the status of employment so that either salesmen or brokers would be subject to and be benefited by the Unemployment Insurance Act. The respondent was selling his own property, consequently he was not a "broker" as that term is defined in the Real Estate Act and the parties were not governed by the terms of this legislation.

Morris also asserts that real estate salesmen may or may not be independent contractors, depending upon the facts in each case. As requiring the affirmance of the judgment in his favor, Morris rests upon the findings and conclusions of the trial court which, he declares, are fully supported by the evidence.

[1] The factors to be considered in making a determination as to whether, in a particular case, one performing services for another is an employee or an independent contractor have been fully stated by this court in recent decisions. Contributions to the Unemployment Insurance Act, it was held, may be assessed only upon amounts paid to employees; a principal for whom services are rendered by an independent contractor does not come within the scope of that legislation. *Empire Star Mines Co. v. California Emp. Comm.*, Cal. Sup., ante, 168 P.2d 686; *Briggs v. California Emp. Comm.*, Cal. Sup., 168 P.2d 696; *Twentieth, etc., Lites v. California Dept. of Emp.*, Cal. Sup., 168 P.2d 699.

The Real Estate Act, *supra*, provides that a real estate broker is a person "who, for a compensation, sells or offers for sale * * * real estate * * * for another or others." § 2; now Bus. & Prof.Code, § 10131. A real estate salesman is "one who for a compensation is employed by a licensed broker to sell, or offer for sale * * * real estate." § 2; now Bus. & Prof.Code, § 10132. The act does not apply "to anyone who shall directly perform any of the acts aforesaid with reference to his own property. * * *" § 2; now Bus. & Prof. Code, § 10133. Both salesmen and brokers are required to establish that they are honest, truthful and of good reputation. §§ 9, 9a, 9c; now Bus. & Prof. Code, §§ 10150, 10151, 10152, 10154.

An applicant for a salesman's license is required to state in his application "the name and place of business of the person * * * then employing him, or in whose employ he is to enter." § 9a; now Bus. & Prof.Code, § 10151. "The licenses of both broker and salesman shall be prominently displayed in the office of the real estate broker, and no license issued hereunder shall authorize the licensee to do busi-

ness except from the location stipulated in the license. The salesman's license shall remain in the possession of the licensed broker employer until canceled or until said licensee shall leave the employ of said broker. Immediately upon the salesman's withdrawal from the employ of the broker, the broker shall return the salesman's license to the commissioner for cancellation. A license cancelled but not suspended or revoked may be reinstated within the fiscal year upon receipt of application and fee of one dollar. * * * " § 11, now Bus. & Prof.Code, §§ 10160, 10161, 10162.

Any person who acts as a real estate broker or a salesman without a license is guilty of a crime (§ 17; now Bus. & Prof. Code, § 10139.) It is also made unlawful for any licensed broker to pay any compensation to any person who is not a licensed broker, or a salesman licensed under the broker paying the compensation, or for any real estate salesman to be employed by or to accept compensation from any person other than the broker under whom he was at that time licensed. § 18; now Bus. & Prof.Code, § 10137.

[2,3] The Real Estate Act, *supra*, does not establish as a matter of law the status of every salesman as being "in employment" within the meaning of the Unemployment Insurance Act. The licensing statute was not promulgated for that purpose; it was designed for the protection of the public, the primary function being to allow only those persons to operate as real estate brokers and salesmen who are honest, truthful, and of good reputation. *Riley v. Chambers*, 181 Cal. 589, 593, 185 P. 855, 8 A.L.R. 418; *Gray v. Horne*, 48 Cal.App.2d 372, 119 P.2d 779; *Koeberle v. Hotchkiss*, 8 Cal.App.2d 634, 640, 48 P.2d 104. The act operates in a comparatively narrow field and the legislation should not be interpreted so as to give a meaning beyond its realm and scope. See: *Black on Interpretation of Laws*, p. 66; *Horack's Sutherland Statutory Construction*, 3d Ed., vol. 3, § 6006, p. 149. The court of appeals of New York reached this conclusion in *Matter of Sullivan Co., Inc.*, 289 N.Y. 110, 44 N.E.2d 387, 388, where the question presented for decision was "wheth-

er respondent, a corporation doing business as a real estate broker * * * is liable under the unemployment insurance law * * * to make contributions with respect to commissions earned by its salesmen." In that case, as here, reliance was placed upon legislation similar to, if not identical with, the provisions of the California statute. After observing that the purpose of the New York enactment was to insure competency and honesty of the licensee, the court held: "It is quite apparent that to effectuate the purposes of the statute [relating to licensing of real estate salesmen and brokers] * * * it is not necessary that we should go so far as to hold that the recognized common law relationship of independent contractor has been outlawed by the statute. No reason appears why the standards of competency and honesty among real estate salesmen cannot be maintained even though brokers have no control over the salesmen's selling methods. If the statute and the common law rule can stand together, the statute should not be so construed as to abolish the common law rule." 289 N.Y. 115, 44 N.E. 2d 389. Considering the facts as to the relationship of the parties, the court held that the broker was not liable for unemployment contributions because the real estate salesmen were independent contractors. And in *Kochler v. Myers*, 3 Cir., 21 F.2d 596, where a statute, N.J.S.A. 45:15-1 et seq., requiring the licensing of real estate salesmen and brokers was construed, the court held that such legislation did not create a new definition of employer and employee.

[4] The Real Estate Act of this state does not expressly give the employer the right to control the manner and means of accomplishing the result desired, nor do its provisions conclusively negative all of the other factors to be considered in determining whether one is an independent contractor. Accordingly, the occupation of real estate salesman, insofar as the Unemployment Insurance Act is concerned, is one that may be classified as that of an employee, or an independent contractor, depending upon the facts of the particular case. *Peters v. California Building-Loan*

Ass'n, 116 Cal.App. 143, 2 P.2d 439; Royal Indemnity Co. v. Industrial Acc. Comm., 104 Cal.App. 290, 285 P. 912; Hartford A. & I. Co. v. Industrial Acc. Comm., 93 Cal. App. 313, 269 P. 733; Meyer & Co. v. Unemployment Comp. Comm., 348 Mo. 147, 152 S.W.2d 184; Guaranty Mortgage Co. of Nashville v. Bryant, 179 Tenn. 579, 168 S.W.2d 182; J. G. Leinbach Co. v. Unemployment Comp. Bd. of Review, 146 Pa. Super. 237, 22 A.2d 57. Insofar as Lowmiller v. Monroe, Lyon & Miller, Inc., 101 Cal.App. 147, 281 P. 433, 282 P. 537, is contrary to this conclusion, it is disapproved.

[5] The evidence concerning the relationship of Morris and the brokers and salesmen working for him shows that he had no right to control, nor did he, in practice, control the manner and means by which the lots were sold. The salesmen were authorized to do business only from the location stipulated in the license and it was subject to cancellation if the licensee terminated his association with the Morris office, but the salesman could, with little difficulty, have the license reinstated. Also, a salesman could receive no compensation from any broker other than from Morris, but these factors merely present a conflict in the evidence in regard to the right of control and do not completely negative, as a matter of law, the possibility of an independent contractor relationship.

In the absence of an agreement for a definite term, the contract of employment was one at will and Morris had the right to discharge the salesmen at any time without cause. That right is strong evidence in support of an employment relationship (Empire Star Mines Co. v. California Emp. Comm., supra), but it is not conclusive where other evidence supports the finding of the trial court that an independent contractor relationship exists between the parties. Counihan v. Lufstufka Bros. & Co., 118 Cal.App. 602, 605, 5 P.2d 694; Royal Indemnity Co. v. Industrial Acc. Comm., supra, 104 Cal.App. 297, 285 P. 912; Luckie v. Diamond Coal Co., 41 Cal.App. 468, 482, 183 P. 178.

Although Morris allowed the salesmen to transact business in his office, he did not

bear any of their expenses in selling his property, and the method of payment was by the job rather than by the time put in on the work. Each of them supplied the essential tools such as telephones, stenographic service, stationery, postage, and business cards, although Morris provided contract forms for their use. Under these circumstances, the finding of an independent contractor relationship finds ample support in the evidence.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.



28 Cal.2d 824

EMPHRAIM et al. v. METROPOLITAN TRUST CO. OF CALIFORNIA et al.

Sac. 5677.

Supreme Court of California, in Bank.

Sept. 11, 1946.

Rehearing Denied Oct. 10, 1946.

1. Quieting title  34(5)

One alleging that he is owner of described realty, that defendants claim an interest therein adversely to him, that such claim is without right, and that defendants have no estate, title, or interest in any part of the realty, pleads all that the law requires in an action to quiet title, and need not particularly state the facts regarding the asserted invalidity of defendants' claim nor attack the instrument claimed to be a cloud against plaintiffs' title. Code Civ. Proc.   738.

2. Action  38(2)

Quieting title  41

A complaint consisting of two counts, one to quiet title to realty and the other, as incidental to the first count, to have declared void an instrument under which particular defendants assert title, states only one cause of action, and therefore a general demurrer should be sustained if the second count reveals a defect in plain-

tiffs' title or does not state a cause of action to remove a cloud. Code Civ.Proc. § 738.

3. Quieting title ⇨34(5)

In suit to remove a cloud on title, complaint must state facts, not mere conclusions, showing the apparent validity of the instrument designated and point out the reasons for asserting that it is actually invalid.

4. Trusts ⇨25(1)

A voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor indicating with reasonable certainty an intention by trustor to create a trust, and the subject, purpose, and beneficiary of the trust. Civ.Code, § 2221.

5. Trusts ⇨112

The primary rule in construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the trustor or settlor.

6. Pleading ⇨35

Where it clearly appeared in action to quiet title to realty, to remove cloud from title, and for declaratory relief by those claiming under trustor's grantee, that trustor and trust company intended to create a valid voluntary trust conforming to statute for purpose of subdividing, selling, and accounting for proceeds of sales of realty in manner specifically provided in declaration of trust, with provision for payment of indebtedness to trust company and to another, allegations of mere conclusions with respect to legal construction of the instrument and the averments in conflict with its provisions were disregarded as surplusage. Civ.Code, § 2221.

7. Conversion ⇨11 Trusts ⇨140(1)

The extent of the interest of the beneficiary of a trust depends on the manifestation of the intention of the trustor, and ordinarily if realty is held in trust, and by the terms of the trust the duty is imposed on the trustee to sell it and hold the proceeds in trust, or distribute the proceeds, the beneficiary's interest is "personalty". Civ.Code, § 863.

See Words and Phrases, Permanent Edition, for all other definitions of "Personalty".

8. Trusts ⇨153

Though the grantor in an ordinary trust deed given to secure a debt retains an interest in the realty, a different situation exists where the realty is conveyed primarily for the purpose of sale.

9. Conversion ⇨11 Quieting title ⇨10(2)

Where owners of realty by express trust conveyed realty to trustee primarily for purpose of sale, and incidentally for purpose of security, holder's interest in realty was converted into "personalty" and whole estate vested in trustee, and therefore an action to quiet title or remove a cloud in favor of original owners of realty or those holding under them would not lie. Civ.Code, §§ 863-865.

10. Trusts ⇨140(1)

Waiver by beneficiaries of trust of provisions of statute relating to sale of pledged personalty was evidence that beneficiaries' interest in realty conveyed to trustee primarily for purpose of sale, was personalty. Civ.Code, § 3006.

11. Trusts ⇨359(1)

The available remedy for owner of realty, who has conveyed the realty to a trustee primarily for the purpose of sale, is either an action to enforce the trust and to obtain conveyance of the legal title or one to compel the trustee to redress the breach of trust.

12. Action ⇨6

Where no present legal controversy existed in action to quiet title to realty and to remove a cloud from title, because of the fact that plaintiffs' interest if any in the realty was merely a personal property interest, no cause of action for declaratory relief was stated. Code Civ.Proc. § 1060.

13. Trusts ⇨195

Statutes relating to notice of sale under power in mortgage, and providing that it applies to every transfer of an interest in property other than any transfer in trust, does not ordinarily apply to transfers of property held in trust. Civ.Code, § 2924.

14. Action ☞6

Quieting title ☞34(4)

Where assignment and deed of trust company at most were only voidable, those claiming under beneficiaries could not obtain equitable relief in action to quiet title, to remove cloud from title and for declaratory relief, without offering to do equity by paying beneficiaries' debts.

CARTER, J., dissenting.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Walter K. Ephraim and another against the Metropolitan Trust Company of California, a corporation, and others to quiet title to realty, to remove a cloud from title, and for declaratory relief. Demurrers to the complaint were sustained, and the plaintiffs appeal.

Judgment affirmed.

Prior opinion 159 P.2d 694.

John J. Redhead, of Salinas, for appellants.

William H. B. Haymond and F. W. Audrain, both of Los Angeles, and Thomas Maul, of Placerville, for respondents.

Herbert E. White, of Sacramento, amicus curiae on behalf of respondents.

EDMONDS, Justice.

In 1927, the owners of certain real property in the county of El Dorado conveyed it to Metropolitan Trust Company of California. Three years later, the parties executed a declaration of trust reciting that the trust company held the property as security for the payment of two promissory notes. The successors in interest of the trustors declare that a conveyance made by the trustee, following an asserted default in payment of one of these notes, is invalid, and the appeal is from a judgment based upon an order sustaining demurrers to their complaint with leave to amend.

In the first count of the complaint, Walter K. Ephraim and his wife claim to be the owners of and entitled to the possession of the specifically described real property. They allege that the trust company,

R. H. Strosnider and Girlie Strosnider, and certain other defendants sued under fictitious names, without any right to do so, claim an interest in the property adverse to their title. The Ephraims also assert that the trust company is made a defendant "as trustee, mortgagee and beneficiary, under any trust or mortgage that may be shown by the declaration" of trust which it executed. A further allegation is that the action is brought under sections 738 and 1060 of the Code of Civil Procedure.

The second count of the complaint is in the nature of a suit to remove clouds from the Ephraims' title and for declaratory relief. The allegations of the first count as to ownership and right to possession of the land, the basis upon which the trust company is made a defendant, and the statements regarding the code sections relied upon, are incorporated by reference. It is then alleged that in 1927 H. L. Henry and his wife were the owners of and entitled to the possession of the property in controversy. At that time the Henrys, to secure the payment of an indebtedness owing by them to the trust company executed and delivered to it a grant deed of the property, the intention of both parties being that the deed would not operate as a conveyance, but as a mortgage only.

In 1930, according to the complaint, the trust company and the Henrys executed and recorded a declaration of trust reciting that the corporation held title to the real property so conveyed, first, as security for the payment of \$10,000 owed by the Henrys to it, and secondly, for the payment of a junior obligation of \$13,000 owed by the Henrys to one Girlie Strosnider. Each indebtedness was evidenced by a promissory note whose terms and conditions are set out in the declaration of trust. Under the declaration the trust company, as trustee, was empowered to hold in trust, subdivide, convey, and improve the real property and to apply the proceeds from the sale of the lots in payment of the indebtedness and to other specified purposes. Each lot of the tract of land as subdivided might be released from the lien of the indebtedness by the payment of \$50, but the trustee retained the power to make a convey-

ance of the property after the payment of the release price. The Henrys, who were designated as beneficiaries, agreed to pay the taxes, assessments, insurance, cost of improvements and certain other charges. The trustee was empowered to convey all necessary easements and to dedicate to public use all streets and alleys shown on the subdivision map. An express purpose of the declaration of trust was the conveyance of lots in accordance with a "Schedule of Sale Prices." The trustee was given the exclusive right to execute all deeds and agreements of sale affecting the property.

A further provision of the declaration of trust was that the interest "of said Beneficiaries and of each * * * successor in interest of said Beneficiaries is personal property and that no such Beneficiary has or shall have any right, title or interest in or to any property covered hereby, nor has or shall have any right or power to in any manner apply for or secure the dissolution or termination of this Trust, or the partition or division of any of the Trust Property. * * *" The trust was to end after 20 years, unless sooner terminated by the sale of all of the property and the performance of the other purposes of the trust. If there was no default the unconveyed property was to be deeded to the beneficiaries.

Should the beneficiaries default in the payment of any sum payable under the trust the trustee, at its election, might sell the real property comprising the trust estate, and, although the provisions of section 2924 of the Civil Code were expressly waived by the beneficiaries, the declaration also provided that the sale of the real property comprising the trust estate should be made only in the manner required by law for the sale of real property under execution and held as security by a deed of trust. However, in regard to the sale of the beneficial interest in case of default, the trust provided "that should the said Henrys default in payment of either of said principal sum of \$13,000 or interest of the said second lien * * * and should said default continue for a period of thirty days after notice in writing * * * of such default * * * upon the request of the holder of said indebtedness the trustee

could proceed to foreclose and sell the beneficial interest of the said Henrys, at public auction, in the manner provided in said declaration, for the payment of said indebtedness." Another provision is that in the event of the foreclosure of the second lien under a power of sale contained in the declaration of trust, the trustee shall first publish notice of the time and place of such sale with a description of the entire beneficial interest to be sold, at least once a week for three successive weeks in a newspaper published in the city of Los Angeles, and "shall give such other notice as may be required by law"; and that upon payment of the purchase price, the trustee shall deliver to the purchaser an "Assignment of Beneficial Interest" so sold. The provisions of Civil Code section 3006, relating to the sale of pledged personal property, were expressly waived by the beneficiaries.

The Henrys defaulted in the payment of the junior note, the complaint continues, and Girlie Strosnider executed and delivered to the trustee a written declaration of default and demand for sale, directing the trustee to sell in the manner set forth in the declaration and "according to law" the entire beneficial interest. Following that demand, the trustee published a notice of time and place of sale of the beneficial interest, without any description of the real property, in a newspaper published and printed only in the city of Los Angeles, and posted a copy of the notice of sale in the city of Los Angeles, where the sale of the beneficial interest was to take place.

At the time specified, the trustee sold the beneficial interest to R. H. Strosnider and executed an "Assignment of Beneficial Interest" to him. Subsequently the trustee executed and delivered to R. H. Strosnider and without reference to the mortgage deed or declaration of trust, a grant deed of the real property which deed was recorded. But there was no recordation in El Dorado County, where the property is situated, of the notice of breach and election to sell. No notice of sale describing the real property was published in any newspaper in that county or elsewhere in the State of California, nor was a copy of the notice of sale or any notice posted on the mortgaged property. This is the only

action to enforce the mortgage and power of sale which has been taken by the respondents.

The mortgage and the debts and notes for which the mortgage and power of sale were security, became due and payable in 1933, and they are now barred by the statute of limitations. In 1939, the Ephraims acquired title to the land by a deed of the trustors' grantee. Because of the illegal sale, and the bar of the statute of limitations, the complaint concludes, the mortgage deed of 1927 and the assignment of beneficial interest and the deed from the trustee to R. H. Strosnider are void and operate only as clouds upon the plaintiffs' title. Accordingly, there now exists an actual controversy between the parties to the action and "it is necessary * * * to secure a declaratory judgment * * * and to remove all of the aforesaid clouds resting upon their title." By the prayer the court is asked to declare that the conveyance of the Henrys and the transaction between them and the trust company constitutes a mortgage and a lien upon the land as security for the payment of the obligations evidenced by the two notes; that the sale by the trustee of the so-called beneficial interest is invalid and did not divest or impair the Henrys' ownership; that, since 1937, the mortgage deed and power of sale, and the debts secured thereby have been barred by the statute of limitations; and that the Ephraims have a valid title to the real property in controversy, freed from any claims of the defendants.

Separate demurrers were interposed to this complaint. The trust company, in addition to pleading that the first count does not include facts sufficient to state a cause of action, set up the bar of sections 318 and 343 of the Code of Civil Procedure as applicable statutes of limitation. The Strosniders demurred to both counts upon these grounds, adding that each of the causes of action is uncertain, ambiguous and unintelligible in certain enumerated particulars. They also included section 319 of the Code of Civil Procedure as a statute of limitation relied upon to bar declaratory relief. The demurrer of the trust company to the second count follows that of the Strosniders, but also pleads that there is a variance be-

tween the averments regarding the declaration of trust, in that at one point it is referred to as a mortgage with power of sale and later as a conveyance of property to a trustee vested with power to convey.

As grounds for a reversal of the judgment, the Ephraims contend that the allegations of the first count include all that the law requires in an action to quiet title. That cause of action they say, is not directed toward any particular instrument. The two counts of the complaint are not interrelated; they do not depend upon the same facts, nor do they attempt to state but one cause of action based upon alleged infirmities of the declaration of trust.

The second count, the appellants assert, is in the nature of an action for declaratory relief and to remove clouds from their title, presenting an issue as to the intention of the parties concerning the purpose of the conveyance and declaration of trust. In this connection, it is urged that the lien of the mortgage was lost by the bar of the statute of limitations on the principal obligation; that the Ephraims are not personally liable for the debts and are under no moral obligation to discharge them, and since the instruments executed by the Henrys created only a mortgage or deed of trust, the power of sale was invalidly exercised by the trustee because it did not comply with the requirements of section 2924 of the Civil Code and section 692 of the Code of Civil Procedure.

Furthermore, say the appellants, an action for declaratory relief will lie even when there is an available remedy in an ordinary action at law or equity, and a general demurrer should be overruled if the plaintiff is entitled to any relief under the allegations of the complaint. Also, the second count does not allege a cause of action which comes within or is affected by a statute of limitation, because such a statute does not apply to a suit to set aside and cancel a conveyance which is a cloud upon title.

In support of the judgment, the trust company asserts that where a simply stated cause of action, such as one to quiet title or a common count, is followed by a second count pleading a statement of facts in de-

tail which is vulnerable to demurrer, the first count cannot stand. Also, it is said, if the deed of 1927 was not a mortgage, then the second cause of action is subject to the plea of the statute of limitations. The further point is made that because, as appears from the opinion in *Strosnider v. Superior Court*, 17 Cal.App.2d 647, 62 P.2d 1394, in 1934 the Henrys were adjudged bankrupt, and in connection with the administration of their estates the bankruptcy court authorized the proceeding under which title was acquired by the Strosniders, the Henrys had no title to convey to the Ephraims' grantors, and the superior court has no jurisdiction to entertain the present action.

Turning to the appellants' characterization of the 1927 conveyance as a "mortgage deed," it is argued that there must first be a determination of the nature of the transaction. The instruments pleaded in the complaint do not constitute a mortgage, hence the trust company was not obliged to observe section 2924 of the Civil Code and section 692 of the Code of Civil Procedure. It is evident from the language of the declaration of trust that the parties intended the Henrys to retain merely a personal property interest in the properties. As supporting this construction of the document, the trust company makes reference to the nature of the trust, the express waiver of section 3006 of the Civil Code relating to the sale of pledged personal property, and the exclusive authority of the trustee to convey a legal title to any portion of the lands in question. In this connection, there is quoted another provision of the instrument which declares that "the interest under this trust of said beneficiary and of each assignee * * * is personal property and that no such beneficiary has or shall have any right, title or interest in or to any property covered hereby." By the terms of the declaration of trust the trustee was not authorized to sell the real property upon the default of the Henrys and it was given no power to make a conveyance but was directed to sell and transfer the "beneficial interest" of the obligors. Moreover, the beneficiaries expressly waived the provisions of section 2924 of the Civil Code. And if the land was originally con-

veyed without consideration, the grantee, from the beginning, must have been a trustee. Finally, the argument concludes, as the appellants are bound by the express terms of the pleaded instruments and a contrary interpretation must be regarded as surplusage, the appellants' complaint is vulnerable to the plea of the statute of limitations.

The Strosniders argue that the first count is interrelated with the second and both are aimed at a removal of a cloud on the title. The first cause of action is barred by the provisions of sections 318 and 343 of the Code of Civil Procedure, they say, because the complaint shows that legal title is not vested in them. Furthermore, the cause of action accrued in 1930, when the declaration of trust was executed and the present action was not commenced until 1943. The count to remove a cloud upon title is subject to general demurrer because there are insufficient facts alleged pointing out the nature of the cloud. And, assuming that a count to quiet title is followed by the statement in a second cause of action of the particular facts upon which the plaintiff relies, and these facts show that the plaintiff is not entitled to recover, a demurrer to both causes of action should be sustained. The characterization of the transaction as a mortgage is not one of the facts admitted by the demurrer if the exhibits deny the pleader's conclusion to that effect.

The Strosniders take the same position as the trust company in regard to the effect of the decision in *Strosnider v. Superior Court*, 17 Cal.App.2d 647, 62 P.2d 1394. They contend also that the Ephraims have pleaded no facts showing that an actual controversy exists, and the court may, in its discretion, refuse to exercise the power granted under section 1060 of the Code of Civil Procedure where its declaration or determination is not necessary or proper at the time and under all the circumstances. Code Civ.Proc. § 1061. Furthermore, the Ephraims have a moral obligation to pay the debts and "he who seeks equity must first offer to do equity."

[1] One who alleges that he is the owner of certain described real property, that

defendants claim an interest therein adversely to him, that such claim is without right, and that the defendants have no estate, title or interest whatever in said premises or any part thereof pleads all that the law requires in an action to quiet title and, in such an action, the complaint need not particularly state the facts in regard to the asserted invalidity nor attack the instrument which is claimed to be a cloud against the title of the plaintiff. Code Civ.Proc. § 738; *Thompson v. Moore*, 8 Cal.2d 367, 372, 65 P.2d 800, 109 A.L.R. 1027; *California-Michigan L. & W. Co. v. Fletcher*, 206 Cal. 392, 394, 274 P. 527; *Hyatt v. Colkins*, 174 Cal. 580, 581, 163 P. 1007; *Castro v. Barry*, 79 Cal. 443, 447, 21 P. 946; *Rough v. Simmons*, 65 Cal. 227, 3 P. 804.

[2, 3] However, a complaint which consists of two counts, one to quiet title to real property and the other, as incidental to the first count, to have declared void an instrument under which particular defendants assert title states only one cause of action. *Thompson v. Moore*, supra, 8 Cal. 2d at page 370, 65 P.2d 800, 109 A.L.R. 1027, and cases cited therein; *Louvall v. Gridley*, 70 Cal. 507, 510, 11 P. 777; *Stephan v. Obersmith*, 48 Cal.App.2d 199, 202, 119 P.2d 388. And where, as is true in the present pleading, the count to quiet title in regard to particularly named defendants clearly shows that it is based upon the same facts which are pleaded in the cause to remove a cloud, a general demurrer of those defendants should be sustained if the second count reveals a defect in plaintiff's title or does not state a cause of action to remove a cloud. *Martin v. Hall*, 219 Cal. 334, 338, 26 P.2d 288; *Hamman v. Milne*, 179 Cal. 634, 178 P. 523; see *Orloff v. Metropolitan Trust Co.*, 17 Cal.2d 484, 110 P.2d 396; *Hibernia S. & L. Soc. v. Ordway*, 38 Cal. 679; *Hays v. Temple*, 23 Cal.App.2d 690, 73 P.2d 1248; *Harris v. Kessler*, 124 Cal.App. 299, 12 P.2d 467. A suit to quiet title must be distinguished from an action to remove a cloud on the title alleged to have been created by a designated instrument. In a suit to remove a cloud the complaint must state facts, not mere conclusions, showing the apparent validity of the instrument designated, and

point out the reason for asserting that it is actually invalid. *Thompson v. Moore*, supra; *Castro v. Barry*, supra; *Hibernia S. & L. Soc. v. Ordway*, supra; *Kroeker v. Hurlbert*, 38 Cal.App.2d 261, 101 P.2d 101; 4 *Bancroft's Code Pleading*, § 2188, p. 3900; 44 *Am.Jur.* § 79, p. 63.

Turning to the second count of the complaint, the allegations clearly show that, after the Henrys conveyed the land to the trust company, they agreed in writing, in the form of the declaration of trust, upon their respective rights and those of *Girle Strosnider* in regard to the terms and conditions under which the land should be held for subdivision and other purposes, and the rights of the creditors in the event of default. There is no charge that the declaration of trust was executed by them as the result of fraud or undue influence, nor that they acted under any mistake of law or of fact. In other words, the pleading affirmatively shows the execution and delivery of a declaration of trust expressly referring to the deed which had been made three years before and stating completely and with certainty the terms upon which title had been conveyed and received with no issue of fact concerning the effect which the parties intended to be given to their contract.

[4, 5] A voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty an intention on the part of the trustor to create a trust, and, the subject, purpose and beneficiary of the trust. Civ.Code, § 2221; see *Cahlan v. Bank of Lassen County*, 11 Cal.App. 533, 105 P. 765; Rest., Trusts, §§ 17 (subd. a), 18. And the primary rule in construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the trustor or settlor. Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14; *Gunter v. Jones*, 9 Cal. 643; *Wright v. Security-First Nat. Bank*, 35 Cal.App.2d 264, 95 P.2d 194; *Smith v. Bank of America, etc., Ass'n*, 14 Cal.App.2d 78, 57 P.2d 1363; see Rest., Trusts, § 23.

[6, 7] In the present case it clearly appears that the Henrys and the trust com-

pany intended to create a valid voluntary trust conforming to the provisions of section 2221 of the Civil Code for the purpose of subdividing, selling and accounting for the proceeds of sales of the real property in the manner specifically provided in the declaration of trust. Provision was also made for the payment of the indebtedness to the trust company and Girlie Strosnider. The allegations of mere conclusions with respect to the legal construction of the instrument, and the averments in conflict with its provisions should be disregarded as surplusage. *Peak v. Republic Truck Sales Corporation*, 194 Cal. 782, 230 P. 948; *Stoddard v. Treadwell*, 26 Cal. 294; *Bashford v. Levy & J. Zentner Co.*, 123 Cal.App. 204, 11 P.2d 51; *Meer v. Cerati*, 53 Cal. App. 497, 200 P. 501. The extent of the interest of the beneficiary of a trust depends upon the manifestation of intention of the trustor, and ordinarily if real property is held in trust, and by the terms of the trust a duty is imposed upon the trustee to sell it and hold the proceeds in trust or distribute the proceeds, the interest of the beneficiary is personal property. *Wright v. Security-First Nat. Bank*, supra; *Smith v. Bank of America, etc., Ass'n*, supra; *Bank of America Ass'n v. Sparr R. Corporation*, 20 Cal.App.2d 10, 66 P.2d 476; *Houghton v. Pacific Southwest T. & S. Bank*, 111 Cal. App. 509, 295 P. 1079; *Finnie v. Smith*, 83 Cal.App. 707, 257 P. 866; see *Title Ins. & Trust Co. v. Duffill*, supra; *In re Walkerly's Estate*, 108 Cal. 627, 41 P. 772, 49 Am. St.Rep. 97; *Ward v. Waterman*, 85 Cal. 488, 24 P. 930; *Faires v. Title Ins. etc. Co.*, 15 Cal.App.2d 350, 59 P.2d 428; *Craven v. Dominguez Estate Co.*, 72 Cal.App. 713, 237 P. 821; *Civ.Code*, § 863; *Rest., Trust*, §§ 128, 131, subd. (1); 13 Cal.L.Rev. 76.

[8,9]. Although the grantor in an ordinary trust deed given to secure a debt retains an interest in the real property, a different situation exists where property is conveyed and held under trust provisions such as those of the declaration agreed to by the Henrys. From the express intention of the parties and the nature and purposes stated in the declaration of trust, it is evident that the Henrys and Metropolitan Trust intended that the grantors should have only a personal property interest in

the corpus of the trust. The trust company was given absolute title to the real property, a step necessary to effectuate the declared purposes of the trust in regard to the subdivision of the land. The trustee had the exclusive right to execute all deeds and agreements of sale affecting the property, to convey all necessary easements, and to dedicate to public use certain designated streets and alleys. Only if the indebtedness was paid in full by the grantors of the land and there was no subdivision sale of any part of it, could the Henrys have again acquired title to the same land they conveyed. It was the duty of the trustee to receive and disburse in the manner provided by the declaration the moneys paid for lots. And although the beneficiaries were to pay certain charges such as taxes and insurance, this was merely a condition imposed by the trustee before it would agree to assume the trust burden and does not indicate any reservation of title in the beneficiaries.

[10] Furthermore, by its terms the trust agreement expressly limited the beneficial interest to personal property. That the interest of the Henrys was personal property was further evidenced by the beneficiaries' express waiver of the provisions of Civil Code section 3006 relating to the sale of pledged personal property. Nor was the title to revert to the beneficiaries immediately after the payment of the indebtedness, but was to continue for 20 years, or until all of the lots were sold and the other purposes of the trust carried out.

It thus appears that by an express trust the Henrys conveyed the real property to the trustee primarily for the purpose of sale, and incidentally for the purpose of security, and the deed and declaration, when construed together, clearly establish that it was the intention of the parties to convert the real property interest of the grantors into personal property.

[11] Under such circumstances since the whole estate vests in the trustee (*Civ. Code*, §§ 863, 864) and the trustee and its successors in interest have a superior title to that of the Henrys or their successors (*Civ.Code*, §§ 863, 865), an action to quiet title or remove a cloud will not lie in favor

of the beneficiaries for whom the trustee holds the legal title in trust. The available remedy for such a plaintiff is either an action to enforce the trust and to obtain a conveyance of the legal title or one to compel the trustee to redress a breach of trust. *Yoakam v. Kingery*, 126 Cal. 30, 58 P. 324; *Harrigan v. Mowry*, 84 Cal. 456, 22 P. 658, 24 P. 48; *Becker v. Highboy Coaster Trust*, 112 Cal.App. 219, 296 P. 651; *Craven v. Dominguez Estate Co.*, supra; see Rest., Trusts, §§ 198, 199 and Cal.Anno. It has also been held that the grantor has the remedy of rescission (*Campbell v. Kennedy*, 177 Cal. 430, 170 P. 1107), but the complaint of the Ephraims includes no facts which would warrant granting such relief.

[12] And since no present legal controversy exists, no cause of action for declaratory relief is stated. Code Civ.Proc. § 1060; *City of Alturas v. Gloster*, 16 Cal.2d 46, 104 P.2d 810; *Merkley v. Merkley*, 12 Cal.2d 543, 86 P.2d 89.

[13,14] The provisions of section 2924 of the Civil Code ordinarily do not apply to transfers of property held in trust but here the trustee agreed to sell the real property in the manner required by law for the sale of real property under a deed of trust. Resolving any ambiguity relating to waiver in favor of the Ephraims, they cannot successfully contend that the sale of the beneficial interest and the conveyance of the real property to R. H. Strosnider were void. Although, according to the allegations of the complaint, the requirements for such sales were not fully complied with, the assignment and deed of the trust company at the most are only voidable and the Ephraims cannot obtain equitable relief without offering to do equity by paying the debt. *Williams v. Koenig*, 219 Cal. 656, 660, 28 P.2d 351; *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d 673; *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 290, 119 P. 82; *Py v. Pleitner*, 70 Cal.App.2d 576, 161 P.2d 393; *Carpenter v. Hamilton*, 59 Cal.App.2d 149, 151, 138 P.2d 355; *Leonard v. Bank of America*, 16 Cal.App. 2d 341, 60 P.2d 325.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAY-NOR, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. In affirming the judgment the majority opinion holds that where the first count of a complaint alleging a cause of action to quiet title shows that with respect to certain defendants it is based upon the same facts pleaded in the second count to remove a cloud from the title, a general demurrer of those defendants will be sustained if the second count reveals a defect in plaintiff's title or fails to state a cause of action; that in the present case the allegations of the second count are insufficient to show a cloud upon the title and, therefore, the trial court properly sustained the general demurrer.

With this conclusion I cannot agree. The allegations of the second count of the complaint in my opinion state facts which would justify a decree declaring that, notwithstanding the apparent validity of the deed and declaration of trust, those instruments are invalid, constituting clouds upon the title. Civ.Code, § 2911; *Faxon v. All Persons*, 166 Cal. 707, 137 P. 919, L.R.A. 1916B, 1209; *Banta v. Wise*, 135 Cal. 277, 67 P. 129; *Hibernia S. & L. Soc. v. Ordway*, 38 Cal. 679, 681; *Hyatt v. Colkins*, 174 Cal. 580, 581, 163 P. 1007; see *Kroeker v. Hurlbert*, 38 Cal.App.2d 261, 265, 101 P.2d 101; *Castro v. Barry*, 79 Cal. 443, 21 P. 946; Civ.Code, §§ 3412-3415. Since these clouds afford grounds for a reasonable apprehension that they may cause serious injury, the Ephraims are entitled to have them removed. Civ.Code, § 3412; *Patterson v. Clifford F. Reid, Inc.*, 132 Cal.App. 454, 457, 23 P.2d 35.

It is urged that where a written contract, which is the foundation of an action, is attached to the complaint and made a part of it, the allegations of conclusions with respect to the legal construction of the instrument and averments in conflict with its clear provisions should be disregarded as surplusage. Citing *Peak v. Republic Truck Sales Corporation*, 194 Cal. 782, 230 P. 948; *Stoddard v. Treadwell*, 26 Cal. 294; *Bashford v. Levy & Zentner*

Co., 123 Cal.App. 204, 11 P.2d 51; *Meer v. Cerati*, 53 Cal.App. 497, 200 P. 501. But a deed absolute on its face may be shown, by parol, to have been intended as a mortgage. Regardless of the form of a conveyance of real property which was given as security for the performance of an obligation it is, in equity, a mortgage. And equity will look beyond the form in which the transaction is clothed, and will grant such relief as is necessary to carry out the true intent of the parties to the agreement. For the purpose of determining that intent the court will consider all of the facts and circumstances of the transaction. *Beeler v. American Trust Co.*, 24 Cal.2d 1, 147 P.2d 583; *Vance v. Anderson*, 113 Cal. 532, 45 P. 816.

Here the Ephraims have alleged that the parties intended the instruments to be a mortgage. The language of the instruments does not conclusively negative that claim. All of the circumstances surrounding the transaction, the conduct of the parties, their declarations as to the purposes to be accomplished, their relations to one another and to the subject matter, are proper subjects for consideration in a trial of that issue. *Beeler v. American Trust Co.*, supra; *Jones v. Dickerman*, 114 Cal. App. 357, 300 P. 135. Upon demurrer to a complaint all facts well pleaded must be taken as true, and the case of the plaintiff must be considered as he has stated it without investigation or inquiry as to its merits. *Favorite v. Superior Court*, 181 Cal. 621, 184 P. 15, 8 A.L.R. 290; *Hevren v. Reed*, 126 Cal. 219, 58 P. 536.

The contention that the cause of action is barred by sections 318, 319 and 343 of the Code of Civil Procedure is without merit. An action to quiet title to land under section 738 of the Code of Civil Procedure or to remove a cloud under sections 3412-3415 of the Civil Code may be brought by one out of possession, and the complaint need not allege that the plaintiff was in possession of the property. *Hyatt v. Colkins*, supra, 174 Cal. at page 581, 163 P. 1007; *Casey v. Leggett*, 125 Cal. 664, 672, 58 P. 264; *People v. Center*, 66 Cal. 551, 556, 5 P. 263, 6 P. 481; *Thompson v. Lynch*, 29 Cal. 189. Nor is the cause of action to

quiet title and to remove a cloud upon the title barred by the statute of limitations. This court has held that "An outstanding adverse claim, which amounts only to a cloud upon the title, is a continuing cause of action, and is not barred by lapse of time, until the hostile claim is asserted in some manner to jeopardize the superior title. So long as the adverse claim lies dormant and inactive the owner of the superior title may not be incommoded by it and has the privilege of allowing it to stand indefinitely. Each day's assertion of such adverse claim gives a renewed cause of action to quiet title until such action is brought." *Secret Valley Land Co. v. Perry*, 187 Cal. 420, 426, 202 P. 449; see *Campbell v. Drais*, 125 Cal. 253, 57 P. 994; *People v. Center*, supra, 66 Cal. at page 565, 5 P. 263, 6 P. 481; *Stewart v. Thompson*, 32 Cal. 260.

To state a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure appropriate facts should be alleged from which the court may determine that an actual controversy relating to legal rights and duties of the respective parties exists (*City of Alturas v. Gloster*, 16 Cal.2d 46, 48, 104 P.2d 810; *Frasch v. London & Lancashire F. Ins. Co.*, 213 Cal. 219, 225, 2 P.2d 147; *American Tel. & Tel. Co. v. California Bank*, 59 Cal.App.2d 46, 51, 138 P.2d 49) and the proceeding is maintainable notwithstanding the fact that the applicant has an adequate remedy by means of an action at law or a suit in equity. Code Civ.Proc. § 1062; *Adams v. Cook*, 15 Cal.2d 352, 362, 101 P.2d 484; *Gunn v. Giraud*, 48 Cal.App.2d 622, 630, 120 P.2d 177. If the complaint is sufficient in form and substance and no facts appear showing that a determination is unnecessary or improper, it is an abuse of discretion to refuse the relief sought. *Henderson v. Oroville-Wyandotte Irr. Dist.*, 207 Cal. 215, 277 P. 487; *Phelps v. Loop*, 53 Cal. App.2d 541, 128 P.2d 63; *Zimmer v. Gorelnik*, 42 Cal.App.2d 440, 109 P.2d 34.

It is contended that the respondents have a moral obligation to pay the debt and "he who seeks equity must first offer to do equity." But the rule that notwithstanding the lien of a mortgage is extinguished by

the barring of the debt by limitations, the mortgagor cannot, without paying the debt, quiet title against the mortgagee, is not applicable to a grantee of mortgaged property who takes title after the running of the statute. *Fontana Land Co. v. Laughlin*, 199 Cal. 625, 639, 250 P. 669, 48 A.L.R. 1308; *Muhs v. Hibernia S. & L. Soc.*, 166 Cal. 760, 138 P. 352; *Faxon v. All Persons*, supra.

Regarding the contention that a bankruptcy court made certain orders in connection with the administration of the property of the Henrys, ordinarily a court takes judicial notice only of proceedings in the same case, although under some circumstances, it will extend the rule to other cases in the same court in the interests of justice. *Willson v. Security-First Nat. Bank*, 21 Cal.2d 705, 711, 134 P.2d 800. However, to hold that a court may generally take such notice of another proceeding with a view to determining whether it is a bar to a pending suit would do away with the rule that although the defense of lack of jurisdiction is never waived, it can be raised by demurrer only if the facts giving rise to such a defense appear upon the face of the complaint. Code Civ.Proc. § 430; *Doll v. Feller*, 16 Cal. 432, 433; *Schwartz, Inc. v. Burnett Phar.*, 112 Cal. App.Supp. 781, 786, 295 P. 508; see *Willson v. Security-First Nat. Bank*, supra, 21 Cal.2d at page 711, 134 P.2d 800. In the absence of such facts, the plea of either lack of jurisdiction or res judicata must be made by answer or appropriate motion. Code Civ.Proc. § 433; *Doll v. Feller*, supra; *Willson v. Security-First Nat. Bank*, supra, 21 Cal.2d at page 710, 134 P.2d 800; *Talbot v. City of Pasadena*, 28 Cal.App.2d 271, 273, 82 P.2d 483. In the present controversy it is apparent that the respondents are urging the defense of res judicata rather than lack of jurisdiction and no facts appear upon the face of the complaint which would warrant an order sustaining a demurrer upon that ground.

A plaintiff who has declined to amend his complaint, after general and special demurrers have been sustained with leave to do so must stand upon his pleading as against both grounds of demurrer. *Aalwyn v. Cobe*, 168 Cal. 165, 173, 142 P. 79; *Mar-*

tinovich v. Wooley, 128 Cal. 141, 144, 60 P. 760. However, a special demurrer should not be sustained where the allegations of the complaint are sufficiently clear to apprise the defendant of the issues which he is to meet (*People v. Lim*, 18 Cal.2d 872, 882, 118 P.2d 472; *Jacobson v. Oakland Meat etc., Co.*, 161 Cal. 425, 433, 119 P. 653, Ann.Cas.1913B, 1194) and as a complaint is invulnerable to general demurrer if upon any theory it states a cause of action (*Johnson v. Clark*, 7 Cal.2d 529, 536, 61 P.2d 767), the order made by the court in this action was erroneous.

The judgment should be reversed.

Rehearing denied; CARTER, J., dissenting.



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GRIFFITH CO. v. BELCHEZ et al.

SAME v. RICE et al.

Civ. 3608, 3609.

District Court of Appeal, Fourth District,
California.

Sept. 18, 1946.

1. Taxation ⚡442

The invalidation of county assessment roll for a particular fiscal year will not be adjudged except on a clear showing of arbitrary and willful disregard of the law intended for the guidance of the taxing authorities.

2. Evidence ⚡83(2)

Municipal corporations ⚡968

Under the presumption that official duty has been regularly performed, court would assume in quiet title action that the taxpayer had notice of public hearing on city appropriation ordinance respecting items set forth in city budget so that taxpayer's failure to object at such hearing to the omissions complained of until 13 years after adoption of budget, constituted a waiver of right to object. Gen.Laws, Acts 8443; Act 8443a, § 4; St.1895 p. 219; St.1931, pp. 2885-2887, 2889, §§ 68-70, 75;

Code Civ.Proc. § 1963, subd. 15; Pol.Code, § 3714.15; Revenue and Taxation Code, § 3521.

3. Schools and school districts ☞103(4)

Where taxpayer failed to exercise his statutory right to appear and object during preparation of the high school district budget, taxpayer's failure to object to the failure of district to consider certain items in making up budget, which objection was made 13 years after budget was made up, was waived. School Code, §§ 4.360 to 4.376, 4.380 to 4.384; Pol.Code, § 3714.

4. Counties ☞191

Municipal corporations ☞953

Schools and school districts ☞103(1)

The tax proceedings by which the 1931-32 tax levy for the San Diego city, county and high school district was made were validated by the 1943 and 1945 curative acts where none of the purported defects violated due process clause of constitution. Gen.Laws, Acts 8443, 8443a; Const. art. 1, § 13.

5. Taxation ☞25

The Legislature has power to enact a statute to validate prior tax proceedings.

Appeal from Superior Court, San Diego County; H. S. Shaffer, Judge Assigned.

Actions by the Griffith Company against John Belchez and others and against Morgan S. Rice and others, to quiet title to certain lands claimed by the defendants by virtue of tax deed. From judgments for defendant Elsie Forrest Gillett in the first case and for defendant Morgan S. Rice and others in the second case, plaintiff appeals. The cases were consolidated for purposes of appeal.

Judgments affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellant.

Virgil S. Kipp, of San Diego, for respondents.

GRIFFIN, Acting Presiding Justice.

These two actions to quiet title were filed in the Superior Court in February,

1945, and separate judgments were rendered in each case. By stipulation they were consolidated for the purpose of this appeal. The facts are identical in each, except for the description of the property involved, and both actions involve the validity of the 1931-1932 tax levy.

In the Gillett case defendant Gillett claims title under a tax deed to the State dated July 1, 1937, a tax deed from the State to defendant Belchez dated November 1, 1944, and a quitclaim deed from Belchez to her dated December 20, 1944.

In the Rice case, defendant and respondent Rice claims under a tax deed to the State dated July 1, 1937, and a tax deed from the State to him dated February 6, 1945, all for the nonpayment of the taxes for San Diego City, County and High School District.

The tax deeds to the State, recorded on July 22, 1937, are directly involved under the attack. It was stipulated at the trial that plaintiff and appellant Griffith Company, a corporation, is the owner of the property described unless deprived of it by virtue of the tax deeds in question. It is contended by plaintiff company that the City of San Diego and the San Diego School Board did not establish the proper and legal tax rate for the reasons: (1) That they failed to take into account items of collection for redemptions and unsecured personal property collections for past years, which amounted to more than the 10 per cent usually allowed for delinquent assessments; and (2) that the tax rate of the City of San Diego was void for the reason that unsecured property valuations were not considered.

Defendants argue: (1) That any claimed defect in the tax proceedings were validated by the 1943 and 1945 Curative Acts (Stats. 1943, p. 1993, Chap. 458, Deering's General Laws 1944, Act 8443, Vol. 3, p. 2994; and Stats. 1945, Chap. 1134, Deering's General Laws 1944, [1945 Supp.] p. 67, Act 8443a); (2) that plaintiff's actions are barred by section 3521 of the Revenue & Taxation Code; and (3) that the City tax rate and School rate for the year 1931-1932 were not excessive, illegal or void.

The evidence shows that there was apportioned to the San Diego City tax Trust Fund for the fiscal year 1931-1932, \$169,727.47 for redemption of real property, and \$122,928.82 from the collection of unsecured personal property taxes, totaling \$292,656.29, and that the City made a request for a budget allowance of \$4,633,562 to be raised by taxation, less a credit of \$1,731,190 "received from other sources," i.e., "revenue from departments." From this evidence it is contended that the \$292,656.29 was not taken into consideration in fixing the rate, and had it been so considered the rate would have been correspondingly lower. The same accusation is advanced as to the High School District, i.e., that according to the evidence, there was apportioned to the School District \$42,310.39 from unsecured personal property collections, and \$45,758.17 from redemption of real estate; that the budget showed a total need of \$748,440 to be raised by taxation and that the collections above mentioned were not taken into consideration when fixing the tax rate; that only 10 per cent variance is usually allowed in such calculations and that the failure to reasonably anticipate the estimate of income from the two sources mentioned was an "unconscionable abuse of power" and an "unreasonable extortion of tax from a taxpayer, citing such cases as *Gottstein v. Gray*, 66 Cal.App.2d 587, 152 P.2d 742; *Otis v. Los Angeles County*, 9 Cal.2d 366, 70 P.2d 633; *Stats.* 1945, p. 2176, sec. 4, chap. 1134.

Defendants claim that plaintiff's whole argument is predicated upon an erroneous assumption that the City, in preparing the budget and fixing and levying the tax of \$2.17 per \$100 for the fiscal year 1931-1932, failed to take into consideration the unsecured personal property valuation and unsecured personal property redemption funds.

The record shows that the City, by ordinance, elected to have the City taxes collected by the County, under *Stats.* 1895, p. 219, Chapter 182, which Act provides that the County assessment shall be used as a basis for the levying of such City taxes, and the acts of the Board of Supervisors are, by the Act, declared to be valid assess-

ments of such property and a valid levy of such rates so fixed. The auditor transmitted to the City Council "a statement in writing showing the total assessed value of all property" within the City of San Diego as "ascertained from the assessment books of the County," and such statement was used by it in determining the amount that might be necessary to be raised by taxation to cover the budget estimate. The amount of the assessed value is not set forth in either of the City ordinances fixing the budget or rate, and nowhere in the record is there any evidence as to what property or items were included in the total assessed value set forth in the auditor's statement. The evidence shows that \$4,633,562 was necessary to be raised for the year; that \$1,731,190 was the revenue estimated to be raised from departments, i.e., from sources other than taxation, leaving \$2,902,372 "to be raised by taxation upon the taxable property therein." It does not affirmatively appear that the unsecured personal property or the City's proportionate share of the collections on unsecured personal property or redemptions were omitted from consideration in preparing and adopting the City budget for that year. Whether or not the total assessed value "of all property within the City," as shown by the statement of the auditor, included the unsecured personal property, or whether he made the usual allowance for delinquencies under section 3714 of the Political Code, subd. 15, is not in evidence. The auditor's statement is not in evidence and was not before the court. Whether the collections from redemptions and unsecured personal property was included in the item of \$1,731,190 as "revenue from departments" or "income from sources other than taxation" is not affirmatively shown.

[1] If plaintiff is to prevail under the showing made, the result of this proceeding would be to invalidate the assessment roll of San Diego County for the fiscal year 1931-1932 in this respect. Such a result should not be adjudged except on a clear showing of arbitrary and wilful disregard of the law intended for the guidance of the taxing authorities. *Rittersbacher v. Board of Supervisors*, 220 Cal. 535, 542, 32 P.2d

135; *Strong v. Mack*, 64 Cal.App.2d 739, 742, 149 P.2d 401.

[2] The Charter of the City of San Diego provides (Stats. 1931, p. 2885, secs. 68 and 69), that the city manager shall submit a budget of the expense of conducting affairs of the City showing the total proposed expenditures and the total anticipated income. Copies are to be prepared and distributed to citizens, newspapers and libraries. Section 70 provides for the annual appropriation ordinance using the budget estimate as a basis, and by the terms of that section provision is made for public hearings upon the appropriation ordinance, at which time the council may reduce or eliminate any item. Section 75 provides that the council shall finally adopt an ordinance levying a tax sufficient to raise the amount estimated in the final budget less the amount estimated to be received from other sources. There is a presumption that "official duty has been regularly performed." Sec. 1963 subd. 15, Code Civ.Proc.

We therefore must assume that the taxpayer had notice of the public hearing respecting the items set forth in the budget, and, so far as the record before us shows, no objection thereto was made at that time or at the time of the adoption of the budget and the fixing of the tax levy. The first objection made by plaintiff to such budget comes 13 years after its adoption.

A similar question was presented in the case of *Strong v. Mack*, supra, and it was there said that the notice and hearing there given was sufficient to constitute due process of law and that the failure of the appellant to avail himself of the opportunity to have the omissions of which he complains corrected constituted a waiver to later object to the consideration of the budget with respect to all matters included in or omitted therefrom which could have been questioned at the hearing. See, also, *City of Compton v. Boland*, 26 Cal.2d 310, 158 P.2d 397; *Wall v. State of California*, 73 Cal.App.2d 838, 167 P.2d 740.

[3] Plaintiff advances much the same argument in regard to the High School District budget and tax levy as it does with reference to the City budget and tax levy,

and what we have said here as to the City budget equally applies to the school budget, as the statutes are somewhat similar in that respect. The School budget introduced by plaintiff, so far as pertinent here, reads in part: "I herewith submit with my approval the budget of the San Diego High School District, together with the following statement of the estimated income for said District for the ensuing year: * * * C. Estimated receipts from County * * * \$332,200. * * * G. Total estimated receipts from all sources * * * \$1,111,383." Just what items were included in the estimated receipts from the County are not shown by the budget. It might be readily inferred that the \$332,200 included the estimated unsecured personal property collections and the estimated redemptions, and that these amounts complained of as being omitted were considered in fixing the high school budget and levy. The law with reference to the preparation of the High School budget and tax levy, publication of time fixed for a taxpayer to appear and object thereto, as well as the financial reports and statements of the High School District, applicable to this action, is found in the School Code of 1929, Stats. 1929 [Supp.] p. 168, Art. VII, secs. 4.360 to 4.376, and Stats. 1929 [Supp.] pp. 353 and 354, Chap. 709, secs. 4.380 to 4.384. See, also, *Deering's School Code 1937*, pp. 274 to 279, Art. VII et seq. As shown therein, the preparation of the budget is open to the public and any taxpayer had the right to appear and object, as he also had a right to appear at the hearing of the County budget. Sec. 3714, Political Code, as then in effect, Stats. 1929, p. 1129. Not objecting, he is barred from complaining with reference thereto at this late stage, as decided in the cases heretofore cited with reference to the City.

[4, 5] Under the latest decisions, the 1943 and 1945 curative or validating acts above cited are here applicable. It was said in *Miller v. McKenna*, 23 Cal.2d 774, at pages 781 and 782, 147 P.2d 531, at page 535: "The Legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance," excepting jurisdic-

tional requisites or Constitutional inhibitions, and such curative acts are effective as to pending litigation. See, also, *Chambers v. Duvall*, 26 Cal.2d 139, 156 P.2d 921; *City of Compton v. Boland*, supra; *Barrett v. Brown*, 26 Cal.2d 328, 158 P.2d 567; *Mais v. Poinsettia Land Co.*, 71 Cal.App.2d 347, 349, 162 P.2d 925; *Wall v. State of California*, supra, 73 Cal.App.2d at page 838, 167 P.2d 740; *Kroenert v. Zaslow*, — Cal.App.2d —, 168 P.2d 779; *Cooper v. Los Angeles Home Co.*, 74 Cal.App.2d 766, 169 P.2d 963.

In *Gottstein v. Gray*, supra, citing *Chase v. Trout*, 146 Cal. 350, 359, 80 P. 81, it was said that the Legislature may, if it sees fit, do away with a budget plan and adopt another, and it may validate defective proceedings under the budget plan, except where the omitted steps were necessary to constitute due process of law or to comply with any other Constitutional prerequisite.

The errors complained of by plaintiff in its attack on these tax deeds have been cured by the Curative Acts of 1943 and 1945, if they ever were sufficient to invalidate them. None of the purported defects violated the due process clause of our Constitution, Art. 1, § 13, and since the Legislature could have done away with the budget plan in the first instance, such defects were therefore validated.

It appears from a reading of Section 3521 of the Revenue and Taxation Code, that defendants' final argument has some merit, i.e., that the one-year statute of limitation had run prior to the filing of this action, particularly in so far as it relates to the validity of the tax deeds to the State. It reads:

"A proceeding based on an alleged invalidity of irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later."

However, in view of the conclusion reached in reference to the Curative Acts, it becomes unnecessary to determine this point. *Mercury Herald Co. v. Moore*, 22

Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111; *Title Guarantee & Trust Co. v. Woody*, 63 Cal.App.2d 209, 146 P.2d 252.

Judgments affirmed.

MARKS, J., concurs.



76 Cal.App.2d 137

LOPEZ v. MACIAS.

Civ. 15196.

District Court of Appeal, Second District,
Division 3, California,
Sept. 18, 1946.

Hearing Denied Nov. 14, 1946.

1. Bills and notes ⇐527(2)

In action on note, evidence did not sustain defense of payment by delivery to plaintiff of another note.

2. Bills and notes ⇐543

In action on a \$2,000 note, award of \$400 attorneys' fees was not excessive.

Appeal from Superior Court, Los Angeles County; Bull, Judge.

Action by Joe R. Lopez against Henry Macias on a note and for money loaned to defendant, who filed a cross-complaint on a note executed by plaintiff to defendant's assignor. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joe Wapner, of Los Angeles, for appellant.

Victor A. Gillespie and Paul E. Tapley, both of Los Angeles, for respondent.

SHINN, Justice.

Defendant Henry Macias gave plaintiff Joe R. Lopez his promissory note for \$2,000. The note not having been paid, Lopez brought this action and recovered judgment for the principal amount and interest, and attorneys' fees of \$400; also for \$152,

money loaned to defendant. Defendant's answer admitted the execution of the note, but pleaded that it had been settled through a later transaction, which is described in the answer as follows: that in January, 1941, plaintiff Lopez gave his promissory note for \$4,000 to one Salud Savilla, and that in April, 1944, an agreement was entered into between plaintiff and defendant, with the consent and approval of said Savilla, that plaintiff would deliver to said Savilla a pick-up truck, would also deliver to defendant herein a receipt in full for all sums due plaintiff from defendant, and that in return defendant would deliver to plaintiff as fully paid the \$4,000 note, theretofore given to Savilla. Defendant also filed a cross-complaint, in which he alleged the execution of the \$4,000 note to Savilla, that it had been assigned to him, had not been paid, and he prayed for judgment on the note in the sum of \$4,000, interest and attorney's fees. Plaintiff's answer to the cross-complaint denied that he had executed the alleged note for \$4,000. The court found in favor of plaintiff and cross-defendant upon all of the issues raised by the complaint and answer and the cross-complaint and answer thereto. The court therefore found that the alleged \$4,000 note had not been executed and that no agreement had been made between plaintiff and defendant for surrender by defendant to plaintiff of the \$2,000 note. A reversal of the judgment is sought upon the ground that the evidence was insufficient to justify the findings.

The execution of the \$2,000 note having been admitted, and the defense of payment having consisted only of the alleged agreement which we have mentioned, we assume that the court was principally concerned with the transactions between the parties which were alleged to have led to the settlement. Salud Savilla testified through an interpreter. He was questioned concerning the alleged \$4,000 note and the consideration for which it was given. He testified that he gave Lopez \$200 in 1940; that he later gave him \$300; that in the same year he gave him "about \$400 or \$300," he did not remember which; that he "kept on giving him as he asked for more," and that he gave Lopez \$750 in 1941; that this

made up a total of \$4,000 and that Lopez gave him a note in January, 1941, in the presence of one Perez; that all the sums were given to Lopez in cash; that he, Savilla, had no bank account, and sometimes money was given to Lopez in the presence of other persons; that money was given to him in cash from a box in which he kept it; that he had not worked for a number of years and had last worked in 1937, hauling fertilizer, at which he made about \$100 a week. He further testified that on or about the 14th of April, 1944, Lopez came to his house and asked him for the note, saying that Salud should give it to him, "that he had already arranged with my boy Macias" and that he gave him the note, although Lopez never paid him the \$4,000. He testified that Perez was present at the time. The witness did not attempt to state when any further sums were advanced to Lopez and apparently had kept no account of any sums advanced. No explanation was made as to why he should have been loaning money to Lopez.

As corroboration of the testimony of Macias, defendant called one Albert as a witness, who testified that he was a gambler, a bookmaker, and in 1940 was associated in business with plaintiff Lopez; that in the fall of 1940 he went to the Macias home with Lopez, where he met Savilla, and that he saw Savilla give Lopez some money, but he did not know the amount. Another witness, Matthews, called by defendant, testified that Lopez had stated to him at one time that he owed Macias' "father" more than Macias owed him; that he thought Lopez said he owed around \$3,500, something like \$4,000. The witness Perez testified that he had known Lopez to get money from Savilla four different times; that on April 14, 1944, he was at Savilla's house when Lopez came and told Savilla that Macias had sent him for the note and that Savilla then walked into his room and came out and handed a paper to Lopez, but that he did not know what was on the paper. He further testified that he had been at the Savilla house at the request of Lopez and that Savilla had given him, Perez, a sealed envelope with money in it, but that he did not open

the envelope. Macias testified that he had borrowed money from Lopez; that in April, 1944, he had had a talk with Lopez about the money that he owed Lopez and that Lopez admitted owing his, Macias', "dad" \$4,000, for which he had given him a note; that the same evening he called Lopez on the phone, asked Lopez to sign a release of any claims against Macias and said, "I will have to take care of my father as soon as I get around to that, and you can sign the release for me and I will be down there and get it." In this connection it was stipulated by counsel that Macias at that time acknowledged an indebtedness to Lopez in the amount of approximately \$3,700, and that Macias was making the claim that Lopez agreed to cancel the indebtedness of \$3,700 and to give Savilla a pick-up truck if Macias would procure the surrender of the \$4,000 note held by Savilla. Macias testified that he had seen such a note early in January, 1941; that the note was on a printed form and that he had seen it on several later occasions; that Macias later presented a release to Lopez to sign but he declined to sign it. His explanation of his borrowing \$2,000 from Lopez was that they had gone to Savilla about it and Savilla told Lopez it was all right to loan Macias up to \$4,000; that Lopez asked Macias how he was going to repay the money and he said, "Well, I am not going to pay you until you have paid my father, and he says, 'Well, that is all right.'" \$750, he said, was loaned by Savilla to Lopez in 1940 with which to purchase an automobile. Macias testified that on or about April 17, 1944, he had a conversation with Lopez in the office of Mr. Tapley, one of Lopez' attorneys; that at that time he told Tapley, in the presence of Lopez, that Lopez owed his father \$4,000, for which Lopez had given his note; that Tapley asked Lopez about it and Lopez said that he didn't know what Macias was talking about but that it had all been straightened up with Macias about the note.

Lopez testified that he had been doing some bookmaking in 1940 and that he had loaned Macias \$2,000 from a safe deposit box which he kept in connection with that business. He testified that he did not bor-

row any money from Salud Savilla in 1938, 1939, 1940, 1941, or at any other time, and did not at any time execute a note of \$4,000 in his favor, that Savilla never advanced any money to him for the purchase of an automobile and that he believed he registered his car in Savilla's name but was not sure; that he had a discussion with Macias in April, 1944, at his home concerning money, but he denied having had a conversation with Macias about the pick-up truck or the return of a \$4,000 note to him. He denied having seen Perez in 1944, except in the month of February. It appeared from the testimony of the witness that he had paid for a Pontiac car, a receipt had been given in the name of Savilla, and that when he, Lopez, was sued and the car attached, Savilla made a third party claim for it. Later he testified that he wished to put the car in Macias' name, but, after discussing it, arranged to put it in the name of Savilla. He denied having received from Savilla any part of the \$750 which was paid for the car. He testified that Macias came to him in April, 1944, and asked him to sign a release in favor of Macias; that Macias then offered to pay him \$200 and that he refused to sign it; that there was no conversation about any indebtedness to Savilla, nor any mention made of a \$4,000 note, and that the first time he ever heard of such a note was when his attorney, Mr. Tapley, told him that Macias claimed such a note was in existence. He testified that he had never received any money from Perez nor sent Perez to Savilla for money; that when Macias presented the release to him for his signature, he asked Macias how much money he had in the bank and Macias replied, "\$18,000"; that he had never gone to Savilla's house to ask return of a \$4,000 note nor had he ever made any statement to the witness Matthews concerning such a note; that he had never been to Savilla's house with Albert and that Savilla never handed him any money in the presence of Albert; that he never had any discussion with Macias as to any money he, Lopez, was supposed to owe Savilla; that in Mr. Tapley's office on April 17 nothing was said about a \$4,000 note owed to Savilla; that Mr. Tapley told him it was

Macias' lawyer who claimed that he, Lopez, had given Savilla the \$4,000 note. Mr. Tapley testified that a conversation was held in his office on April 17, 1944, after the institution of the present action, between Lopez, Macias, and himself; that nothing was said concerning \$4,000 or a \$4,000 note owing to Savilla, nor was there any discussion of Savilla at that time; that the conversation was with reference to a settlement of the suit on the \$2,000 note.

[1] The foregoing statement of the evidence has been derived from a reading of the transcript, and if anyone should chance to read this opinion he will have learned before reaching this point, that the evidence was sufficient to justify the findings in favor of plaintiff and cross-defendant.

[2] From a consideration of the extent of the services of plaintiff's attorneys in the litigation, we are of the opinion that the award of \$400 as attorneys' fees was not excessive.

The judgment is affirmed. The attempted appeal from the order denying a new trial is dismissed.

DESMOND, P. J., and WOOD, J., concur.



WARGIN v. WARGIN et al.
Civ. 15250.

District Court of Appeal, Second District,
Division 3, California.
Sept. 23, 1946.

Automobiles ⚡20

Compliance by owner of automobile with Statute requiring an owner, on selling a vehicle and delivering possession, to notify the motor vehicle department immediately, did not relieve owner and buyer of automobile of their duty under Vehicle Code to procure a re-registration of the automobile, and where they did not take

the necessary steps for re-registration before levy of execution issued on a judgment against seller of automobile, no sale was made that could defeat the execution creditor's rights as to the automobile. Vehicle Code, §§ 177, 186.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Esther Wargin against Emil Wargin, wherein the plaintiff obtained a judgment against the defendant. An automobile sold by the defendant to Ida McCleary, third party claimant, was taken on an execution issued on the judgment against the defendant, and the third party claimant filed a third party claim of ownership of the automobile. From a judgment that third party claimant was not the owner of the automobile she appeals.

Judgment affirmed.

Joseph L. Fainer, Jerrell Babb, and Louise A. Steele, all of Los Angeles, for appellant.

Ernest Eugene Walker, of Hollywood, for respondent.

SHINN, Justice.

This is an appeal by Ida McCleary from a judgment upon her third party claim of ownership of an automobile, which judgment reads as follows: "Judgment is hereby ordered against the third party claimant. That she was not the owner of the car involved at the time of the levy." Appellant purchased the car from Emil M. Wargin February 21, 1945. She received a bill of sale on that date, and possession of the car which she retained and used thereafter until it was taken by the Marshal May 15, 1945, on an execution issued on a judgment against Emil M. Wargin.

The reporter's transcript of the hearing on the third party claim contains no evidence that Mrs. McCleary received the ownership certificate (pink slip) at the time she bought the car, but it is not material whether she received it then or later. It was in evidence that the Motor Vehicle Department received from Emil M. Wargin on February 23 a notice dated February 21,

stating that he had sold the car to Ida McCleary, giving a description of the car and other data, as required by section 177 of the Vehicle Code. The registration card (white slip) was already in the hands of the Motor Vehicle Department, with an application by Emil M. Wargin for re-registration of the car for the year 1945. A new one was eventually issued to him and, together with the ownership certificate, was forwarded to the department and a new ownership certificate and registration card were issued by the department to Mrs. McCleary May 21, 1945, six days after the levy of execution.

The question is: Which prevailed, the attempted transfer of ownership, or the execution?

So far as applicable here, section 186 of the Vehicle Code, as amended, Stats. 1943, Chap. 1129, sec. 1, provides that, "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements:

"(1) The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the United States mail, addressed to the department, such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration except as otherwise provided in Section 180, or

"(2) The transferor shall have delivered to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer except as provided in Section 178."

The Vehicle Code makes no provision for a transfer such as the one attempted to

Mrs. McCleary, other than by endorsement and delivery of the certificate of ownership and delivery of the registration card and the delivery or mailing of the same to the department with the proper transfer fee and an application for transfer. While section 177 requires an owner, upon selling a vehicle and delivering possession, to immediately notify the department thereof, with his name and address and those of the transferee, and a description of the vehicle, no fee is exacted and the proceeding is not one for the re-registration of the vehicle. Compliance with that section did not relieve the parties of their duty to procure a re-registration of the vehicle and as they did not take the required steps before the levy of the execution, it necessarily follows that no sale or transfer had been made which could defeat the rights of the execution creditor. The cases upon which appellant relies held that an owner who has sold a vehicle, received the purchase price, and delivered possession, is estopped to deny the ownership of the purchaser, and that a creditor of the seller, having no better claim than the seller, also is estopped. These decisions, however, merely gave effect to an exception contained in section 186, prior to the 1943 amendment, which qualified the provision that title did not pass until registration had been made, with the following phrase: "except as a transferor may be estopped by law to deny a transfer and except as provided in Sections 178, 180 and 180.5 hereof and in Chapter 3 of this division." *Carpenter v. Devitt*, 49 Cal.App.2d 473, 122 P.2d 79; *LeGrand et al. v. Russell et al.*, 52 Cal.App.2d 279, 126 P.2d 136. The exception was eliminated in the 1943 amendment and the cases therefore are not controlling. The provisions of the statute are clear and positive. The levy of execution gave the judgment creditor a claim superior to that of Mrs. McCleary.

The judgment is affirmed.

DESMOND, P. J., and KINCAID, J. pro tem., concur.

ISLAND v. FIREMAN'S FUND INDEMNITY CO. et al.

No. 13004.

District Court of Appeal, First District,
Division 1, California.

Sept. 10, 1946.

Hearing Granted Nov. 4, 1946.

1. Trial Ⓒ207

In action against insurer to enforce judgment obtained against insured, instruction that insured's affidavit, which was inconsistent with insured's testimony as to insured's use of automobile, was admitted solely for purpose of impeachment and should not be considered as evidence affirmatively establishing the existence or truth of the facts stated in affidavit, was proper.

2. Appeal and error Ⓒ910

District Court of Appeal would assume that insurer's answer raised defense that automobile was not within policy which excluded coverage of automobiles owned by members of insured's household, where exclusionary clause of policy was set out in full in insurer's answer and answer alleged that automobile was furnished to insured by a member of household and that accident did not come within coverage of the policy, notwithstanding that the defense was inadequately presented.

3. Domicile Ⓒ5

A person does not lose his legal residence by reason of absence due to military service.

4. Insurance Ⓒ646(6)

The burden of proving that there was no coverage because of some exclusion clause or condition of automobile liability policy was upon insurer against whom plaintiff was seeking to enforce judgment against insured.

5. Insurance Ⓒ146(3)

Where the phrase "member of household", in automobile liability policy not covering automobiles owned by members of insured's household, was fairly susceptible of two constructions, it should be construed most strongly against the insurer.

6. Insurance Ⓒ435

A married man who, at the time he entered military service, was living in father's home, did not continue to be a "member of household" of father within automobile liability policy not covering automobile driven by father and owned by member of father's household.

See Words and Phrases, Permanent Edition, for all other definitions of "Member of Household".

7. Insurance Ⓒ435

The words "member of household", in automobile liability policy not covering automobiles owned by members of insured's household, mean a person who was actually dwelling under the same roof with insured at the time of the accident.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action on judgment by Isaac Island against Fireman's Fund Indemnity Company and another. From an order granting a new trial after verdict and judgment for the plaintiff, the plaintiff appeals, and the named defendant cross-appeals.

Order reversed and judgment affirmed.

James G. Quinn, Jr., of Emeryville, and John J. Healy, Jr., of San Francisco, for appellants.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal by plaintiff from an order granting a new trial in an action by plaintiff against defendant as insurance carrier of one J. C. Cave, Sr., and a cross appeal (taken pursuant to the new procedure set forth in Rule 3(a) of the Rules on Appeal) by defendant from the judgment in favor of plaintiff.

On November 14, 1942, defendant executed a policy of automobile insurance to J. C. Cave, Sr., covering a 1934 Ford Tudor Sedan automobile owned by him and also covering said J. C. Cave, Sr., "with respect to the operation of any other private passenger automobile by such named

insured." At the time he entered military service in December, 1942, J. C. Cave, Jr., and his wife were living at the home of his father, J. C. Cave, Sr., in Oakland, California. The son was the owner of the Ford sedan automobile which was involved in the accident with plaintiff, which automobile he had left at his father's home upon going into the army. The son was in the military service about eight months. His automobile was left at the father's home, the son requesting the father to "drive it once in a while and keep the battery up—charged." On March 22, 1943, while J. C. Cave, Sr., was driving the son's automobile a collision occurred in which plaintiff was injured, and judgment was thereafter recovered by plaintiff against J. C. Cave, Sr., which judgment is the one upon which the action involved in this appeal was brought.

Upon the trial plaintiff rested his case after reading in evidence certain admissions made in the pleadings and stipulation of counsel and after the court had received in evidence the policy of insurance and the judgment in the case of *Island v. Cave*. Defendant as part of its case called J. C. Cave, Sr., as a witness and he testified that he drove his son's car 15 or 20 times during the time his son was in the army. Defendant claimed surprise and was permitted to lay the foundation for impeaching the witness, after which the witness resumed the stand and counsel for defendant had the witness identify an affidavit which had been sworn to by the witness several months before, which affidavit quoted the witness as stating that he had driven his son's automobile "about 15 days per month to work or just about as much as I drove my own car." The affidavit was admitted in evidence as defendant's exhibit and it is clear from the record and from the statement of the trial court in admitting it, that it was offered solely for the purpose of impeachment.

Among the instructions given by the court to the jury was the following: "In this case, evidence was received tending to show that the witness Cave had made statements, with reference to his use of the automobile involved in the accident, in-

consistent with his testimony upon the witness stand. Such testimony was admitted solely for the purpose of impeachment, in order to assist you in determining what credibility should be given to his present testimony. It should not be considered by you as evidence affirmatively establishing the existence or truth of the facts stated in such prior statements."

Following the verdict of the jury in favor of plaintiff and the entry of judgment thereon, defendant made a motion for a new trial and it is conceded that the only ground argued in support of the motion was that the foregoing instruction was erroneous. The order of the trial court granting the motion did not mention insufficiency of the evidence as a ground thereof and it is conceded that the motion was granted solely because the trial court became convinced error was committed in giving the above quoted instruction.

The only question, therefore, which we have to consider upon plaintiff's appeal from the order granting a new trial is whether or not said instruction was erroneous. If the instruction was erroneous, the motion was properly granted; if the instruction was not erroneous, then it was error to grant the motion.

Plaintiff argues that the hearsay statement of the witness Cave, Sr., was not admissible against plaintiff for anything other than impeachment purposes and that, therefore, the instruction was properly given to the jury. Plaintiff cites *Yore v. Booth*, 110 Cal. 238, 42 P. 808, 52 Am.St. Rep. 81, in which the court held that statements by the assured are not binding on the beneficiary of a life insurance policy who had a vested interest in the policy. The trial court had refused to admit certain inconsistent statements of the assured. On appeal the court, speaking through Chief Justice Beatty, said 110 Cal. at pages 240, 241, 242, 42 P. at page 808, 52 Am. St.Rep.81: "I was at first inclined to regard this ruling as erroneous, but an examination of a large number of cases has convinced me that it is sustained at all points by the decided weight of authority. * * * From this it follows that, as to these plaintiffs, any declarations of the

deceased not made at the time of procuring the policy, or as part of the *res gestae*, were hearsay and incompetent. The authorities in support of this proposition are numerous, and need not be cited here." To the same effect see also *McEwen v. New York Life Ins. Co.*, 42 Cal.App. 133, 183 P. 373, and *Paez v. Mutual Indemnity etc. Ins. Co.*, 116 Cal.App. 654, 3 P.2d 69.

Plaintiff also cites *Malmgren v. Southwestern A. Ins. Co.*, 201 Cal. 29, 255 P. 512, in which it was held that the injured person had a vested interest in the insurance policy in question immediately upon the happening of the accident.

In 2 Cal.Jur. 10 Yr.Supp., 145, it is said: "Under the provisions of the statute (Ins. Code, sec. 11580) the contract of insurance inures to the benefit of any person who may be injured by the assured 'as completely as if such injured person had been specifically named in the policy.'"

In *Wigmore on Evidence*, Vol. IV., section 1081, it is stated: "* * * hence, unless the beneficiary has in the beginning been made a party to the contract so as to bind himself to be identified with the insured (and some forms of contract attempt this), the insured's admissions would not be receivable against the beneficiary."

In Jones "The Blue Book of Evidence," 1913 edition, Vol. 2, section 242, it is said: "It has been held that there is no such privity of interest between an *insured person* and his beneficiary as to admit the declarations of the former in actions on life insurance policies. This general statement, however, must not be accepted without question and inquiry into each case on its own facts as to the extent of the influence of *res gestae* and the defense of fraud. Cases are frequently cited with the bald assertion that the statements of the assured are evidence against the beneficiary, and search will reveal that in such cases the testimony was received on one or the other of those grounds."

Defendant in reply argues that the statement of the witness Cave, Sr., was admissible as a declaration against the interest of plaintiff, and the trial court properly granted defendant's motion for a new trial on the ground of error of law in

instructing the jury that evidence of prior statements of Mr. Cave could be considered only for determining his credibility. Defendant contends that plaintiff stood in exactly the same position as did the insured. The cases of *Valladao v. Fireman's Fund Indem. Co.*, 13 Cal.2d 322, 332, 89 P.2d 643; *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, and *Purefoy v. Pacific Auto. Indem. Exchange*, 5 Cal.2d 81, 53 P.2d 155, cited by defendant, are all cases where the assured's failure to cooperate with the insurance carrier precluded the plaintiff from recovering. The rule of those cases has no application to the case at bar. In those cases the conduct of the assured in failing to cooperate was set up as a defense. They do not purport to deal with the effect of hearsay statements made by the assured after the accident as to events occurring before. The same distinction may be drawn between the cases of *Kindred v. Pacific Auto. Ins. Co.*, 10 Cal.2d 463, 464, 75 P.2d 69, and *Sears v. Illinois Indemnity Co.*, 121 Cal.App. 211, 9 P.2d 245, also cited by defendant. In the *Kindred* case, the defendant insurance carrier proved by competent evidence that in violation of the provisions of the policy, the automobile was regularly used more than fifty miles from a given place. Hence, there was no coverage at the time of the accident. In the *Sears* case, there was held to be no coverage where the insurance carrier demonstrated by competent evidence that in violation of the provisions of the policy, a person under sixteen years of age was driving the automobile at the time of the accident.

Defendant contends further that the Supreme Court in the case of *Emery v. Pacific Employers Ins. Co.*, 8 Cal.2d 663, 67 P.2d 1046, decided contrary to plaintiff's position. There plaintiff recovered a judgment against one Bronis, defendant's policy holder, and brought action to enforce it. Defendant denied liability because of false representations as to prior cancellations of other insurance. In reversing a judgment for plaintiff the court said, 8 Cal.2d at page 673, 67 P.2d at page 1052: "Defendant also sought to prove cancellation of automobile liability insurance policies issued in 1930 and 1933 by the Norwich

Union Indemnity Company. The witness Addington, claims adjuster for the defendant insurance company in the instant action, testified that after the accident in which plaintiffs were involved Bronis stated that the Norwich Union Indemnity Company had cancelled his insurance in the year 1930. The court ruled against the admissibility of this testimony. The statement made by Bronis was admissible as a declaration against interest. *Lansley v. Zurich Gen. Acc. & L. Ins. Co.*, 219 Cal. 101, 25 P.2d 418. It was to the interest of Bronis at the time when the statement was made and at the time of the trial that the defendant insurance company should recognize liability on the policy issued to him."

However, it must be pointed out that the Emery case was a fraud case, and that the insurer was defending upon the ground that the insured had made false statements at the time of obtaining the policy. The distinction between the Emery case and the case at bar is well indicated by the quotation from Jones on Evidence hereinafter set forth.

No cases in which public liability policies were involved, and bearing directly upon the issue under discussion, have been cited in the briefs, but we have found two decisions in other jurisdictions which appear to support plaintiff's contention that Cave's statements were not admissible upon the merits but were only admissible for the purpose of impeachment.

One is the case of *Dziadosc v. American Casualty Co.*, 114 N.J.L. 137, 176 A. 150, which involved an action against the automobile liability insurer by a party who had judgment against the insured for injuries negligently inflicted by the insured while driving the insured vehicle. A New Jersey statute allowed an action against the insurer by the injured person who had first taken judgment against the insured and had his levy returned unsatisfied. The statute allowed such action "under the terms of the policy." The trial court admitted the testimony of the insurer's investigator to the effect that the insured had admitted to him after the accident that he had been carrying passengers for hire at the time of the injury to plaintiff—such being in violation

of an exclusionary provision in the policy absolving the insurer from liability in such case. In the opinion of the reviewing court it is said that the "passengers for hire" exclusion was a clear cut defense, but that it had to be established by competent evidence. The court held that the testimony of the investigator was inadmissible against the plaintiff. The court in reversing the trial court's judgment in favor of the defendant for the error in admitting the hearsay statements of insured on the merits of the exclusionary defense said: "The defendant must establish its defense by competent evidence. The plaintiffs had a right of action to recover under the terms of the policy, and statements of the assured to third persons were not competent to prove the fact sought to be set up in defense, as against the plaintiffs, any more than a like statement was binding on the plaintiff in the Center Garage Co. case [*Center Garage Co. v. Columbian Ins. Co.*, 96 N.J.L. 456, 115 A. 401]. The assured, Keir, was not the representative or agent of the plaintiffs and they do not sue in his right, strictly speaking, but are given an independent right to sue, dependent, of course, upon the validity of the policy."

The case of *Indemnity Ins. Co. of North America v. Forrest*, 9 Cir., 44 F.2d 465, was an action by a surviving widow against an insurance carrier after a prior judgment had been reversed against the chauffeur of the insured, the chauffeur having been driving the car of the insured when the injuries were inflicted. Both the insured and the chauffeur had been originally sued, but the insured died while the action was pending, and it was later dropped as against her and her estate. In addition to covering the insured herself, the policy also covered persons driving the car of insured with her permission. The insurance company's defense was that the chauffeur was driving the car without the permission of the insured at the time he injured plaintiff. In affirming a judgment in favor of the widow, the Circuit Court of Appeals of the Ninth Circuit ruled that a letter from the insured addressed to the defendant, in which she (insured) stated that her chauffeur was driving without permission at the time of the accident, was properly refused

admission. The court said, 44 F.2d at page 466: "The letter addressed to the appellant by Mrs. Kittredge during her lifetime, in which she declared that Hooper was driving the automobile at the time of the accident without her permission, was not a declaration against interest, and was not admissible in evidence against the appellees in any conceivable aspect of the case."

[1] In view of the authorities hereinbefore set forth, our conclusion is that the trial court correctly instructed the jury that the statement of Cave, Sr., could only be considered by them for the purpose of impeachment, and that the court erred in granting defendant's motion for a new trial.

We shall now proceed to discuss the appeal of defendant from the judgment in favor of plaintiff.

Paragraph V of the automobile liability policy issued to J. C. Cave, Sr., relating to the use of other automobiles, provided in part as follows: "This insuring agreement does not apply: (a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named assured or a member of his household other than such chauffeur or servant; * * *

Defendant concedes that there is a conflict in the evidence as to the issue of *regular use*, but asserts that as a matter of law the evidence shows that Cave, Sr., was at the time of the accident driving an automobile "owned in full or in part by * * * the named assured or a *member of his household*," and that the accident was thus placed outside of the coverage contracted for. Defendant contends that the trial court erred in denying its motion for a directed verdict and that the evidence is insufficient to support the judgment in favor of plaintiff. (Italics added)

Defendant argues: "The automobile involved in the accident was owned by the son who was a member of the household of the named assured. The fact that the son had temporarily entered the armed services could have no effect on his status as a member of such household. The pre-

cise question was before the District Court of Appeal in *Johnston v. Benton*, 73 Cal. App. 565, 569, 239 P. 60, 62, in which it is said:

"It is well settled that the domicile of a person is in no way affected by his enlistment in the civil, military, or naval service of his country; and he does not thereby abandon or lose his domicile which he had when he entered the service, nor does he acquire one at the place where he serves. 9 R.C.L. 551; *Stewart v. Kyser*, 105 Cal. 459, 39 P. 19; *People v. Holden*, 28 Cal. [123], 124; *Estate of Gordon*, 142 Cal. 125, 75 P. 672; *Percy v. Percy*, 188 Cal. [765], 768, 207 P. 369."

Defendant also cites a note in 148 A.L.R. where it is said on page 1414: "The residence or domicile of a person in the military or naval service is simply a question of intent. The actual residence of a soldier or sailor, since it is not the result of his own volition, does not, of itself, operate to change the residence or domicile which he had when he entered the service. Therefore, in the absence of a contrary intent, it will be assumed that that continues to be his present residence or domicile."

Defendant also cites *Kinsel v. Pickens*, D.C., 25 F.Supp. 455, 456, in which the court said: "This man's location here (Texas) is dependent entirely upon the will of others. He came here under orders and he will leave under orders. * * * To hold him to be a resident of Texas * * * would be entirely outside the purpose and spirit of the law."

[2] Plaintiff in reply contends first that the "member of household" defense was not pleaded by defendant, nor was it relied upon by defendant in the lower court, and plaintiff argues that defendant cannot properly urge such defense for the first time upon appeal. While it is apparent from the record that defendant in its answer and upon the trial placed its main reliance upon the "regular use" defense, and did not even offer an instruction on the issue of whether Cave, Jr., was a member of the household of Cave, Sr., at the time of this accident, yet a reading of defendant's answer discloses that the hereinbefore quoted exclusionary clause was

set out in full and it was alleged that the automobile involved in the accident was "furnished for regular use to J. C. Cave, Sr., by a member of his household, to-wit, his son" and that said accident did not come "within the purview of the coverage afforded by said policy of insurance." Furthermore, one of the grounds included in defendant's motion for a directed verdict was "that the ownership of the car that he was operating was by a member of his [Cave, Sr.'s] household." Therefore, we may assume for the purposes of this appeal that the "member of household" defense was raised by the answer and was properly before the trial court, even though it was inadequately presented if defendant intended to rely upon it either in the trial or upon appeal.

[3] Plaintiff contends further that even though the "member of household" defense may be properly before the court, under the authorities and the evidence, Cave, Jr., was not a member of his father's household at the time of the accident. He argues correctly that the decisions relied upon by plaintiff, and hereinbefore referred to, deal with the question of domicile and residence, and not with the definition of the term "household." It is, of course, true, as pointed out in these cases, that a person does not lose his legal residence by reason of absence due to military service.

[4] It may be appropriate to point out here that the burden of proving that there was no coverage because of some exclusion clause or condition of the policy was upon the defendant. See 14 Cal.Jur. 617, et seq. And, as stated in *Lumbermen's Mutual Casualty Co. v. Pulsifer*, D.C., 41 F.Supp. 249, at page 252: "It is a general rule of law that an insurance policy must be interpreted to give effect to the intention of the parties so far as such intention can be discovered from the language of the policy and where the meaning of an insurance policy is fairly susceptible of two constructions, it should be construed most strongly in favor of the policy holder." *Trinity Universal Ins. Co. v. Cunningham*, 8 Cir., 107 F.2d 857, 860, and cases cited." For other state-

ments of the rule see *Culley v. New York Life Ins. Co.*, 27 Cal.2d 187, 194, 163 P.2d 698; *Baine v. Continental Assur. Co.*, 21 Cal.2d 1, 5, 129 P.2d 396, 142 A.L.R. 1253; *Fageol T. & C. Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 747, 117 P.2d 661.

Plaintiff cites *Moore Shipbuilding Corporation v. Industrial Accident Comm.*, 185 Cal. 200, at page 207, 196 P. 257, at page 259, 13 A.L.R. 676, where the court said: "There is little to be gained by reviewing the numerous definitions given by the courts and lexicographers of the words 'family' and 'household.' They mean different things under different circumstances. The family, for instance, may be an entire group of people of the same ancestry, whether living together or widely separated; or it may be a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household. Again, the word 'household' is variously used to designate people, generally, who live together in the same house, including the family, servants, and boarders; or it may be used as including only members of the family relation. It is probable that the two terms are coupled together in this statute to indicate that they are used synonymously, the 'family' to include only those of the household who are thus intimately associated, the 'household' to exclude those of the family not living in the home."

Plaintiff also cites *Collins v. Northwest Casualty Co.*, 180 Wash. 347, 39 P.2d 986, 97 A.L.R. 1235, *Lumbermen's Mutual Casualty Co. v. Pulsifer*, supra, and numerous other cases dealing with various interpretations of the word "household."

In *Lumbermen's Mutual Casualty Co. v. Pulsifer*, supra, 41 F.Supp. at page 251, 252 it is stated:

"While Louis Pulsifer was the householder, having title to the premises, no control was exercised by him or his wife (who was the wage-earner) over the young couple. The son had a steady job which occupied him by day and often by night. * * * Whether the term 'household' or 'family' is used, the term embraces a col-

lection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof; a 'collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness.'

"Here two families came together temporarily until the newcomer could find an other place of abode, which was expected to be a matter of only a few weeks. There was no one head of both groups; no permanence; no pursuit of a common object; no such union of the two families as would make them one. It was a temporary arrangement for the convenience of the son and his family while getting located elsewhere. Each family retained its own organization under its own head and did not merge to make one family or one household in any such way as the word is used in the policy.

"It should not be overlooked that the language of this endorsement was framed by the Company itself which, by definition or otherwise, could have made the term 'member of the household' less ambiguous."

In Webster's New International Dictionary, one of the definitions of "household" is "Those who dwell under the same roof and compose a family; a domestic establishment."

No clear and final definition can be arrived at from the decisions cited, and a reading of them convinces us that it must be determined upon the peculiar facts of the particular case under consideration when a person is a "member of the household."

The evidence in the instant case showed that Cave, Jr., and his wife were living at the home of the insured at the time Cave, Jr., entered the military service. The only part of the record which states that Cave, Jr., and his wife were living in the insured's home prior to that time is in the prior written statement of the insured, offered and received for impeachment purposes only, and which we have already held the court correctly instructed the jury not to consider as evidence of

the truth of the statements contained therein but only as bearing on the credibility of the witness. Furthermore the record shows that when defendant offered said statement in evidence, the court, in ruling upon plaintiff's objection to its introduction, stated: "That portion of this statement—that which states the extent of his driving of the automobile—may be admitted and you may read it. * * * Only a portion of the document." Therefore, it cannot be held that there is any evidence in the record as to how long Cave, Jr., had been living in the home of the insured prior to his entering the military service, nor is there any evidence in the record that his wife continued to live in the home of insured after Cave, Jr., left to enter military service. The record does show that Cave, Jr., was in the military service for 8 months and that the accident occurred during that time.

[5-7] It must be borne in mind, as hereinbefore pointed out, that the burden of establishing its defense was upon defendant and that where the meaning of the term "member of the household" is fairly susceptible of two constructions it should be construed most strongly against the defendant by whom it was drawn. We do not believe that we would be justified in holding, upon the record here, that the implied finding of the jury that Cave, Jr., was not a member of the household of the insured, Cave, Sr., at the time of the accident, lacks substantial support in the record. Nor do we believe that the record either compels or justifies a finding that Cave, Jr., was a member of insured's household at said time. We are not convinced that a married man who, at the time he enters the military service, is living at the home of his father, continues to be a "member of the household" within the meaning of the exclusionary clause here involved during the time he is away from said home and in military service. We are rather inclined to believe that the term "member of the household," in view of the rules of law hereinbefore set forth, should be construed to refer to a person who at the time of the accident is actually dwelling under the same roof with insured at the time of the accident, for

as stated in *Lumbermen's Mutual Casualty Co. v. Pulsifer*, supra, 41 F.Supp. at page 252: "It should not be overlooked that the language of this endorsement was framed by the Company itself which, by definition or otherwise, could have made the term 'member of the household' less ambiguous." But, in any event, we are convinced from the record that defendant failed to sustain its burden of establishing its defense that Cave, Sr., was at the time of the accident driving an automobile owned by a "member of his household." We conclude, therefore, that the trial court correctly denied defendant's motion for a directed verdict and that the judgment in favor of plaintiff should be affirmed.

In view of the foregoing the order granting defendant's motion for a new trial is reversed and the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



ISENBERG v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.
Civ. 15073.

District Court of Appeal, Second District,
Division 1, California.

Sept. 16, 1946.

Rehearing Denied Oct. 7, 1946.

Hearing Granted Nov. 14, 1946.

1. Master and servant ⇨78

The Unemployment Insurance Act must be liberally construed with a view to effect its purpose and to promote justice. General Laws, Act 8780d, § 1 et seq.

2. Master and servant ⇨78

The Unemployment Insurance Act is purely a police power measure. General Laws, Act 8780d, § 1 et seq.

3. Constitutional law ⇨70(3)

In the exercise of the police power, large discretion is necessarily vested in legislature to determine not only what pub-

lic's interests require, but also what measures are necessary for protection of such interests, and therefore legislature's decision as to necessity or reasonableness of the given regulation is conclusive unless court can see, in light of facts properly brought to its knowledge, that such regulation has no just relation to object which it purports to carry out, and no reasonable tendency to preserve or protect public safety, health, comfort or morals.

4. Constitutional law ⇨70(1)

Whether a legislative enactment relating to the police power is so unreasonable as to transcend the proper exercise of the law-making power, is a question to be determined by the court.

5. Constitutional law ⇨70(1)

Where a statute, purporting to have been enacted to protect the public health, morals or safety, has no real or substantial relation to those objects or is a palpable invasion of rights secured by the constitution, it is the duty of the courts so to adjudge.

6. Taxation ⇨59

"Contributions" referred to in the California Unemployment Insurance Act and in rules adopted by the Unemployment Commission under the Act, are a "tax." General Laws, Act 8780d, § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Tax".

7. Constitutional law ⇨72

In connection with constitutional authority, a governmental agency is not only vested with a power, but also is affirmatively imposed with a duty, but in connection with the police power, the governmental agency's power is acknowledged only for certain purposes and within certain limitations.

8. Taxation ⇨543(8)

In action by owner of string of horses to recover "contributions" paid under protest, in accordance with the Unemployment Insurance Act, on remuneration received by jockeys, trial court properly assumed responsibility of determining whether relation of employer and employee actually existed, since the act and the employment commission are the product of the police

power, and therefore the act and the regulations of the commission are subject to judicial review. General Laws, Act 8780d, § 45.10.

9. Taxation ☞59

Free lance jockeys were not "employees" of owner of horses within meaning of the Unemployment Insurance Act and money paid by owner to jockeys was not "wages" within meaning of act, where jockeys were hired especially for each race the day before the race and received a fixed sum for riding in a race. General Laws, Act 8780d, §§ 6.5, 8.5, 11(a) (1).

See Words and Phrases, Permanent Edition, for all other definitions of "Employees" and "Wages".

10. Appeal and error ☞1011(1)

The trial court's determination on conflicting evidence is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by H. N. Isenberg against the California Employment Stabilization Commission, successor to the California Employment Commission (formerly Unemployment Reserves Commission) and Homer W. Buckley and others, members of the California Employment Stabilization Commission, and others to recover "contributions" paid under protest in accordance with provisions of the California Unemployment Insurance Act. From a judgment in favor of the plaintiff, the commission and the members thereof appeal.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

John Moore Robinson, of Los Angeles, for respondent.

DORAN, Justice.

The action herein was commenced by plaintiff and respondent to recover "contributions" paid under protest, in accordance with the provisions of Sec. 45.10 of the California Unemployment Insurance Act. The sum sought to be recovered was "contributed" under the act referred to, on

the remuneration received by jockeys performing services for plaintiff during a certain period. Following a trial on the merits, plaintiff prevailed and, from the judgment that followed, defendant appeals.

Appellant recites the facts as follows:

"During the period in question, respondent owned a string of horses which he raced at Bay Meadows Race Track; various jockeys, whose status is in question, were engaged to ride respondent's horses; these jockeys secured their mounts by having their agents contract the owner of the horses, or the trainer of the horses, on the day before the race for all races except stake races; with relation to stake races, agreements were usually entered into two or three weeks before the race was run. The testimony disclosed that the custom and practice of the jockeys and their method of operation was that the jockeys reported to the jockey's room at noon on the day of the race; that they changed into the silks furnished by the owners at the time they were to ride the scheduled race and proceeded to the paddock, where the jockey met with the owner or the trainer. At this time the owner or trainer (the agent of the owner) advised the jockey regarding the running of the race; the jockeys received instructions as to how the horses were to be raced, whether they should be warmed up before going to the gate; whether the horse was to be whipped, or whether he was to be held back in the early part of the race. The owner, however, can give no instructions which do not have for their objective the winning of the race, with the exception of the instances where an owner has more than one horse entered in the same race, as such would be against public policy and against the express rules of racing in California, (Pl. Ex. 2, Rule 323(a). Either the trainer or the owner specifically informs the jockey as to the characteristics of the particular horse that he is to ride. Where the owner believes it is advantageous that the horse be ridden without a whip or stick, the owner may have the whip or stick taken from the jockey by application to the stewards. In such case, during the remainder of the racing meet, the horse must be ridden without a stick unless an

application is made by the owner to the stewards to change the ruling.

"In the instant matter, the statement of Mr. Molter, the respondent's trainer, who, as part of his duties, hired the jockeys whose status is in question, discloses that he instructed the jockeys as to the various characteristics of the horses they were to ride and how to ride them. After the race, the trainer or owner had the right to obtain information from the jockey as to the reason for the horse not running, or as to the type of race the horse did run. If the jockeys did not follow the instructions of the owner or trainer, the owner would not engage the jockey to ride again.

"The same instructions were given to all jockeys, whether they were termed apprentices, free lance or contract riders. The jockeys received a fixed sum for riding the race, in the absence of a specific contract, which was the situation in the present matter, \$35.00 for a winning mount and \$10.00 for a losing mount."

It is contended by appellant that "The sole issue presented to the court by this appeal is whether or not the free lance jockeys performing services for respondent were in 'employment' within the meaning of Section 6.5 of the California Unemployment Insurance Act."

Respondent points out briefly that, "The facts as stated in Appellants' Opening Brief are to some extent erroneous, or are Appellants' interpretation of the testimony. There is no evidence in the record that the owner advised the jockey how to run the race, but there is testimony that not only did the owner not so advise but that it would be impossible. The whip is not taken from any jockey but is taken from the horse. There is no evidence that Mr. Molter told any of the jockeys whose status is in question how to ride their horses. There is no evidence that the owner would not engage the jockeys to ride again if the jockeys failed to follow instructions, but only that if done too often that the jockey 'probably would not ride for that owner again.'" It is respondent's contention that, "The sole issue involved in this appeal is whether there was sufficient evidence to support the judgment of the trial court."

Appellant replies that, "The challenge raised by Respondent to the statement of facts as set out in Appellants' Opening Brief clearly shows that there is no essential conflict in the facts in this case, but the question to be determined is one of law, and therefore, the Appellate Court is not bound by the findings of the Trial Court. The sole issue to be determined is whether, as a matter of law, from the uncontradicted facts these jockeys were 'in employment'."

"Section 6.5 of the California Unemployment Insurance Act defines 'employment' as: '* * * service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied * * *'

"Section 8.5 of the California Unemployment Insurance Act provides in part: '* * * Each individual employed to perform or to assist in performing the work of any individual employed by an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such individual so employed, providing the employing unit had actual or constructive knowledge of the work.'

"Section 11 of the California Unemployment Insurance Act provides as follows: '(a) Except as hereinafter in this section provided, the term "wages" means: (1) All remuneration payable for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the cash value of all remuneration payable in any medium other than cash * * *'

[1] Appellant argues that, "The California Unemployment Insurance Act is social legislation and as such must be liberally construed to the end that its purpose may be accomplished." California Employment Commission v. Butte County Rice Growers Association, 25 Cal.2d 624, 154 P.2d 892, 894, is cited in support of the above argument. There, the court held that, "The tax feature as to the reciprocal contributions of employers and their employees is but an incident, not the essence

of the state unemployment insurance law, which in turn is integrated with the operation of comparable federal legislation. * * * Such legislation is remedial in character, subject to a liberal construction to effectuate its purpose and to coincide with its reflection of public policy." The statutory rule in this regard is that, "* * * The code establishes the law of this state respecting the subject to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." Civil Code, sec. 4. And with relation to the same subject, the rule has been declared to be that, "The different Codes are to be harmonized and construed together as parts of the same statute, as far as may be reasonably possible." *Weber v. McCleverty*, 149 Cal. 316, 86 P. 706, 708. Sec. 4480 of the Political Code as enacted in 1872 provides, "With relation to each other, the provisions of the four codes must be construed * * * as though all such codes had been passed at the same moment of time, and were parts of the same statute." Thus, there can be no question as to the validity of the contention that the statute here considered "must be liberally construed with a view to effect its purpose and to promote justice", but, not because it is "social legislation"; it is the general rule and statutory law.

The case cited above, namely, the *California Employment Commission v. Butte County Rice Growers Association*, however, is not decisive of the issues involved in the within action. The question presented in the former action was whether, "the labor involved in the activities of the association constituted 'agricultural labor' and was therefore exempt from the coverage provisions of the act." In the last mentioned case at page 629 of 25 Cal.2d, at page 894 of 154 P.2d, also appears the following, "The California Unemployment Insurance Act expressly excepts 'agricultural labor' but does not expand the term in any detail. * * * However, plaintiff, as the administrative agency created by the act and entrusted with its enforcement * * *, is authorized to 'adopt and enforce rules and regulations which to it seem necessary and suitable to carry out the provisions of this act.' * * * Upon this basis the

plaintiff promulgated rule 7.1, effective February 14, 1937, and in force during the period here involved, which administrative aid defined the term 'agricultural labor' as including all services performed." Then follows the definition of, "agricultural labor", promulgated by the California Employment Commission. The opinion continues, "Considering at the outset the challenge of the validity of rule 7.1, the objection is not well taken. Where the Legislature has by its enactments declared policies and fixed primary standards, as it did in the Unemployment Insurance Act, there can be no question but what it may validly confer on administrative officers power to 'fill up the details' by prescribing rules and regulations to promote the spirit and purpose of the legislation and its complete operation." However, it should be noted at this point that the question as to the authority of the legislature to thus delegate to a commission, its power to tax, and, its power to define and classify for taxation purposes, was not raised.

Appellant also quotes at length from *Drillon v. Industrial Accident Commission*, 17 Cal.2d 346, 110 P.2d 64, 65. There the petitioner sought the "annulment of an award made against him by the Industrial Accident Commission in favor of Claude Hooper, a jockey suffering injuries while riding a horse for petitioner in a race at Del Mar, California. The respondent commission found that Hooper was an employee, as against the defense that he was an independent contractor and accordingly made the award to Hooper including an increased indemnity as petitioner was found to be wilfully uninsured." The court adhered to the well established rule controlling in such circumstances and held, "We think it is clear therefore that the evidence is sufficient to support the respondent commission's finding that Hooper was an employee and not an independent contractor". Following a comprehensive review of the facts, the court concludes, in part, with the following observation, "In any event the issue of whether or not a person is an employee or an independent contractor is a judicial question and not a legislative or executive one." The only issue in the *Drillon* case was whether Hooper was an

"employee" within the purview of the workman's compensation laws. The Industrial Accident Commission held that Hooper was such an employee; the Supreme Court decided that there was sufficient evidence to support the finding, and affirmed the award. And in the final analysis, whether Hooper, under applicable phases of other doctrines, might also have been an independent contractor as well as a "workman", was beside the issue. It does not follow therefore, that all jockeys are necessarily employees, even within the purview of the Workmen's Compensation Act; the evidence in each case is controlling.

It also should be remembered, in connection with a consideration of the Drillon case, that Article XX, sec. 21 of the California Constitution is the authority for the Workmen's Compensation laws and the functions of the Industrial Accident Commission; they are not the product of the police power.

[2] Unlike the California Workmen's Compensation Insurance and Safety Laws, which the legislature, by constitutional enactment was expressly vested with plenary power to create, the California Unemployment Insurance Act is purely a police power measure. Article I of the act recites a premise followed by the conclusion that, "The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State." Deerings General Laws, Vol. 3, p. 3322.

[3-5] Pertinent phases of the police power are summarized in 5 Cal.Jur. p. 711 as follows: "In the exercise of the police power, a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but also what measures are necessary for the protection of such interests. It is therefore settled that the decision of the legislative body as to the necessity or reasonableness of a given regulation is conclusive unless the court can see, in the light of facts properly brought to its knowledge, that such regulation has no just relation to the object which it purports to

carry out, and no reasonable tendency to preserve or protect the public safety, health, comfort or morals. It is equally well settled that the question of whether or not an enactment so possesses this character of unreasonableness as to transcend the proper exercise of the law-making power is one to be determined by the court. Accordingly, where a statute, purporting to have been enacted to protect the public health, morals or safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the constitution, it is the duty of the courts so to adjudge and thereby give effect to the fundamental law." And, with regard to the same subject, the Supreme Court has declared, "Under our form of government by constitution, the individual, in becoming a member of organized society, unless the Constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists. Cooley on Stat.Lim., pp. 68, 244; 1 Barb. on Rights, pp. 122, 284. * * * The police power is broad in its scope, but it is subject to the just limitations that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare." Ex parte Quarg, 149 Cal. 79, at pages 80, 81, 84 P. 766, 5 L.R.A.,N.S., 183, 117 Am.St.Rep. 115, 9 Ann.Cas. 747.

[6] It is the duty of the California Employment Commission to "carry out the provisions of this act"; imposed with this duty, the commission has extended and multiplied the provisions of the Act by the adoption of certain rules and regulations with reference to the "contributions" referred to in the Act. By whatever name it may be called, the "contribution" is a tax. And, the failure to comply with the published rules of the commission is declared to be a crime. Article 8 sec. 101.5, Vol. 3, Deerings Gen.Laws, p. 3373. Thus, to the Commission is delegated, in effect, the power to tax, the power to determine who shall be taxed, and the power to in-

itiate criminal prosecutions for the violations of its rules and regulations. The validity of the aforesaid power is not disputed in the within action.

[7] The foregoing somewhat extended consideration of the law governing the California Employment Commission and the Commission itself, is to emphasize the proposition that they both are the product of the police power. The effect of police power regulations and the acts of those charged with the operation of such regulations are never conclusive. They frequently, if not invariably, precipitate legitimate controversies, the determination of which is exclusively judicial. All of which, it may be assumed, the trial judge took into account in the trial of the within action. It also may be assumed that the trial court knew of the differences between constitutional authority and authority that has its source in the police power; and, that in connection with the former, the governmental agency is not only vested with a power, but also is directly and affirmatively imposed with a duty, all of which is determined by the people through the medium of the Constitution; whereas, with the latter, its power is acknowledged only for certain purposes and within certain limitations. The courts are bound to uphold the former in any event, but with the latter, are frequently called upon to judicially determine the validity and limitation of police power statutes or regulations in the light of the many phases of the law that affect such validity and limitation.

[8] In the within action the trial court properly assumed the function and responsibility of determining whether the relation of employer and employee actually existed within the meaning and application of the act in question and, in that connection, in effect, rejected the defendant commission's contention that all jockeys are in, "employment", simply by being so classified by the commission. The court found, and the findings in part recite, "That it is true that during no portion of said quarter end-

ing June 30, 1944, were any or all of said five free lance jockeys employees of plaintiff, and none of the aforementioned sums of money so paid to said free lance jockeys was wages, and during the entirety of said period none of said free lance jockeys was in the employment of plaintiff, and said plaintiff during the entirety of said period was not an employer of any or all of said free lance jockeys, nor was he an employing unit of said free lance jockeys, or any of them; and that the aforesaid sums of money, so paid during the said quarterly period to the aforementioned five free lance jockeys, were payments made by plaintiff to independent contractors, and no portion of said monies are, or at any time have been, subject to any or all of the provisions of said California Unemployment Insurance Act. * * * That it is true that during the entirety of said quarter ending June 30, 1944, and particularly during the time that said services were so rendered, as aforesaid, by said five free lance jockeys, and each of them, none of said free lance jockeys were subject to any or all of the provisions of said California Unemployment Insurance Act, and at none of said times did an employer-employee relationship exist between any or all of said five free lance jockeys." Moreover, it should be noted that, the right to contract freely is a personal right, and is of the very essence of liberty.

[9, 10] The sole issue on appeal, as contended by respondent, is whether the evidence sustains the findings and the judgment. That the evidence does in fact, and in law sustains the findings and the judgment, there can be no question. The fact that the evidence may have been conflicting to some extent, must be disregarded. In the circumstances, the judgment is conclusive on appeal. See *California Empl. Stab. Comm. v. Wirta*, 75 Cal.App.2d 739, 171 P.2d 728.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

ANDERSON v. THACHER et al.

Civ. 15146.

District Court of Appeal, Second District,
Division 1, California.

Sept. 11, 1946.

Hearing Denied Nov. 4, 1946.

1. Appeal and error ⇨931(1)

On appeal, conflicting evidence is considered most favorably to respondent

2. Brokers ⇨31

An owner exchanging her apartment house for business property could not recover secret or other profits from brokers who negotiated exchange and one of the broker's mother-in-law in whose name the business property was placed for purpose of transfer, unless the real estate broker with whom owner dealt bore a fiduciary relation to owner and was her confidential agent.

3. Principal and agent ⇨14(2)

An agency may be created, not only by written instrument or by word of mouth, but may be implied from the conduct of the parties.

4. Brokers ⇨38(4)

Evidence that fiduciary relationship existed between apartment house owner and broker negotiating exchange of apartment house and a sum of money for business property, and that broker knew that apartment house was not to be placed in hands of owners of business property but was to be obtained as a secret profit in the transaction, and that broker made no disclosure to apartment house owner, and that broker made misrepresentations to owner for purpose of inducing owner to exchange properties, warranted apartment house owner's recovery of secret profits from broker.

5. Brokers ⇨19

A real estate agent owes his client the same obligation of undivided service and loyalty that a trustee owes his beneficiary.

6. Brokers ⇨31

A real estate broker sued for secret profits realized when client exchanged

properties could not assert that the property received by client was worth amount paid by client, where client did not complain that client was induced to pay more than the property was worth, but that client would have paid less if broker had been faithful to his trust.

7. Brokers ⇨32

A broker acts as a middleman when his duty is simply to bring together two or more people who desire to exchange their property, and his duty is performed when he has brought the respective parties together and he represents no conflicting interests and his advice and assistance are not called for, and he is not in the strict sense of the word an agent.

8. Brokers ⇨31

A broker could not escape liability for secret profits to client exchanging properties on ground that broker was merely a middleman owing no duty to client other than to bring client and the other property owner together, where broker was clothed with authority to do everything necessary, usual, and proper in the ordinary course of business to effectuate the purpose of his agency, and actively exercised discretion in advising client and in negotiating for her the exchange of the properties. Civ.Code, § 2319.

9. Brokers ⇨32

A real estate broker owing a fiduciary duty to client exchanging properties did not owe a greater duty to the other party to the exchange, so as to forbid broker's disclosure to client of information upon which client based her cause of action against broker for secret profits, where broker was not the agent of the other party.

10. Principal and agent ⇨70

An agent acting for adverse principals with the acquiescence of each has a bounden duty to act with fairness to each and must disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency.

11. Brokers ⇨31

The dominant characteristic of a fiduciary relationship is the confidence reposed

by one in the other, and a real estate broker enjoying such a relationship cannot further his own interests and enjoy the fruits of an advantage taken of such relationship, but must make a full disclosure of all material facts surrounding the transaction that might affect the decision of his principals.

12. Limitation of actions ⇨179(2)

Where a confidential relationship is involved, the rigid rules applying in cases in which relief is sought from fraud by actions commenced more than three years after the perpetration of the fraud, that the complaint must contain allegations as to time when fraud was discovered, how the discovery was made, and why the discovery was not made sooner, are relaxed. Code Civ.Proc. § 338, subd. 4.

13. Limitation of actions ⇨100(8, 11)

An apartment house owner's cause of action against real estate broker to recover secret profits on exchange of apartment house for business property was not barred by statute of limitations, where confidential relationship existed between owner and broker, and broker abused such confidence, and broker's misrepresentations were intentional and false and made to induce owner to make the exchange, and owner's delay in discovering the fraud was induced by such representations, and owner was sufficiently diligent in discovering the alleged fraud and instituted the action within a reasonable time thereafter. Code Civ.Proc. § 338, subd. 4.

14. Limitation of actions ⇨100(11)

In determining whether action based on fraud is barred by limitations, where the representations are intentional rather than negligent, the plaintiff's negligence in failing to discover the falsity thereof is no defense. Code Civ.Proc. § 338, subd. 4.

15. Brokers ⇨31

An apartment house owner suing real estate broker for secret profits on exchange of apartment house for business property would not be denied recovery on ground that owner was charged with knowledge of contents of county public records showing that true ownership of business property was not as represented by owner, where

owner's conduct was not manifestly unreasonable. Civ.Code, § 1213.

16. Brokers ⇨34

A client exchanging property can act on the presumption, in dealing with his real estate agent, that there exists no intention to defraud client, and client is not required to assume that everyone with whom he has a business transaction is a rogue and act accordingly.

17. Limitation of actions ⇨13

A real estate broker sued for secret profits by client exchanging property, on ground that broker breached his fiduciary duty to client, was estopped from taking advantage of statute of limitations, where client's delay was induced by broker's representations to client. Code Civ.Proc. § 338, subd. 4.

18. Fraud ⇨11(1)

Expressions of opinion to avoid an action for deceit or fraud must be of an opinion honestly entertained by person making the statement.

19. Limitation of actions ⇨100(11)

A plaintiff may bring action for fraud discovered less than three years before although means of knowledge were open to plaintiff more than three years before commencement of action, unless circumstances were such that inquiry became a duty and failure to make inquiry constituted a negligent omission. Code Civ.Proc. § 338, subd. 4.

20. Conspiracy ⇨14

Defendants who, through fraud and conspiracy, assist a real estate broker in violating his obligation to his principal by making and retaining a secret profit in exchange of real properties, are equally liable for all the consequences of the conspiracy, regardless of the extent of their participation or the share of the secret profits obtained by them.

21. Conspiracy ⇨14

Joint recovery of damages may be had against all parties to a conspiracy pursuant to which a civil wrong is done.

22. Principal and agent ⇨160½

Where, after the violation of a fiduciary obligation, an amount is found to be

due from the agent, judgment for the same amount may also be rendered against those proved to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries and even though they received no share of the profits.

23. Conspiracy ⚡19

Evidence was sufficient to show that real estate brokers participated in conspiracy to obtain secret profits from principal who engaged one of the brokers to negotiate an exchange of real properties, rendering brokers liable for such profits.

24. Conspiracy ⚡19

Evidence was sufficient to show that mother-in-law of one real estate broker who conspired with another broker to obtain secret profits from principal who engaged the other broker to negotiate exchange of real properties, knowingly participated in the conspiracy by serving as "dummy" in certain escrow transactions, rendering mother-in-law liable for the secret profits, notwithstanding that mother-in-law did not receive any of the benefits of the conspiracy.

25. Conspiracy ⚡14

The liability of a conspirator is not dependent on whether such conspirator receives any of the benefits of the conspiracy.

26. Appeal and error ⚡994(3)

The District Court of Appeal cannot retry a case or substitute its judgment for that of the trial court in the matter of credibility of witnesses.

Appeals from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action to recover secret profits in connection with the exchange of certain real properties by Gertrude H. Anderson against Frederic G. Thacher, C. G. Sackett, and Margaret Johnstone. From the judgment, the defendants separately appeal.

Affirmed.

John W. Preston, of Los Angeles, for appellant Frederic G. Thacher.

C. E. Spencer, of Los Angeles, for appellants C. G. Sackett and Margaret Johnstone.

Bailie, Turner & Lake and L. S. B. Ritchie, all of Los Angeles, for respondent.

WHITE, Justice.

Separate appeals are prosecuted by defendants from a judgment entered against them jointly in the sum of \$40,000 after trial before the court sitting without a jury. The action was one to recover secret profits in connection with the exchange of certain real properties.

[1] Insofar as the evidence may be conflicting, it is axiomatic that on appeal we must consider the evidence most favorably to respondent. In accordance with that rule, we feel justified in making the following statement of facts, although as to some of them there was a sharp conflict in the evidence.

During the summer of 1937, respondent Gertrude H. Anderson, 73 years of age and residing in San Diego, California, owned an apartment house in that city called the Garden Court Apartments which she desired to exchange at a valuation of \$55,000 for some Los Angeles business property. Her husband, A. C. Anderson, age 76 years, with whom she resided, was a licensed real estate broker and used the San Diego address of George L. Barney Co. (hereinafter referred to as Barney Co.), a real estate agency, on his application for his license, but he had not been active in the real estate business for a number of years prior to 1937.

In connection with the exchange of their property, the Andersons consulted W. J. Brown, sales manager of Barney Co. at San Diego. He, in turn, contacted defendant Frederic G. Thacher, a licensed real estate broker in Los Angeles, soliciting the latter's cooperation with Barney Co. in locating some Los Angeles business property for the proposed exchange. Defendant Thacher agreed to cooperate as requested, and stated that he would attempt to find a suitable property and submit the same for consideration.

Soon thereafter, defendant Thacher submitted to Mr. Brown of Barney Co. a proposition for an exchange of property at St. Andrews and Santa Monica Boulevard in Los Angeles for plaintiff's San Diego property, and Brown submitted the proposition to plaintiff Anderson. In an exchange of letters, Brown asked Thacher for a 50-50 split of commissions if a deal was consummated. Because she lived in San Diego, plaintiff, upon submission of the just-mentioned proposition, wrote to George Wood, certified public accountant in Pasadena who did the accounting work for the Andersons and in whom they had great trust and confidence, asking the latter to make an examination of and investigate the proposition submitted by defendant Thacher. After investigation by Mr. Wood he wrote plaintiff advising against the acceptance of the foregoing proposition and the same was rejected by her.

About the middle of August, 1937, Wood advised the Andersons that defendant Thacher had shown him a piece of property on Wilshire Boulevard near Doheny Drive which the former desired the Andersons to see. Pursuant to an appointment, the Andersons came to Los Angeles and, for the first time, met defendant Thacher at this property. The Andersons introduced themselves to defendant Thacher, after which, according to the testimony of plaintiff, "Mr. Anderson said we had come up because Mr. Wood had told us that Mr. Thacher wanted us to see this particular property, and that is why we came. Then Mr. Anderson said that he had had a conversation with Mr. Brown in which Mr. Brown had said that Mr. Thacher and Mr. Brown would represent us as our agent in any deals that might be made between—about an exchange of our San Diego property for any Los Angeles business property, and Mr. Thacher said that was true. * * *."

Plaintiff rejected this proposed trade and advised defendant Thacher to submit any other proposals to her advisor, Mr. Wood.

During the times above-mentioned defendant Sackett was a licensed real estate broker maintaining offices at 3871 Wil-

shire Boulevard, in Los Angeles. He was acquainted with defendant Thacher whose offices were at 3875 on the same boulevard. Sometime in August or September 1937 defendant Sackett first learned of the Garden Court Apartments from defendant Thacher. This information Sackett testified was given to him about the time he "started negotiations" on a piece of property on Hollywood Boulevard in Los Angeles, owned by Harry W. Chase and his sisters Mable L. Bireley and Gladys C. Herrington. Shortly thereafter, defendant Sackett went to San Diego to see the Garden Court Apartments at the suggestion of defendant Thacher. Defendant Sackett advised defendant Thacher that the Hollywood Boulevard property could probably be used in making a deal for the San Diego property of plaintiff but advised Thacher that the sum of \$125,000 in cash would be required in the transaction. Defendant Sackett himself testified he was informed by Mrs. Herrington, one of the owners of the Hollywood Boulevard property, that the terms of the deal must be all cash, that no property would be taken in trade by the Chase family, and that Sackett could have anything offered in exchange, provided the Chase family got their price of \$125,000 cash. In any event there is ample evidence that at all times defendant Sackett was aware of the fact that the Hollywood Boulevard property could be acquired for the sum of \$125,000 cash and that the owners would require a deposit of \$5,000 in any escrow opened in connection with the sale.

Defendant Margaret Johnstone was the mother-in-law of defendant Sackett and resided at his home. At the trial it was stipulated that she was over 75 years of age and, by reason of illness, was unable to be present, but that if she were present and sworn as a witness she would testify that each and every act performed by her in connection with the transactions herein was done and performed at the instance of Sackett, and that the latter received such proceeds as were obtained by her from the transactions. The record reflects that neither defendant Sackett nor Mrs. Johnstone had sufficient funds to purchase the

Hollywood Boulevard property or to meet the escrow requirements later involved in the transactions.

Defendant Thacher testified he did not know defendant Mrs. Johnstone at any time during the course of the negotiations or prior to the completion of the transaction later to be referred to and involved in this litigation. He also testified that he was first apprised of the fact that her name was to be used in the transaction by defendant Sackett shortly before the opening of the escrow thereon. But, notwithstanding his testimony in this regard, defendant Thacher used Mrs. Johnstone's name as the purported purchaser of the plaintiff's San Diego property and stated she had agreed to pay him a \$5,000 commission.

Coming now to the circumstances surrounding the transactions out of which this litigation arose, it appears that in the early part of September, defendant Thacher informed Mr. Wood, plaintiff's advisor, that the Hollywood Boulevard property could be obtained in trade for plaintiff's Garden Court Apartments and \$125,000 in cash, and "that was the lowest it could be had for." At the request of defendant Thacher, Mr. Wood inspected the Hollywood Boulevard property. He took a photograph of it and sent the same to plaintiff, "went to the City Hall and looked at the City Assessor's record and found out when the building was erected and found the assessed valuation of the land and buildings and found out to whom the property was assessed." He reported to plaintiff that the property for three years prior thereto was assessed to Gladys C. Herrington. Mr. Brown, sales manager for Barney Co., testified that "after the Andersons were introduced to Mr. Thacher he took them over completely and I wasn't consulted on any of the matters regarding agency or anything else outside of the fact that we had our written agreement as to commissions."

In the light of what we shall hereinafter have to say, we attach significance to a letter written under date of September 11, 1937 by defendant Thacher to Mr. Brown of Barney Co. stating that Wood, plaintiff's advisor, had taken pictures of the property

and that "We are asking for the Garden Court (plaintiff's San Diego property) and \$125,000 to make the deal and it can be done. I just put the San Diego property up to them about two weeks ago and they were lukewarm, but have since been down to see the stuff and seem ready to deal * * *."

On September 19, Mr. and Mrs. Anderson, at the request of defendant Thacher, came to Los Angeles to look over the Hollywood Boulevard property. On the evening of the date of their arrival they inspected the exterior of the property and concluded they did not want it. On the following morning they called defendant Thacher on the telephone and advised him they had decided not to take the property. Defendant Thacher then requested that he be permitted to come to their hotel and talk with them, to which they consented. Upon his arrival he said he could not tell them about the property unless he could show them the interior, and requested that they accompany him so that he could take them through and show them the interior of the building. This was agreed to and defendant Thacher showed them through the building, stating that the same, which was three stories in height, had a foundation sufficient to support a height-limit building; that the rents on the property were far too low and should be increased by \$500 a month or more; that he would be willing to act without charge as plaintiff Anderson's manager for the building until the rents had been increased in that amount. He further stated that the Hollywood property was worth \$200,000 and would increase in value, while plaintiff Anderson's San Diego property would go down in value; that the only reason that they could get the building at that time was because there were several members in the family owning it, that they wanted to divide their interests, and that one of the members would accept the San Diego property while the others would divide the cash. Defendant Thacher again stated that the property could be gotten for \$125,000 in cash and the plaintiff's San Diego property and that that was the least that it could be obtained for. Defendant Thacher also stated that the owners would be willing to

spend \$1,000 on improvements, since the outside of the building needed painting, and that in the event the owners would not consent to such expenditure he would make the necessary improvements himself. Plaintiff Anderson then asked defendant Thacher if he would be willing to represent her in closing the deal and he said that he would. In answer to questions as to whether she believed the statements that defendant Thacher had made to her, plaintiff testified "I did * * * I began to have confidence in Mr. Thacher at the Hollywood Boulevard property when he said he would pay that \$1,000 if the former owners didn't; and another thing that gave me confidence was he said he would do this work for \$500—I mean, would do this work for nothing until the rents came up to \$500 a month more, and I thought that was unusually fair. I thought it was honest and square. And another thing that made me have confidence in Mr. Thacher was the fact that he said he knew about San Diego property, had lived there and been a broker there, and also knew about Los Angeles property, and seemed so well posted, and then, if Mr. Wood and my husband had opposed me in it I would have taken Mr. Thacher's word, because I was thoroughly sold on Mr. Thacher, and continued to be sold on him until the day before he was discharged. I believed every word he said."

At the suggestion of defendant Thacher, Mr. and Mrs. Anderson rode with him to the Sixth and Oxford Branch of the Security-First National Bank in Los Angeles, where they were taken to the escrow department and the terms of the escrow were thereupon dictated by defendant Thacher. The escrow, which was numbered 113-8299-S, was dated September 20, 1937, and called for the execution and delivery into escrow of a deed signed by Gertrude H. Anderson to Margaret Johnstone covering the Garden Court Apartments in San Diego, California, together with the payment of \$125,000 in cash, in exchange for a deed of conveyance by Margaret Johnstone of the property on Hollywood Boulevard in Los Angeles. Mrs. Johnstone was not present at this time and her escrow instructions were signed later. While the

escrow instructions were being prepared at the bank, plaintiff's husband stated to defendant Thacher that inasmuch as Mr. Brown, Mr. Thacher and himself were representing Mrs. Anderson he thought that the commission should be split three ways. To this defendant Thacher replied "that was understood." The commission to be paid by plaintiff was set at \$2,750 on a basis of \$55,000 valuation of the Garden Court Apartments. Replying to an inquiry from plaintiff's husband defendant Thacher stated that he would receive a \$5,000 commission from the other side and that the entire commission would be pooled and split three ways. The reasonable market value of the Garden Court Apartments was established as being \$40,000.

When the escrow papers had been signed defendant Thacher handed the escrow instructions, bill of sale, sales agreement, and the deed to Mrs. Anderson, asking her to sign them. Noting that Margaret Johnstone's name instead of that of a brother and three sisters had been set forth in the instructions as the owners of the Hollywood Boulevard property and as the purchaser of the Garden Court Apartments, plaintiff's husband inquired as to why only one person had been named in the instructions because he understood from defendant Thacher that there were several members of the family owning the property. To this defendant Thacher replied that Mrs. Johnstone was a member of the family, was one of the owners of the Hollywood Boulevard property, and was acting for the other members of the family for the convenience of all concerned because the others lived out of town. In response to a question from plaintiff as to whether it was all right for her to sign the papers defendant Thacher said, "Yes," and she thereupon affixed her signature.

Defendant Thacher then suggested to Mrs. Anderson that she make a \$5,000 down payment as an evidence of her good faith. Thereupon plaintiff made out a check for \$5,000 which was deposited in the escrow.

While it appears that the leases on the Hollywood Boulevard property bore the names of the members of the Chase family as lessors at the time they were approved by plaintiff, it appears from the rec-

ord that neither plaintiff nor her husband read the leases nor noted the names of the parties thereto.

According to his own testimony, defendant Thacher knew that Mrs. Johnstone was not the owner of the Hollywood Boulevard property on September 20, 1937. He was also aware of the fact that defendant Sackett was receiving a broker's commission from the owners of the Hollywood Boulevard property and that he was putting the same into the deal. Furthermore, at the outset of the negotiations, and some time prior to September 30, 1937, defendant Thacher agreed with his codefendant Sackett that he would wait for his commission in the deal until a loan could be made on the Garden Court Apartments.

There was no mention in the plaintiff Anderson-Johnstone escrow instructions of the \$5,000 commission payable to defendant Thacher until after the instructions were signed by Margaret Johnstone, when an instruction to pay a \$5,000 commission to defendant Thacher was written in the Anderson-Johnstone instructions in pen and ink in the handwriting of defendant Sackett. It also appears from the record that at a conference between defendant Sackett and Mrs. Herrington and her brother Harry W. Chase, two of the owners of the Hollywood Boulevard property, the purchase price of said property was discussed. Finally it was agreed that the building needed painting and the owners said that they would paint the building and would come down on the price of the property from \$125,000 to \$124,000. This, however, was denied by Mr. Reynolds, representative of the Chase family, who was present at the conference in question.

The Chase-Johnstone escrow, No. 113-8310-B, was opened at the Sixth and Oxford Branch of the Security-First National Bank of Los Angeles on September 22. In that escrow defendant Margaret Johnstone agreed to hand the bank \$124,000 in payment of the purchase price of the Hollywood Boulevard property and the owners agreed to accept that amount for a conveyance of such property. This escrow was opened two days after the plaintiff Anderson-Johnstone escrow was established. The Chase-Johnstone escrow also

called for a deposit of \$5,000 by the defendant Mrs. Johnstone within twelve days after the signing of such escrow and provided that if such deposit was not made the sellers might withdraw their papers from the escrow. This \$5,000 was withdrawn from the plaintiff Anderson-Johnstone escrow and put into the Chase-Johnstone escrow.

The record reflects that so far as plaintiff Anderson was concerned she paid the \$5,000 hereinbefore referred to into the escrow on September 20, and later on October 4 paid into her escrow the further sum of \$121,204. Under written instructions signed by defendant Mrs. Johnstone the bank transferred from the plaintiff Anderson-Johnstone escrow to the Chase-Johnstone escrow cash in the sum of \$117,582.28, and this sum, together with the fund transferred by defendant Thacher to the Chase escrow, totalled \$119,965.62. A further sum of \$2,000, out of commissions payable to defendant Sackett as a broker for the Chase family, was deposited in the Chase-Johnstone escrow by defendant Sackett. The Chase escrow called for the payment of \$124,000 by defendant Mrs. Johnstone, and out of this sum the Chases agreed to pay a real estate broker's commission of \$4,350; \$2,350 of which was to be paid to defendant Sackett and \$2,000 to another representative of the Chase family. Under date of October 6, 1937, defendant Sackett filed an instruction in the Chase escrow directing the transfer of the sum of \$2,000 "from funds accruing to my account to the credit of Margaret Johnstone and hold the difference of \$350 for me at the close of escrow."

The record further reflects that the plaintiff Anderson-Johnstone escrow was closed October 7, 1937, and prior to that time application for a loan on the Garden Court Apartments was made by defendant Thacher through the San Diego Trust and Savings Bank for \$12,500. On September 29, 1937, defendant Thacher wrote to Mr. Brown of Barney Co. enclosing the application for the loan signed by defendant Mrs. Johnstone. On October 7, 1937 the San Diego Trust and Savings Bank sent a check to defendant Margaret Johnstone on account of this loan in the sum of

\$12,384.20. The loan was secured by deed of trust, together with a chattel mortgage covering certain personal property contained in the Garden Court Apartments.

Prior to the closing of escrow and under date of September 30, 1937, defendant Thacher wrote a letter to Mrs. Anderson confirming his agreement to manage the property on Hollywood Boulevard without any charge to plaintiff until such time as the income would be increased \$500 or more a month or "until such time as it is mutually agreed to alter the arrangement." The letter further stated, "I have in my possession a written agreement to pay immediately upon presentation of bills to a total not exceeding \$1,000 for such painting, repairs, and renovation as you may decide to do on the property * * *."

After both escrows had been closed defendant Thacher commenced negotiations for an exchange of the Garden Court Apartments and an increase of the loan on the property from \$12,500 to \$20,000. An escrow was opened in which defendant Margaret Johnstone deposited a deed conveying the Garden Court Apartments to Martha T. Forward subject to a \$20,000 trust deed and chattel mortgage in exchange for a San Diego home owned by Martha T. Forward. Out of the proceeds of this loan the prior loan of \$12,500 to the San Diego Trust and Savings Bank was paid.

Thereafter, on instructions from defendant Thacher, application for a loan of \$10,000 on the Forward property was made by defendant Margaret Johnstone and a loan of that amount secured by trust deed on the Forward property was obtained from Prudential Life Insurance Company.

Thereafter, in February, 1939, under the instructions of defendant Thacher, the Forward property was sold to Benjamin and Eulalie Polak, subject to the aforesaid \$10,000 trust deed for a cash consideration of \$2,500.

Plaintiff Anderson discharged defendant Thacher as managing agent of her Hollywood Boulevard property on February 10, 1940 but such discharge was not due to the transaction which gave rise to this lawsuit, but was occasioned because

an action had been brought against plaintiff Anderson by one of the tenants in the Hollywood Boulevard property.

The record reflects that not until September 6, 1940 did plaintiff discover the true situation with reference to the aforesaid transaction when George Carter, a Los Angeles real estate broker, called upon her and asked if she would be willing to sell the Hollywood Boulevard property for \$110,000. When she replied that she had paid \$175,000 for it, Mr. Carter stated that it had been on the market for around \$120,000. In the course of this same conversation, plaintiff was advised that defendant Margaret Johnstone was not a member of the Chase family, the former owners of the Hollywood Boulevard property, and that Harry W. Chase lived at Merced, California. Subsequent to Mr. Carter's visit, plaintiff's husband communicated with Harry W. Chase and met the latter at the law offices of Winterer and Ritchie in Los Angeles about September 19, 1940. Upon that occasion Mr. Chase advised plaintiff's husband of the details of his escrow with defendant Margaret Johnstone and the following day, upon the return of plaintiff's husband to San Diego, he related to her what he had learned. This was the first time plaintiff learned that Mrs. Bireley and Mrs. Herrington both lived in Los Angeles and were sisters of Mr. Chase and that the Chase family did not personally know defendant Margaret Johnstone. Thereafter, plaintiff's husband went to the Security-First National Bank in Los Angeles, examined the escrow instructions and in that way plaintiff first discovered that the Hollywood Boulevard property had been purchased from the Chase family for a consideration of \$124,000. On February 5, 1941 plaintiff instituted this action.

Epitomizing the factual background surrounding this litigation, we are confronted with a situation wherein plaintiff sought the aid of real estate brokers to exchange a piece of property owned by her in San Diego worth \$40,000. At the conclusion of more or less extensive negotiations she parts with her \$40,000 property plus approximately \$125,000 in cash and receives in return therefor Los Angeles business

property that had for some time been offered in the open market for and was sold for the sum of \$124,000. In other words, plaintiff pays \$165,000 for property anyone could have purchased for not more than \$125,000. Some three years later she learns that her San Diego property was not included in the exchange made with the owners of the Los Angeles property and that the owners of the last-named property received only \$124,000 for the same while her San Diego property was converted into a sizable sum for division among certain of the aforesaid brokers who participated in the transaction involving plaintiff's property and the acquisition by her of the Hollywood Boulevard property in Los Angeles.

The court found on substantial evidence that the plaintiff's Hollywood Boulevard property was inspected by Mr. Wood, plaintiff's advisor, at the request of defendant Thacher who informed Wood that the above-mentioned property "could not be purchased from the then owners thereof for less than the San Diego property clear, and one hundred and twenty-five thousand dollars (\$125,000) cash."

The plaintiff inquired of said defendant Thacher whether he could purchase said Hollywood Boulevard property for her for less than \$125,000 plus her San Diego property, to which defendant Thacher replied "that he could not and that the present owners would not accept less than \$125,000 and the San Diego property for said Hollywood Boulevard property." As to the other facts hereinbefore narrated the court found the same to be true and that insofar as the aforesaid representations allegedly made by defendant Thacher are concerned the court found that plaintiff relied upon such representations. The court also found that all defendants knew that defendant Thacher had accepted employment for and on behalf of plaintiff and also knew that the Hollywood Boulevard property together with leases thereon and the personal property in such leases described, were being openly offered for and could be purchased for not more than \$125,000 cash. The court also found that insofar as the profits made upon the San Diego property by defendants were con-

cerned, the same was pursuant to mutual agreement divided between them save and except that defendant Margaret Johnstone did not receive any of said profits. The court found that defendant Thacher was at all times the agent and representative of plaintiff in the aforesaid transaction; "that by reason of the fraud and deceit practiced upon the plaintiff by the defendant as hereinbefore found, and by reason of the secret profit gained by the defendants through their scheme and plan hereinbefore found, said plaintiff has been damaged in the sum of forty thousand (\$40,000) dollars."

Judgment was entered accordingly and from such judgment defendants prosecute this appeal.

Defendant Thacher's Appeal.

[2-6] In urging a reversal of the judgment against him, defendant Thacher contends that he was not a fiduciary of plaintiff in the exchange of properties. The law is well settled that unless defendant Thacher bore a fiduciary relationship toward plaintiff and was her confidential agent, she is not entitled to recover any profits, secret or otherwise, which were realized by the defendants. *Read v. Mortgage Guarantee Co.*, 11 Cal.App.2d 137, 143, 144, 53 P.2d 377. An agency may be created not only by written instrument or by word of mouth but may be implied from the conduct of the parties. *Brand v. Mantor*, 6 Cal. App.2d 126, 130, 44 P.2d 390. In the instant case the evidence shows that defendant Thacher was approached on behalf of plaintiff by the sales manager of Barney Co., real estate brokers in San Diego, who enlisted Thacher's aid to assist plaintiff in finding some suitable Los Angeles business property to exchange for plaintiff's San Diego property. Subsequently, the Andersons came to Los Angeles at the request of defendant Thacher and at that time Mr. Anderson told Thacher that he understood that the latter and Mr. Brown, the sales manager of Barney Co., would represent the Andersons as agents in any deal they might make for an exchange of their San Diego property for Los Angeles property, and Thacher's reply was that that was true. Again, when on a subse-

quent visit to Los Angeles and a meeting with defendant Thacher by the Andersons, plaintiff herself asked defendant Thacher if he would be willing to represent her in closing the deal, he said that he would be willing so to do. As heretofore indicated by the testimony of Mr. Brown, Thacher "then took the Andersons in charge." Defendant Thacher also told plaintiffs that the owners of the Los Angeles property would allow \$1,000 for repairs on the building and that he would act as plaintiff's property manager for the building without compensation until the rents had been increased at least \$500 per month. Defendant Thacher also assured plaintiff that he knew that the deal could not be consummated for less than the exchange of her San Diego property plus \$125,000 in cash. He also told plaintiff that defendant Johnstone was a member of the Chase family when he knew that she was not, for he was told by defendant Sackett who the members of the Chase family were. Throughout the escrow negotiations defendant Thacher represented plaintiff who had returned to her San Diego home. We are not impressed with defendant Thacher's claim that he was the agent of defendant Sackett because the latter, himself a licensed real estate broker, was representing the owners of the Hollywood Boulevard property as broker, and certainly defendant Thacher was not the agent of defendant Johnstone because he was not even acquainted with her until after the deal was closed. We deem it unnecessary to here repeat the evidence hereinbefore narrated in detail. Suffice it to say that it establishes a fiduciary relationship between plaintiff and defendant Thacher and imposes upon him the fiduciary duties of a real estate agent which under the California law demands the same obligation of undivided service and loyalty that it imposes upon a trustee in favor of his beneficiary. *Rattray v. Scudder*, 28 Cal.2d 214, 169 P.2d 371. The evidence warranted the inference by the court that defendant Thacher was aware of the fact that plaintiff's San Diego property was not to be included in the exchange because he agreed to wait for the \$5,000 commission due him from the Chase-Johnstone escrow until a

mortgage could be placed upon the San Diego property after its acquisition by defendant Johnstone. The claim that defendant Thacher was not acting as plaintiff's agent is clearly inconsistent with the documentary and oral evidence introduced and heretofore set forth. Appellant Thacher's contention that the property was worth all that plaintiff gave for it is immaterial because plaintiff does not complain that she was induced to pay more than the property was worth, but that she would have paid less if defendant Thacher had been faithful to his trust.

[7,8] Appellant Thacher's contention that he owed no greater duty to plaintiff in the exchange of properties than that which is owed by a middleman to one or the other of the parties whom he brings together is without merit. A broker acts as a middleman when his duty is simply to bring together two or more people who desire to exchange their property and whose entire duty is performed when he has brought the respective parties together. In such a case the broker is in no sense representing conflicting interests. He has nothing whatever to do with the trade. Under his contract the advice and assistance of a middleman is not called for. Therefore he is not an agent in the strict sense of the word. But in the case now engaging our attention we have no such situation. On the contrary, after plaintiff advised defendant Thacher of her rejection of the Hollywood Boulevard property exchange he actively interested himself and urged upon plaintiff the benefits that would accrue to her through such an exchange, told her that it would be a good deal for her, that he would obtain an allowance of \$1,000 from the owners to repair the property, and agreed that if the owners refused such an allowance he would himself pay for such repairs. He stated to plaintiff that the rents were too low and that if she would buy the property he would act as her agent free of charge until the rents were raised at least \$500 per month. In the preparation and conduct of the escrow he was active in advising and assisting plaintiff. To hold that such activities and conduct on the part of defendant Thacher cast him in the role of a middle-

man would do violence to reason and challenge credulity. Furthermore, under the facts here present defendant Thacher was clothed with authority to do everything necessary, usual and proper in the ordinary course of business to effectuate the purpose of his agency. Civ.Code, sec. 2319. Here defendant Thacher not only was invested with but actively exercised discretion in advising plaintiff and in negotiating for her the exchange of the properties in question. *King v. Reed*, 24 Cal.App. 229, 234, 141 P. 41.

[9-11] Appellant Thacher urges that even though it be assumed he became a fiduciary he owed a greater duty to defendant Johnstone, the other principal, which forbade a disclosure of the information upon which plaintiff's cause of action is based, but the answer to this claim is that, as heretofore pointed out, defendant Thacher was not the agent of defendant Johnstone. Indeed, he was not even acquainted with her during the times here pertinent. Furthermore, when an agent acts for adverse principals with the acquiescence of each, he has a bounden duty to act with fairness to each, and is bound to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency. Restatement of the Law of Agency, § 392. In the present case there can be no doubt that plaintiff would not have consummated the exchange of properties as made had she known that the Hollywood Boulevard property was being purchased for \$124,000 cash. Defendant Thacher not only failed to disclose the truth but made the misrepresentation that the Hollywood Boulevard property could not be obtained for less than the San Diego property of plaintiff plus the sum of \$125,000 cash. The dominant characteristic of a fiduciary relationship is the confidence reposed by one in the other and a broker occupying such a relationship can not further his own interests and enjoy the fruits of an advantage taken of such a relationship. He must make a full disclosure of all material facts surrounding the transaction that might affect the decision of the principals. Defendant Thacher insists that the record is barren of any evidence that he knew that the Hollywood Boulevard

property could be or was purchased for \$124,000, but he did know that the property was owned by the Chase family and that defendant Johnstone was not a member of that family. He knew defendant Johnstone had no interest in the property and was also aware that plaintiff's San Diego property was not being transferred to the real owners of the Hollywood Boulevard property, but to defendant Johnstone, and he agreed to wait, and waited for his \$5,000 commission in the transaction until a loan could later be obtained on plaintiff's San Diego property after its transfer to defendant Johnstone. The court was justified in drawing an inference that defendant Thacher was aware that plaintiff's San Diego property was to be obtained as a secret profit in the transaction, out of which he was to be paid his \$5,000 commission when a loan could be obtained on the same after its acquisition by defendant Johnstone.

Defendant Thacher concedes his knowledge of the fact that defendant Johnstone did not have title to the Hollywood Boulevard property at the time it was first submitted to plaintiff, but insists that plaintiff had or was chargeable with the same knowledge. The answer to this is that when plaintiff inquired of defendant Thacher as to why the escrow was opened in the name of defendant Johnstone, he replied that she was a member of the Chase family who owned the property and was acting for the other members who resided outside of the city of Los Angeles—a statement which he knew to be false. The facts present in the instant controversy present a situation wherein sound public policy demands that a transaction involving duplicity and concealment on the part of an agent against an innocent principal should not be permitted to stand. We therefore hold that the findings of the court that defendant Thacher occupied a fiduciary relationship to plaintiff and that he violated his fiduciary duty of disclosure, and beyond that made misrepresentations, all of which resulted in damage to plaintiff through secret profits made as a result of Thacher's abuse of the confidence reposed in him are supported by substantial evidence and inferences reasonably deducible therefrom.

[12-15] Finally, defendant Thacher urges that plaintiff's cause of action is barred by the provisions of subdivision 4, section 338 of the Code of Civil Procedure. In view of the findings of the trial court hereinbefore set forth, supported as they are by competent evidence, defendant Thacher's contention in this regard can not be sustained. Where, as here, a confidential relationship is involved, the rigid rules applied in cases where relief is sought from fraud by actions commenced more than three years after the perpetration of the fraud, that the complaint must contain allegations as to time when the fraud was discovered, how the discovery was made, and why it was not made sooner, are somewhat relaxed. *Rutherford v. Rideout Bank*, 11 Cal.2d 479, 486, 80 P.2d 978, 117 A.L.R. 383. The evidence in the case at bar clearly establishes a confidential relation between plaintiff and defendant Thacher, and that the latter abused the confidence placed in him. When the misrepresentations are intentional rather than negligent plaintiff's negligence in failing to discover the falsity thereof is no defense. *Seeger v. Odell*, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291. The same case is authority for the statement that the fact that an investigation would have revealed the falsity of the misrepresentations will not always bar recovery. Defendant Thacher's claim that plaintiff is also charged with knowledge of the contents of the public records of Los Angeles County, which showed the true ownership of the Hollywood Boulevard property (Civ.Code, sec. 1213) is answered by the Supreme Court in *Seeger v. Odell*, supra, 18 Cal.2d at page 415, 115 P.2d at page 980, 136 A.L.R. 1291, wherein it is said: "* * * and it is well established that he is not held to constructive notice of a public record which would reveal the true facts. Rest. Torts, sec. 540(b); see cases cited in 12 Cal.Jur. 759, 764; Prosser, Torts, 750, 751. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value." Under the facts of the instant case it can not be said that plaintiff's conduct in the light of her own intelligence and information was manifestly unreasonable. Therefore, she will not

be denied recovery. Defendant Thacher cannot be heard to complain that plaintiff reposed too much confidence in him. "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." *Seeger v. Odell*, supra, 18 Cal.2d at page 415, 115 P.2d at page 981, 136 A.L.R. 1291. The law does not applaud fraud and condemn the victim thereof for his credulity. Peculiarly pertinent to the case at bar is the following language used by the Supreme Court in *Victor Oil Co. v. Drum*, 184 Cal. 226, 241, 193 P. 243, 249:

[16-19] "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part. The present case is not of that character." The possible but antiquated authority that one must assume that everyone with whom he has a business transaction is a rogue and acts accordingly will not receive judicial approval. Courts rather will hold that one can act upon the presumption that there exists no intention to defraud him. *Tide-water Southern R. Co. v. Harney*, 32 Cal. App. 253, 260, 162 P. 664. We do not deem it necessary to here repeat the testimony concerning defendant Thacher's conduct toward and the representations made by him to plaintiff. Suffice it to say that the findings of the court that such representations were not true and were made by defendant Thacher for the purpose of inducing plaintiff to make the exchange; that plaintiff believed the representations and relied thereon in making the exchange; and if she had not so believed and relied thereon she would not have entered into the transaction, are supported by competent and substantial evidence. We therefore hold that the evidence in this case is reasonably susceptible to the conclusion that there existed a continuing confidential and fiduciary re-

lationship between plaintiff and defendant Thacher. The evidence satisfies us as it did the trial court that the delay upon plaintiff's part about which appellant Thacher complains was induced by his own representations to her, and by reason thereof, even if it be conceded that the statute of limitations commenced to run as contended for by him he is estopped from taking advantage of the statute. *Calistoga National Bank v. Calistoga Vineyard Co.*, 7 Cal.App.2d 65, 72, 46 P.2d 246. Though it be conceded as claimed by defendant Thacher that some of the representations made by him related more or less to matters of opinion, nevertheless, expressions of opinion to avoid an action for deceit or fraud, must be of an opinion honestly entertained by the person making the statement. *Macdonald v. De Fremery*, 168 Cal. 189, 142 P. 73; *Phelps v. Grady*, 168 Cal. 73, 141 P. 926; *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 573, 126 P. 351, 42 L.R.A.,N.S., 125; *Zwart v. Landfield*, 93 Cal.App. 328, 333, 269 P. 740. And whether representations are of a fact or matters of opinion is largely dependent upon the surrounding circumstances. *Hall v. Mitchell*, 59 Cal.App. 743, 211 P. 853; *Hodgkins v. Dunham*, 10 Cal.App. 690, 705, 103 P. 351. That means of knowledge were open to plaintiff does not necessarily preclude her from relief. Only when the circumstances are of such a character that inquiry becomes a duty is the failure to make it a negligent omission. *Denson v. Pressey*, 13 Cal.App.2d 472, 476, 477, 57 P. 2d 522. We find nothing in the evidence here that would excite the suspicions of an ordinarily prudent person situated as plaintiff was, or that would put such a person on inquiry. The record contains evidence that would justify a trial court in finding that the plaintiff was sufficiently diligent in discovering the alleged fraud practiced upon her and that the action was instituted within a reasonable time thereafter.

Defendant Sackett's Appeal.

[20-23] This defendant occupied no fiduciary relation to plaintiff and his liability is dependent on whether he joined a conspiracy to defraud plaintiff through the

making of a secret profit to be divided between plaintiff's fiduciary Thacher and defendant Sackett. If through fraud and conspiracy other defendants assisted defendant Thacher in violating his obligation to his principal by making a secret profit and by retaining the proceeds therefrom, they, as well as the fiduciary Thacher, are equally liable for all the consequences of the conspiracy, regardless of the extent of their participation or the share of the secret profits obtained by them. It is not the conspiracy but the civil wrong which gives rise to the cause of action. If plaintiff is successful in proving an injury of the nature claimed she may recover in her action against all those who have united or co-operated in inflicting that injury. *Revert v. Hesse*, 184 Cal. 295, 193 P. 943. And where, after the violation of a fiduciary obligation, an amount is found to be due from the agent, judgment for the same amount may also be rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries, and even though they receive no share of the profits. *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 97 P. 10, 18 L.R.A.,N.S., 1105. The trial court reached the conclusion that defendant Sackett was implicated in the conspiracy and in view of the fact that the evidence was in conflict or that it was possible to draw conflicting inferences from that part of the evidence which was not of itself conflicting, the conclusion that a conspiracy was established and that Sackett participated therein can not be disturbed upon appeal. Because of the inherent difficulty in proving a conspiracy, it has been held that a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances. *Revert v. Hesse*, *supra*. That both defendants Thacher and Sackett knew that plaintiff's San Diego property was not to be included as a consideration for the Hollywood Boulevard property is attested by the fact that both defendants agreed that Thacher was to wait for his \$5,000 commission until plaintiff's property

was acquired by defendant Johnstone and a loan could be negotiated thereon. The question might also be appropriately asked as to why defendant Sackett selected defendant Johnstone, his mother-in-law, to act as a "dummy" in the escrow opened in connection with the Chase property? Was it to keep secret the fact that plaintiff was not, as defendant Thacher represented to her, transferring title to her San Diego property in exchange for the Hollywood Boulevard property? Why was a double escrow resorted to when if there was nothing to conceal from plaintiff a single escrow would have sufficed? The conduct of defendant Sackett is hereinbefore set forth in detail. The foregoing narrative of testimony received at the trial showing as it does a course of conduct on the part of the defendants Thacher and Sackett teeming with fraudulent representations and replete with intrigue, deception and duplicity, warranted the trial court in finding that a civil conspiracy was formed by defendants Thacher and Sackett, put into operation, and that damage resulted to plaintiff from an act or acts done in furtherance of a common design which was to obtain plaintiff's San Diego property as a secret profit and to divide such profits between at least two of the conspirators.

Other contentions advanced by defendant Sackett are answered by what we have said in our determination of the appeal taken by defendant Thacher.

Defendant Johnstone's Appeal.

That this defendant knowingly aided in furtherance of the design or scheme there can be under the evidence little if any doubt. She willingly permitted the use of her name in the dual escrow opened by defendants Thacher and Sackett in carrying out their design to defraud plaintiff. This defendant knew she did not have the money with which to purchase the Hollywood Boulevard property when she signed the Chase-Johnstone escrow. She had read and was conversant with that escrow which specified a cash purchase by her for \$124,000 and she had read and was equally conversant with the Anderson-Johnstone escrow instructions requiring plaintiff to pay \$125,000 together with her San Diego

property. This defendant willingly acted as a "dummy" to aid her codefendants in every step of the transactions, and likewise, in subsequent developments through which money was obtained on plaintiff's San Diego property after it was acquired by her she acted as a figurehead in the Forward-Johnstone escrow and in the Polak-Johnstone escrow in San Diego. She opened a bank account in which the proceeds from the loans on plaintiff's San Diego property were deposited. It was the cooperation of defendant Johnstone that made it possible to acquire the San Diego Garden Grove Apartments without the knowledge or consent of plaintiff Anderson or of the Chase family, owners of the Hollywood Boulevard property. Whether a defendant conspired together with others for any purpose, and if so what that purpose was, are primarily questions of fact.

[24-26] In the state of the evidence here presented we would not be justified in disturbing the conclusion arrived at by the trier of facts that defendant Johnstone joined in the plan and scheme initiated by defendants Thacher and Sackett to obtain plaintiff's San Diego property as a secret profit; that her conduct in acting as a "dummy" in the dual escrows and in the subsequent negotiations through which plaintiff's property was disposed of, were illegal and in furtherance of the common scheme or design to achieve the unlawful purpose of the conspiracy. As heretofore pointed out, the liability of a conspirator receives any of the benefits of the conspiracy. By reason of the surreptitious and deceptive means resorted to by her codefendants and in which defendant Johnstone willingly used her name, it can not be said that the trial court's inference that she had knowledge of the conspiracy and its unlawful purpose was unreasonable. As stated at the outset of this opinion, much of the evidence to which we have adverted was contradicted, but under familiar rules for which citation of authority is unnecessary, we cannot re-try the case, nor substitute our judgment for that of the trial court in the matter of credibility of witnesses.

It results from what we have said above that the judgment against each defendant must be affirmed. It is so ordered.

YORK, P. J., and DORAN, J., concur.



76 Cal.App.2d 104

In re CAMM'S ESTATE.
Civ. 13020.

District Court of Appeal, First District,
Division 1, California.
Sept. 17, 1946.

Hearing Denied Nov. 14, 1946.

1. Fraudulent conveyances ☞57(4)

Where deceased's estate was insolvent at the time of her death, her creditors, rather than her son, were entitled to income which had accrued from trust created by deceased, notwithstanding provision of trust instrument for benefit of son.

2. Fraudulent conveyances ☞24(1)

Equity treats a trust as void in so far as it operates to defeat creditors' claims.

3. Fraudulent conveyances ☞110(1)

A person cannot place his property or the income thereof beyond the reach of his creditors so long as he himself retains the right to receive and use it.

4. Fraudulent conveyances ☞111

If instrument providing that trustee should pay income from trust estate to trustor during her life, and on her death with accumulated income to her son, was construed as depriving trustor's creditors from resorting to accrued income on death of trustor insolvent, it amounted to a "fraudulent transfer" within statute. Civ. Code, § 3439.04.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulent Transfer".

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Catherine V. Camm, deceased, wherein Karl Brooks filed objections to the first and final report and account of Horace O. Camm, administrator of the estate of Catherine V. Camm, deceased. From an order refusing to settle the account, the administrator appeals.

Order affirmed.

Lewis H. Cromwell, of Petaluma, and A. Dal Thomson, of San Francisco, for appellant.

Geary & Tauzer, of Santa Rosa, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order refusing to settle the first and final report and account of the administrator of the estate of Catherine V. Camm.

The parties are before this court on a clerk's transcript, and the only issue involved is whether certain "accrued, accumulated income" of a trust created by decedent was part of her estate and available as such to her creditors, or whether under the terms of the trust it vested at her death in a remainderman free from any claims of her creditors. The "remainderman" herein involved is appellant, the son of decedent-trustor, and administrator of her estate.

Respondent is a creditor of decedent for the sum of \$540.82. His claim was allowed, but appellant administrator in his final report and account set out that no assets remained in the estate for the payment of respondent's claim.

Respondent filed objections to such final report and account, setting forth therein that appellant had received funds out of several bank accounts standing in his mother's name, but had failed to charge himself as administrator with the receipt of such monies.

The court found that in January, 1925, decedent transferred certain of her properties in trust to the Wells Fargo Bank and Union Trust Company; that certain amendments thereto were made, the last of which is the provision involved upon this appeal, and reads as follows: "(a) The Trustee shall pay the entire net income, revenue

and profit from the trust estate to the Trustor for and during her natural life, and upon her death (*together with any accrued, accumulated income*) to Horace O. Camm, son of the Trustor, for and during his natural life" with remainders over to other persons after the son's death. (Emphasis added.)

The court further found that at the time of the trustor's death the "accumulated and accrued income" from the trust estate included \$1,052.67 in the San Francisco Bank, \$502 in the Sonoma County Branch of the Bank of America, and \$554.12 in the Wells Fargo Bank and Union Trust Company; that in July, 1942, the money in those three accounts was paid to appellant, and that such funds "were subject to and chargeable with all of the debts of said decedent at the time of her death."

For the foregoing reasons, the court further found that there were still sufficient funds in the estate to pay respondent's claim, and that the administrator's first and final report and account did not show all of the monies with which he was actually charged—to wit, the sum of \$2,108.79, as before shown.

The court then concluded that the first and final report and account could be allowed and approved, and administration terminated upon appellant's paying to respondent the amount of his claim, and an order to that effect was made.

In a memorandum opinion the trial court rejected the contention of the appellant administrator that the accrued, accumulated income in the book accounts before noted, vested in him as remainderman at his mother's death, free from claims of such life beneficiary's creditors. In his opinion the trial judge stated: "I am satisfied that the rule that a person cannot place his property or the income thereof beyond the reach of his creditors so long as he himself retains the right to receive and use it is applicable in this case. The defense that at the moment of death the money in the income accounts of the deceased vested in Horace O. Camm, as a remainderman, under the terms of the amended trust instruments, cannot be sustained. Equity treats the trust as void insofar as it oper-

ates to defeat creditor's claims. Hence, to the extent necessary to pay such claims, the money must be treated as that of the decedent at death and as having passed into her estate for purposes of administration for the benefit of creditors who would otherwise be deprived of their just dues. If this trust as to the accrued and accumulated income to which the settlor was entitled before death could be upheld as against this creditor's claim, it would be possible for anyone to create a trust for his own benefit, in which he retained the right to receive and use all income during his life, with remainder to another at the moment of death, free from claims of creditors, and then keep large credit accounts running and die leaving his debts unpaid, thus cheating his creditors. Equity will not permit this. Authorities relied upon by the objector fully support his position."

Appellant contends that he took such accrued, accumulated income absolutely in remainder, under the terms of the trust agreement, and that the estate of his mother had no right thereto. Appellant states: "Reducing the argument to the simplest terms, the percentage of zero is zero. Since the Estate could not claim any interest in any portion of this fund, it follows that a creditor of the Estate likewise cannot do so." He then cites a number of authorities in support of the undoubted and well established rule of law that a creditor of a trust beneficiary has no better claim to the trust fund than the beneficiary has.

Certainly, if the estate of Catherine V. Camm had no right to said funds, the respondent as a creditor would have none. However, the trial court found that the money in said income accounts became a part of Catherine Camm's estate upon her death and was subject to the claims of creditors, and the question that we must decide upon this appeal is whether or not this determination of the trial court was correct.

Appellant relies upon *Greenwich Trust Co. v. Tyson*, 129 Conn. 211, 27 A.2d 166, 169, as his case most closely in point. There a grantor had created a "discretionary trust" with the income payable to the grantor at the discretion of the trustee and also giving the trustee discretion to ac-

cumulate any part thereof, or to expend any part thereof directly for the support of the grantor or of his wife and children. The trust instrument created a remainder by way of trust with income to be paid to the grantor's widow. An action was brought by a creditor to subject income and principal to the payment of his claim. The trial court held that the half of the corpus of the trust, which, under its provisions, had already vested in the grantor beneficiary, was subject to the creditor's claim; that the creditor also had the right to reach so much of the income as the trustee in his discretion did not deem to be required for the support of the wife and children of the grantor; but that the creditor had no right to the remaining half of the corpus which had not yet vested in the grantor. Pending the determination of the appeal the grantor-beneficiary died and his executor was substituted as a party, and as stated in the opinion, "He [the executor] and the other parties have stipulated that there is in the possession of the trustee some undistributed income from the fund, and further that this court may proceed to decide all the issues presented on the record and in so doing may take cognizance of the fact of Tyson's [grantor's] death to any extent to which it affects those issues." The Supreme Court of Errors of Connecticut affirmed the judgment of the trial court in all respects except that it held that the trial court erred in holding that the creditor was limited to so much only of the income as the trustee in his discretion deemed not required for the support or education of the grantor's wife and children.

Appellant quotes the following language from pages 173, 174 of the case in 27 A.2d: "When Tyson died, the contingencies which might defeat the remainder interests could no longer happen, and those interests then became indefeasibly vested. *Bates v. Spooner*, 75 Conn. 501, 508, 54 A. 305; *Thomas v. Castle*, 76 Conn. 447, 451, 56 A. 854; *Daskam v. Lockwood*, 103 Conn. 54, 64, 130 A. 92. While we have found few cases dealing with a situation where the settlor of the trust, after reserving to himself the income for life, creates vested indefeasible interests, to take effect at his

death, we have found none which subjects such interests to the demands of the settlor's creditors, and on principle there is no question that the creditors cannot reach those interests. Over them the settlor has no dominion, and his creditors have no more right to reach them than they would any interests in property formerly owned by him which has passed into the ownership of another. *Bryan v. Knickerbacker*, supra, 1 Barb. Ch., N.Y. [409], 425; *Griswold*, op. cit., § 475; 1 *Perry, Trusts*, 7th Ed., p. 654."

However, the quotation is merely to the effect that the remaining half of the corpus of the trust created by the decedent trustor passed upon his death to the remainderman named therein free from the claims of the creditors of the decedent trustor who was also the original life beneficiary. This is, of course, in accordance with well settled principles concerning which there is no dispute in this case, as the corpus of the trust is not here involved. But appellant has apparently overlooked the main holding of the *Tyson* case which is that certain income of the trust which had accrued prior to the grantor-beneficiary's death was liable for his debts even though payments of income to the decedent were discretionary with the trustee. For the court said 27 A.2d at pages 172, 173:

"The trust before us is not a spendthrift trust but, by reason of the discretion reposed in the trustee as to the use of the income, it is a 'discretionary' trust. If in such a trust the settlor is the sole person entitled to the income, that income can be reached by his creditors. *Griswold*, op. cit., 481; *Restatement*, 1 *Trusts*, § 156(2). A provision in the trust instrument that the trustee might in his discretion withhold the income from the settlor and accumulate it would not in itself place the income beyond the reach of his creditors. *Petty v. Moores Brook Sanitarium*, 110 Va. 815, 817, 67 S.E. 355, 27 L.R.A., N.S., 800, 19 Ann.Cas. 271, and see *Warner v. Rice*, 66 Md. 436, 443, 8 A. 84. * * *

"The outstanding factor in the situation is that, under a trust where the trustee has absolute discretion to pay the income or expend it for the settlor's benefit, the trust-

tee could, even though he had a like discretion to expend it for others, still pay it all to the settlor. Such a trust opens the way to the evasion by the settlor of his just debts, although he may still have the full enjoyment of the income from his property. To subject it to the claims of the settlor's creditors does not deprive others to whom the trustee might pay the income of anything to which they are entitled of right; they could not compel the trustee to use any of the income for them. The public policy which subjects to the demands of a settlor's creditors the income of a trust which the trustee in his discretion may pay to the settlor applies no less to a case where the trustee might in his discretion pay or use the income for others. The trial court was correct in holding that the plaintiff was entitled to reach the income if necessary to satisfy its judgment, but was in error in holding that its rights were limited to so much only of that income as the trustee in his discretion deemed not to be required for the support, maintenance or education of the settlor's wife and children."

We believe that the Tyson case, properly analyzed and considered, supports the order of the trial court in the instant case and does not support the contention of appellant.

In an annotation in 141 A.L.R. at page 1469 it is stated: "Another type of provision casting doubt on the testator's intent is a direction in the trust instrument to pay over, upon the life beneficiary's death, any accrued or accumulated income to subsequent beneficiaries. Most cases seem to hold that such a provision, without more, does not evince an intention on the part of the creator of the trust that income available for distribution, but not paid, to the life beneficiary, should be denied to his estate."

In *Re Dexter's Estate*, 134 Misc. 195, 235 N.Y.S. 763, at pages 764, 765, the court said:

"Paragraph 8 of the will gives all of the residuary estate to the executors 'in trust to receive the rents, income and profits thereof and to pay over the same to my sister, Julia Pinkney, so long as she shall

live and upon her death I give, devise and bequeath the principal of my residuary estate and any accrued income thereon which has not been paid over to my sister, Julia Pinkney, to Louise Ewing Dexter.' * * *

"This leaves but one question to be determined, namely, whether the testatrix intended, by the direction to pay to the remainderman 'any accrued income,' that all of the income received by the executors from the date of her death to the date of the death of the life tenant, and not paid to the latter during her lifetime, should be paid over to the remainderman, instead of to the estate of the life beneficiary. I hold that the testatrix intended payment of such income to the life tenant. * * *

"The rule above stated which governs payment of *income from trust estates*, and not the rule governing outright gifts, must, therefore, be applied. The words 'accrued income' in this will must be construed, as they are commonly used, to mean income for the current period which was earned upon investments, but which was not yet payable to the executors or trustees at the time of the termination of the trust."

In the case of *Horlick v. Sidley*, 241 Wis. 81, 3 N.W.2d 710, the remainderman of a trust sought without success to prevent the net income which had accumulated, but which had not been paid over by the life tenant from being paid to the executors of the estates of the life tenants, relying upon a provision in the trust that in the event of the death of the beneficiary before the termination of the trust the share of any such beneficiary was to be transferred to his or her lawful issue. The court said, 3 N.W.2d at pages 712, 713:

"The reasons opposing appellant's claim are clearly stated by the New Jersey court in the *Spiegelberg* case, *supra* [Commercial Trust Co. of N. J. v. *Spiegelberg*, 117 N.J.Eq. 171, 175 A. 164], in the following language at pages 174, 175 of 117 N.J.Eq., at page 166 of 175 A.:

"By the first paragraph of the trust indenture, *supra*, the net income of the trust for and during the life of the settlor's wife was given to her, absolutely and unqualifiedly, and its payment to her specifically enjoined upon the trustees. That income

was set aside as and became her absolute property. She could not legally be deprived of any part of it by and (sic) act, design, or default on the part of the trustees. Nor could the trustees, by merely neglecting or refusing to pay it to her in the manner directed by the settlor, convert all or any part of it into corpus or accumulations thereon, payable, upon her death, to the remaindermen under the trust.

"To hold otherwise, and as contended for by the remaindermen, that income accrued, but not actually paid over, during the life of the life tenant reverted upon her death to the remaindermen as accumulations on corpus, would necessitate a construction whereby this outright gift to the settlor's wife would be qualified so as to include not that which he had specifically directed the trustees to pay her, but only that which they saw fit to actually pay her, during her lifetime. * * *

"The inevitable result and effect of any such construction would be to enable the trustees by their mere withholding, intentionally or otherwise, payment of all or any part of the net income until after the life beneficiary's death to thereby not only deprive the latter of that which the creator of the trust intended and specifically directed should absolutely be hers, but to even frustrate and defeat his very intent. A construction so harsh and casting such grave doubts upon the stability and security of trust settlements, and incidentally upon the settlor's power to dispose, as he sees fit, of that which is his own, should not, and will not, be adopted unless the language and tenure of the trust indenture admits of no other."

"Granting that the interest of William H. Sidley is an executory interest operating to defeat the prior vested interest in the principal of the trust, it does not necessarily follow that it likewise operates to defeat such interest in the collected or accrued income. What distinguishes, for the purposes of appellant's argument, such income and income previously paid to the primary beneficiaries? The interest in the accrued and the collected income is a fully vested interest whatever may be the nature of the title to the principal and to the subsequently accruing income, and this

vested interest is not subject to any defeasance."

[1] Under the decisions hereinbefore cited we believe that the most reasonable interpretation of the trust instrument here involved is that the grantor-beneficiary did not intend by the use of the words "accrued, accumulated income" to deprive her creditors of any portion of the income of the trust which she up to the instant of her death had a right to demand. Such a construction is not compelled by the instrument itself, taking it in its entirety, and if we should give it such a construction we would certainly have to impute to the deceased the ignoble purpose and desire to make the income of the trust available to her during her lifetime and yet have the unused portion of that income, which she had permitted to remain in the hands of the trustee, free from the just claims of her creditors.

[2,3] But, if, as so vigorously contended by appellant, the only proper construction of the trust instrument is that it was the intention of the trustor to have the portion of the income of the trust which through failure of the trustee to pay said income to the trustor as directed by the trust instrument, remained in the hands of the trustee at the date of the death of the grantor-beneficiary, pass immediately to the remainderman free from any claims of the trustor-beneficiary's creditors, then we believe that, as stated by the learned trial judge in his opinion, "Equity treats the trust as void insofar as it operates to defeat creditors' claims." " * * * the rule that a person cannot place his property or the income thereof beyond the reach of his creditors so long as he himself retains the right to receive and use it is applicable to this case."

For as was said in *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, at page 186, 155 P. 995, at page 997, Ann.Cas.1917D, 1050: "For this reason and upon grounds of public policy, it is further held that one cannot by any disposition of his own property put the same or the income thereof beyond the reach of his creditors, so long as he himself retains the right to receive and use it."

[4] Furthermore the effect of the construction contended for by appellant would be to render the estate of decedent trustor insolvent upon her death, and there is substantial merit in the argument of respondent that it would be a fraudulent transfer under section 3439.04 of the Civil Code which provides: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." See also *Scholle v. Finnell*, 166 Cal. 546, 137 P. 241.

In view of the foregoing we believe that the order of the trial court disallowing the account of appellant administrator and ordering him to account as administrator for the funds in said income accounts and pay the claim of respondent, should be, and the same is hereby affirmed.

PETERS, P. J., and WARD, J., concur.



76 Cal.App.2d 133

**In re MARTIN'S ADOPTION.
SODERMAN et al. v. MARTIN.
Civ. 15192.**

District Court of Appeal, Second District,
Division 3, California.

Sept. 18, 1946.

Hearing Denied Nov. 14, 1946.

1. Adoption ⇐15

Trial judge's decision in adoption proceeding is final in absence of a clear showing of abuse of discretion, and appellate court should not place itself in position of trial judge and weigh the evidence under the rules which govern in the decision of questions of fact, or substitute its discretionary judgment for that of trial judge.

2. Adoption ⇐13

That adoptive parents were 68 and 62 years of age, respectively, was one of the

disadvantages to be considered in determining propriety of adoption of their five-year-old granddaughter.

3. Adoption ⇐13

Trial court did not abuse its discretion in ordering adoption by maternal grandparents with mother's consent of five-year-old girl whose father was dead, though adoption was opposed by paternal grandparents with whom child had lived since birth and who would place child in same home as mother who was subject to epileptic attacks.

Appeal from Superior Court, Los Angeles County; Wm. B. McKesson, Judge.

Proceeding in the matter of the adoption of Janice Adele Martin, a person under the age of 21 years, upon the petition of Ottina P. Soderman and John V. Soderman, opposed by Hulda Martin. From an order of adoption, Hulda Martin appeals.

Order affirmed.

Marcus, Rabwin & Nash, of Los Angeles, and Leo C. Dunnell, of Fairfield, for appellant.

Loucks, Phister, Baker & Stephenson, of San Pedro, for respondents.

SHINN, Justice.

This is an appeal by Hulda Martin from an order for the adoption of Janice Adele Martin, now aged five, by her maternal grandparents, John V. and Ottina P. Soderman. Janice is the daughter of Ottina P. Martin, who consents to the adoption, and Clyde Martin, now deceased. Ottina P. Martin, her husband and the child Janice lived in the home of Hulda Martin and her husband, John Martin, and the Martins' young son, then of the age of 16 years, from the time Janice was born until the accidental death of Clyde Martin November 22, 1942. Hulda Martin and her husband are the paternal grandparents of Janice. When Clyde Martin died, Ottina removed from the Martin home to that of her parents, petitioners and respondents herein, but the child has since remained and now is with her paternal grandparents. John V. Soderman was 68 years of age in September, 1945; his wife Ottina was then 62. They are purchas-

ing a home, have \$2500 in bank, \$700 worth of bonds, Mr. Soderman carries \$3,000 in life insurance, and is steadily employed as foreman of a rigging outfit. In the Soderman home the child would be with her mother. It is claimed that this arrangement, which would ordinarily be a desirable one, would be so seriously detrimental to the welfare of the child as to render the order of adoption an abuse of discretion, this because the mother, since she was about six years of age, has been a chronic sufferer from epilepsy. This unfortunate condition was the principal reason for the residence of the younger Martins in the home of Mr. Martin's parents.

Ottina Martin testified that the condition of her health had improved greatly since she left the home of John and Hulda Martin. Between March, 1943, and March, 1944, she had had 12 to 14 epileptic seizures, but she testified, "I am so improved that I don't have those hard ones, so many." The epileptic attacks would leave her unconscious, sometimes for a minute, usually longer, and upon one occasion she was unconscious for almost 30 hours. Mrs. Soderman testified that during the past year the seizures had lasted for a half minute to a minute and "would then be all over." Except during these brief intervals she was "perfectly capable and normal in all respects and her health has been improving." At the time of trial Ottina Martin was working as a clerk in a cleaning establishment at San Pedro. She testified that she always had warning of the approach of the attacks and that when the warnings came she would lie down.

There was medical testimony on each side, consisting of opposing opinions as to whether the child would suffer detriment by reason of her observation of her mother's condition or through accidental physical injury that might be occasioned thereby. This testimony will be referred to briefly. The physicians were in substantial agreement that the mother's affliction is a permanent one in the light of present medical knowledge. An osteopathic physician and surgeon, a cousin of the mother who had attended her since 1943, testified that under treatment her seizures had become mild ones, with no convulsions such as she formerly suffered. A psychiatrist who testified on be-

half of the petitioners expressed the opinion that the injury to the child's psychic development through observing the mother's condition would be negligible, assuming that the child was not neurotically predisposed. He was further of the opinion that no harm would come from the child's living in the house with her mother, provided she was not under the sole care of her mother. Another psychiatrist testified that he believed there would be a reasonable probability of psychic trauma to the child and that it would not be in the best interests of the child to be transferred from the home of John and Hulda Martin to that of the Sodermans. Another physician who had attended the mother prior to and after the birth of the child testified that there would be danger to the child if the mother happened to be carrying her when she suffered an attack, and still another physician testified that the child living in the home with her mother would not be in the best of surroundings, due to the indelible impressions that might be received from observing the mother's periodic attacks.

While the mother and child were living with the elder Martins, Janice was largely under the care of Hulda Martin, and when Clyde died the elder Martins requested the mother and child to remain with them, but Ottina was not happy there and went to the home of her own parents, although the child remained with the Martins. Had the mother been content to live with the Martins, she and the child would still be there and living under substantially the same conditions as will prevail in the Soderman home under the order of adoption. The fact that the mother was not happy in the home of her husband's parents reflects no blame upon the latter nor upon the mother. It is only an unfortunate circumstance. The mother is a kindly, gentle, and intelligent person. The Sodermans, needless to say, were before the court and they were found to be qualified in all respects to become the adoptive parents of Janice.

[1] The briefs on appeal contain a thorough discussion of the advantages and disadvantages to the child of living with her mother in the home of respondents. And yet such arguments are only a repetition of

those which were made to the trial court and which, we are confident, received the court's most careful consideration. It was the judgment of the court that the advantages which would accrue to the child through being reared in the home of respondents and in the society of her mother would outweigh the disadvantages. And implicit also in the order is a finding that the welfare of the child would be promoted by her removal from the home of the Martins to that of respondents, although this finding is by no means a reflection upon the paternal grandparents. It is not our province to place ourselves in the position of the trial judge and to weigh the evidence under the rules and by the processes which govern in the decision of questions of fact, nor is it our province, if we should chance to disagree with the conclusions of the trial judge, to substitute our discretionary judgment for his own. His decision is final, in the absence of a clear showing that the order of adoption was an abuse of judicial discretion. In *re* Fahlman, 84 Cal.App. 248, 257 P. 893; In *re* Peterson's Guardianship, 64 Cal.App. 2d 473, 149 P.2d 65.

[2,3] Appellant argues that the maternal grandparents are too old to adopt the child, and their age is, of course, one of the disadvantages to be considered. Another argument is that adoption of the child by respondents is being used as a means by which the mother will be able to have the child with her and that the proceeding therefore has been prosecuted principally for the benefit of the mother. Even if this be true, it would be purely incidental to the controlling fact, as found by the court, that adoption by respondents will best promote the welfare of the child. The proposed adoption had the approval of the State Department of Social Welfare and the court had the benefit of the report of the investigation made by the Department. But the most important feature of the trial was that the parties were before the court, subject to the court's inquiry and observation, which gave the trial judge the benefit of evidence which cannot be reflected in a printed record. The arguments of appellant reduce themselves to the proposition that the young children of a woman who suffers occasional

spells of epilepsy should not be permitted to live in the home with her if another entirely suitable home can be provided for them. The trial court's disagreement with that contention was not at all unreasonable. The court undoubtedly believed that it would be of definite advantage to the child to permit the adoption. We appreciate that it was difficult for the court to make an order which deprived the Martins of the custody of their granddaughter, who has lived with them since birth, but this fact would indicate to us that the court was well convinced that the adoption should be permitted. No abuse of discretion has been shown.

The order is affirmed.

DESMOND, P. J., and WOOD, J., concur.



76 Cal.App.2d 148

PEOPLE v. LE GRANT et al.

Cr. 3993.

District Court of Appeal, Second District,
Division 3, California.

Sept. 18, 1946.

1. Criminal law ⇨1144(13)

On appeal, the evidence was viewed most favorably in support of judgment of conviction.

2. Homicide ⇨255(2)

Evidence which was sufficient to show that defendant committed assault and battery on deceased and that death resulted warranted conviction for involuntary manslaughter, notwithstanding that defendant had no intent to take life. Pen.Code, § 192.

3. Criminal law ⇨59(5)

A defendant aiding and abetting in commission of crime can be convicted as a principal under statute without regard to conspiracy or concert of action. Pen. Code, §§ 31, 971.

4. Homicide ⚡29

While mere presence of defendant at scene of homicide is insufficient to make defendant a participant, and while his failure to prevent homicide does not necessarily make him guilty of homicide, his presence is a circumstance showing that he is a principal. Pen.Code, §§ 31, 971.

5. Criminal law ⚡59(5)

A defendant aids and abets person committing unlawful act, so as to be guilty as a principal, by aiding such person by acts or encouraging such person by words, with knowledge of wrongful purpose of such person. Pen.Code, §§ 31, 971.

6. Criminal law ⚡59(5)

The direct perpetrator of crime need not communicate his wrongful purpose to make defendant, who is present and knows intent of perpetrator and aids or encourages commission of crime by acts, words, or gestures, liable as an aider or abettor. Pen.Code, §§ 31, 971.

7. Criminal law ⚡59(4)

A defendant aiding or encouraging third person's commission of crime by acts, words, or gestures is liable as an aider and abettor only to extent of his knowledge of third person's wrongful purpose, or of the natural and reasonable consequences of the acts aided or encouraged by defendant. Pen. Code, §§ 31, 971.

8. Homicide ⚡249

Evidence that motorist aided and abetted companion in unlawful assault and battery and resulting homicide by stopping automobile from which challenging remarks were hurled at passing automobile, and by making no effort to restrain companion's vicious attack on driver of passing automobile which had also stopped, and by encouraging attack by preventing bystanders from interfering, warranted conviction of motorist as principal for involuntary manslaughter. Pen.Code, §§ 31, 192, 971.

From the judgment of conviction and an order denying their motion for a new trial, they appeal.

Judgment and order affirmed.

Joseph L. Fainer and Betty B. Gillette, both of Los Angeles, for appellant Howard Le Grant.

Maurice A. Gleason, of Los Angeles, for appellant Vincent Poche, Jr.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

KINCAID, Justice pro tem.

By indictment, Raymond Poche and the appealing defendants, Howard Le Grant and Vincent Poche, Jr., were accused of the crime of murder, a felony.

A trial by jury was waived by each defendant, and, following the court trial, Raymond Poche was exonerated and the appealing defendants were found guilty of the crime of manslaughter, a felony, as a lesser offense than that charged in the indictment of murder but one necessarily included therein. From such judgment and from the order of the court denying them a motion for a new trial, such defendants jointly appeal.

[1] While the evidence is highly conflicting in many particulars, viewed most favorably in support of the judgment, the record discloses the following series of events to have taken place.

At about 12:15 a. m., on September 6, 1945, the decedent, Elliott Casselman, a United States Army soldier in uniform, had left a bar, in company with two lady friends, and was driving his automobile with them as companions in an easterly direction on Hollywood Boulevard in Los Angeles. Another automobile, operated by the defendant Howard Le Grant, with the defendant Vincent Poche, Jr. accompanying him in the front seat, and with Raymond Poche and a young lady occupying the rear seat, was likewise proceeding at the same place and time and in the same direction. As the automobiles were passing in traffic remarks were exchanged between the occupants of the two cars, whereby someone in the Le Grant autom-

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Howard Le Grant and Vincent Poche, Jr., were convicted for manslaughter.

bile said, "do you want to make something of it?" to which Casselman replied, "sure." Thereupon, someone from Le Grant's car said, "pull over to the curb," whereupon both automobiles were parked adjacent to the curb with Le Grant's car some 35 feet ahead of the point where Casselman had parked. The three male occupants of Le Grant's car thereupon got out and stood together at a point on the sidewalk about the rear of that automobile, while at the same time Casselman left his car and walked toward them with his arms swinging naturally at his sides. No word was spoken by any of the four men at that time, but as Casselman got within range of the three standing men, the defendant, Vincent Poche, Jr., struck Casselman about the chin, knocking him backward into a plate glass show window of a store building with such force that the window was cracked. Casselman then rebounded or lunged forward and was struck again by Vincent Poche, Jr., whereupon Casselman again was forced back into and through the window, striking the rear portion of his head and upper body on the corner of the glass and of the base of the window, shattering the glass on both sides of such corner. He then slumped to the ground, unconscious, and died either then or very shortly thereafter. Neither Raymond Poche nor Le Grant advanced from the point where the three were originally standing on the sidewalk, nor did they physically participate in the actual attack upon Casselman. Additional evidence further involving Le Grant is found in the testimony of police officers who took statements from him following the incidents in question, to the effect that after he got out of his car he went over and kept the people back in order to see that it was a fair fight and that they fought together without anyone "butting in."

The autopsy disclosed a marked dislocation of the fifth cervical vertebra, caused by a blow of some kind, of a nature to cause a complete paralysis from the shoulders down. The area of the scalp back of the left ear was torn and crushed with a profuse subdural hemorrhage over the base of the brain due to trauma and causing the death. There was no evidence of any bruise or injury to the face or any other

part of the body. The autopsy surgeon testified further that, while the type of injury here found is not the kind usually caused by a striking with the fist or hand, it is of a character usually associated with a solid object coming into contact with the back of the head with great force, such as by a fall.

Each appealing defendant contends that the evidence adduced at the trial was wholly insufficient to support his conviction of the crime of manslaughter, a felony.

Manslaughter, as defined by Penal Code, section 192, is the unlawful killing of a human being, without malice. It is of two kinds: voluntary—upon a sudden quarrel or heat of passion; and involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. "And it is held that while in the first kind there must be present an intent to kill, in the second kind such intent is not essential. In other words, in cases of voluntary manslaughter, although the elements of malice and premeditation are wanting, an intent to kill must exist, and the question of its presence becomes one of fact for the jury to determine from all the circumstances under which the homicide was committed. But involuntary manslaughter, as the code defines it, is the taking of life in certain unlawful ways without any intention of doing so (see cases cited in 13 Cal.Jur. 608); and consequently the killing is involuntary manslaughter 'where death occurred, without malice or any intent to kill, but in the commission of an unlawful act not amounting to a felony'. (13 Cal. Jur. 614.)" *People v. Miller*, 1931, 114 Cal.App. 293, 300, 299 P. 742.

[2] As to the defendant Vincent Poche, Jr., the evidence is sufficient to sustain the judgment of the court. From the acts of such defendant the court was justified in finding him to have committed an assault and battery upon the person of Casselman, constituting the commission of an unlawful act not amounting to a felony, and, death having resulted therefrom, the killing was involuntary manslaughter even though

there was no intent to take life. This is true even though the evidence is insufficient as a matter of law to prove an intent to kill, and that consequently a case of voluntary manslaughter has not been established. *People v. Miller*, supra; *People v. Bones*, 1917, 35 Cal.App. 429, 434, 170 P. 166; *People v. Riley*, 1945, 71 Cal.App.2d 170, 173, 162 P.2d 64.

[3] With reference to defendant Howard Le Grant, it is earnestly contended in his behalf that the record is entirely devoid of evidence showing any preconceived conspiracy or concert of action between Le Grant and Vincent, either as to any intended assault by the latter on Casselman or as to any intention on the part of Vincent to kill him, and that evidence is equally lacking to show such defendant to have participated directly, or to have aided and abetted Vincent in the commission of the act or acts causing the death. However, the liability of a defendant for a criminal act is fixed by the provisions of sections 31 and 971, Penal Code, whereby all persons "concerned" are principals, whether directly, or by aiding and abetting in its commission, and conspiracy or concert of action, comprehend nothing that is not included in the definition of "who are principals." *People v. Talbott*, 1944, 65 Cal.App.2d 654, 665, 151 P.2d 317; *People v. Stein*, 1942, 55 Cal.App.2d 417, 420, 130 P.2d 750. One may aid and abet without having previously entered into a conspiracy to commit a crime. *People v. Bond*, 1910, 13 Cal.App. 175, 185, 186, 109 P. 150; *People v. Wade*, 1945, 71 Cal.App.2d 646, 652, 163 P.2d 59.

[4,5] While mere presence alone of the accused at the scene of the homicide is not sufficient to make him a participant, nor is he necessarily guilty because he does not prevent it, his presence is a circumstance tending to support a finding that he is a principal. In order to have aided and abetted the person who actually committed the unlawful act, facts and circumstances must be adduced tending to show that the accused aided such person by acts, or encouraged him by words or gestures, before a conviction can be sustained. 12

A.L.R. 279, 280, 291. Not only must he aid such direct perpetrator by assisting or supplementing his efforts, but he must, with knowledge of the wrongful purpose of the perpetrator, abet such person by inciting or encouraging him to commit a crime. *People v. Dole*, 1898, 122 Cal. 486, 492, 55 P. 581, 68 Am.St.Rep. 50; *People v. Bond*, supra, 13 Cal.App. 175, 185, 109 P. 150.

[6,7] It need not be shown, however, that such direct perpetrator communicated his purpose to the accused in order to make him liable as an aider and abettor, for he would be liable as such if he were present, and knew the intention of the other, and either by acts, words or gestures, aided or encouraged the commission of the crime. But he would be guilty only to the extent of his knowledge or of the natural and reasonable consequences of the acts aided or encouraged by him. *People v. Bond*, supra, 13 Cal.App. 185, 109 P. 150; 7 Cal.Jur. 890, sec. 39, and 853, sec. 13; 26 Am.Jur. 205, sec. 68.

[8] Applying the evidence herein, as it relates to the defendant Le Grant, to the foregoing rules of law, we are unable to agree that the judgment of conviction of such defendant is so lacking in evidentiary support as to require its reversal. Le Grant was the owner and operator of the automobile from which the challenging remarks emanated. It was within his power to have ignored the acceptance of such challenge by Casselman and to have driven on, thus entirely avoiding the violent and unlawful controversy which he must have known might follow if both such cars stopped. Nevertheless he turned into the curb ahead of Casselman, got out of his car in company with the two Poche brothers, and stood with them at the rear of such automobile, watching the soldier approach them. Le Grant was standing immediately adjacent to Vincent when the latter launched his vicious attack and made no effort by either word or deed to restrain the latter during any part of the ensuing proceedings. Indeed, by his own statements, he gave active aid, encouragement and assistance to Vincent by taking such

an affirmative part as to keep other people back who might have "butted in" and have thus prevented the tragedy. By so doing he acted with full knowledge that an assault and battery was in progress, the reasonable and natural consequence of which might be a serious injury to, or possibly the death of, either or both of the combatants. Such a course of conduct on the part of Le Grant constituted an aiding and abetting of Vincent in the unlawful assault and battery and resulting homicide, thus making him also liable as a principal for the crime of involuntary manslaughter. See *People v. Marty*, 1922, 59 Cal.App. 503, 210 P. 964; *People v. Blackwood*, 1939, 35 Cal.App.2d 728, 732, 96 P.2d 982; *People v. Mummert*, 1943, 57 Cal.App.2d 849, 855, 135 P.2d 665; *People v. Wade*, supra, 71 Cal.App.2d 646, 652, 163 P.2d 59. *People v. Bowers*, 1922, 56 Cal.App. 80; *State of Missouri v. Darling*, 1909, 216 Mo. 450, 115 S.W. 1002, 129 Am.St.Rep. 526 and 23 L.R.A.,N.S., 272 and note.

The judgment and order are affirmed as to each appealing defendant.

DESMOND, P. J., and WOOD, J., concur.



76 Cal.App.2d 161

Ex parte WILLIAMS.
Cr. 1977.

District Court of Appeal, Third District,
California.
Sept. 19, 1946.

1. Habeas corpus 85(1)

In absence of evidence to the contrary on petition for habeas corpus, appellate court must assume that no evidence was adduced in trial court on petitioner's motion to change plea of guilty to "not guilty", that he abandoned such issue, and that trial court did not abuse its discretion in denying motion. Pen.Code, §§ 644, 1018, 4532.

2. Criminal law ⇨274, 1149

The trial court has sound discretion, under statute, to grant or deny defendant's motion to withdraw plea of guilty and substitute plea of not guilty, even before judgment is pronounced, and court's ruling on such motion will be sustained unless abuse of discretion is clearly shown. Pen.Code, § 1018.

3. Criminal law ⇨1202(1)

Defendant's plea of guilty of convictions of two offenses prior to principal offense charged did not warrant trial court's determination that defendant was habitual criminal, where one conviction was merely for auto theft in another state prior to statutory amendment declaring such theft grand theft regardless of automobile's value, in absence of proof that stolen automobile was worth over \$50. Pen.Code, §§ 487, 644, 668.

4. Criminal law ⇨1211

Habeas corpus ⇨50

One, sentenced to state prison for term prescribed by law on his plea of guilty of felonious escape from sheriff's custody and prior convictions of felony of burglary and misdemeanor of auto theft, was in effect sentenced for maximum term of five years' imprisonment for felony charged and conviction of one prior felony, and hence was not entitled to discharge on writ of habeas corpus before expiration of such term, though he was wrongfully determined to be an habitual criminal. Pen.Code, §§ 644, 668, 3024(c).

5. Criminal law ⇨991(2)

A sentence to excessive term of imprisonment on conviction for offense of which trial court has jurisdiction is valid as to term prescribed by law and invalid only as to excess term.

Original proceeding by Robert E. Williams for a writ of habeas corpus to Robert A. Heinze, Warden of the California State Prison at Folsom.

Petitioner remanded to respondent's custody.

A. M. Mull, Jr., of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., Jas. O. Reavis, Deputy Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

THOMPSON, Justice.

By means of a writ of habeas corpus the petitioner seeks to procure his release from state prison. By an information filed in San Bernardino County he was charged, under section 4532 of the Penal Code, with escaping from the custody of the sheriff and with two prior convictions of other offenses. He pleaded guilty of the principal felony and admitted the prior offenses as charged in the information. The court found him guilty of the crime of escaping from the officer and guilty of two prior felonies. January 3, 1945, he was sentenced to San Quentin State Prison for the term prescribed by law. No appeal was taken from that judgment.

It is contended that the petitioner was wrongfully determined to be an habitual criminal as provided by section 644 of the Penal Code, for the reason that one alleged prior offense of conviction of "auto theft" in Oklahoma in 1923, without proof of the value of the automobile, was not then a felony under the statutes of California, and it was therefore wrongfully considered in determining that he is an habitual criminal. The petition further asserts that "It was stated and understood that he [the defendant] would not be adjudged an habitual criminal if he did so plead," and that the court abused its discretion in not permitting the defendant to withdraw his plea of guilty and enter a plea of not guilty of the principal offense charged. The answer to the petition for a writ of habeas corpus specifically denies that it was "stated or understood" that the defendant would not be adjudged to be an habitual criminal. It does not appear when the application to change defendant's plea was made. No evidence of any showing upon that application in the trial court appears in the record. No evidence was adduced at the hearing in this court upon that issue. That point was not even urged by the petitioner in this court or in his points and authorities filed with the petition.

[1,2] The court did not err in denying defendant's motion to change his plea of guilty to that of not guilty. The petitioner does not now, and never did contend that he was not guilty of the principal offense of feloniously escaping from the custody of the sheriff of San Bernardino County. In the absence of evidence to the contrary we must assume that no evidence was adduced in the trial court upon that application for change of plea. Having failed to offer proof in this court in support of that allegation of the petition, and having failed to mention that issue in his points and authorities filed in this court, or upon the oral argument, we must assume that petitioner abandoned that issue. The authorities are uniform to the effect that the trial court has a sound discretion, under section 1018 of the Penal Code, to grant or deny defendant's motion to withdraw his plea of guilty and to substitute therefor a plea of not guilty, even before judgment is pronounced. The ruling of the court thereon will be sustained unless an abuse of discretion is clearly shown. *People v. Smink*, 105 Cal. App. 784, 792, 288 P. 873; 7 Cal.Jur., sec. 135, p. 1000. In the present case it does not appear whether the motion to change the plea was made before or after the judgment was pronounced. No evidence of any showing of cause for granting the motion appears. That issue was abandoned on this hearing. We must assume that the court did not abuse its discretion in that regard. *People v. Bauman*, 39 Cal.App.2d 587, 103 P.2d 1020.

[3] The defendant's plea of guilty of the two prior offenses as charged in the information does not furnish proof that he is an habitual criminal under section 644 of the Penal Code, since one of them merely charged that he was convicted of "the crime of auto theft" in Oklahoma on May 8, 1923, and that he served a term of imprisonment therefor in the state prison. The other charge of conviction of the felony of burglary in 1930 does come within the provisions of section 644, and may be properly considered in determining whether the accused person is an habitual criminal. But the charge and proof of conviction of one prior felony mentioned in that section

does not warrant the determination that he is an habitual criminal.

The petitioner admitted that he was convicted of "auto theft" in Oklahoma, in 1923, but that offense did not then constitute grand theft in the state of California. There was no proof of the value of that automobile. The record of the Oklahoma court fails to show the value of the automobile stolen. It merely states that defendant was found "guilty of the crime of larceny of automobile." In 1923, larceny of an automobile, without proof that it was of a value in excess of \$50, did not constitute grand theft in California. To constitute grand larceny it was then necessary in California to prove that the property exceeded the value of \$50. Stats.1923, chap. 129, p. 271. It was not until 1927 that, by an amendment to section 487 of the Penal Code, California made the theft of an automobile, regardless of its value, grand theft. Stats.1927, chap. 619, p. 1047. Since the theft of an automobile in Oklahoma in 1923 was not punishable, in the absence of proof of its value, by the statutes of California by imprisonment in the state prison, that conviction could not lawfully be considered in determining that the petitioner is an habitual criminal under section 644 of the Penal Code. In re Taylor, 64 Cal.App.2d 47, 148 P.2d 143; People v. D'A Philippo, 220 Cal. 620, 624, 32 P.2d 962. Section 668 of the Penal Code provides in that regard that:

"Every person who has been convicted in any other state, government, or country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed in sections 644, 666 and 667, and to the same extent as if such prior conviction had taken place in a court of this state."

Petit larceny is not included in section 644 of the Penal Code as a basis upon which to determine that one who has been subsequently convicted of a felony in this state is an habitual criminal.

[4] We conclude that the petitioner was wrongfully determined to be an habitual

criminal under the circumstances of this case. The judgment of conviction of the principal offense of escaping from an officer, and of one prior conviction of the felony of burglary committed in Missouri in 1930, are nevertheless valid. The minimum term of sentence for the felony of escaping from an officer, together with that valid conviction of one former felony, is five years imprisonment in state prison. Penal Code, sec. 3024(c). The prisoner was sentenced January 3, 1945, for the term prescribed by law. In effect he was sentenced for the maximum term prescribed by law, subject to the shortening of that term, by the Prison Board, as provided by statute. People v. Ralph, 24 Cal.2d 575, 150 P.2d 401; In re Lee, 177 Cal. 690, 171 P. 958. He has not served even the minimum term for the valid portion of his sentence. He is therefore not illegally restrained of his liberty, and is not entitled to be discharged.

[5] The erroneous determination that the defendant is an habitual criminal merely had the effect of extending unduly the term of imprisonment prescribed by law. Since the court had jurisdiction of the principal offense with which the defendant was charged, the judgment of conviction is valid with respect to that crime, and as to the prior conviction of burglary in Missouri. 13 Cal.Jur., sec. 22, p. 243; 25 Am.Jur., sec. 59, p. 188. In the present case the court merely erroneously found that the defendant was previously convicted of a felony in Oklahoma which, it is inferred, the Adult Authority would be authorized to take into consideration in fixing his term of imprisonment. Numerous California cases hold that when the trial court has jurisdiction of the offense with which the accused person is charged, and it has merely erroneously determined an excessive penalty, the sentence is valid as to the term prescribed by law and invalid only as to the excess term determined. In re Morck, 180 Cal. 384, 181 P. 657; People v. McVicker, 37 Cal.App.2d 470, 99 P.2d 1110; Ex parte Goetz, 46 Cal.App.2d 848, 117 P.2d 47; 76 A.L.R. 476, Note.

It follows that the only portion of the judgment in this case which is valid is the determination that the petitioner is an

habitual criminal. That portion of the judgment is annulled. The balance of the judgment is valid. The Adult Authority is therefore directed to disregard the determination that petitioner is an habitual criminal, and to fix his term of imprisonment based upon his conviction of the crime of escaping from the officer, together with the one prior felony of burglary committed in Missouri.

The prisoner is remanded.

ADAMS, P. J., and PEEK, J., concur.



76 Cal.App.2d 166

PEOPLE v. OWSLEY.
Cr. 1968.

District Court of Appeal, Third District,
California.

Sept. 20, 1946.

1. Criminal law ⇨1178

Assignments of error not argued are abandoned.

2. Criminal law ⇨829(1), 830

The refusal to give requested instructions was not error where such instructions were either partially erroneous or were substantially embodied in the instructions which were given.

3. Criminal law ⇨768(1)

A defendant accused of rape is entitled to a cautionary instruction.

4. Appeal and error ⇨1173(1)

Whether failure to give cautionary instruction in rape prosecution is prejudicial error depends on the circumstances of the case.

5. Criminal law ⇨1173(1)

In rape prosecution, the failure to give cautionary instruction is not prejudicial error if the evidence clearly points to defendant's guilt, or prosecuting witness' testimony is amply corroborated, or other

factors show that defendant has been given a fair trial.

6. Witnesses ⇨40(1)

A 13 year old prosecuting witness in rape case, though still a child, was not of such tender age as to give rise to the inference that her testimony was given without understanding or that she did not comprehend the nature of the acts to which she was testifying.

7. Criminal law ⇨1173(1)

In prosecution for rape of 13 year old female, failure to give requested cautionary instruction was not prejudicial error, where female's testimony was not inherently improbable, there was circumstantial corroborating evidence and jury was instructed that defendant was presumed to be innocent and that his guilt must be established by competent evidence beyond a reasonable doubt and meaning of reasonable doubt was explained.

8. Criminal law ⇨822(1)

The general sufficiency of court's charge to jury depends primarily upon whether, in the light of a fair and reasonable construction without straining at particular phrases or expressions, the charge as a whole adequately, fairly and correctly states the law applicable to the case.

9. Rape ⇨52(1)

In prosecution for rape of 13 year old female by brother-in-law, evidence of brother-in-law concerning remote quarrel with female's family was insufficient to show that testimony of female or her mother was motivated by animosity, malice or a desire for vengeance.

10. Criminal law ⇨1159(2)

The sufficiency of evidence to show penetration of 13 year old female who was allegedly raped by her brother-in-law was conclusive on appeal where the jury and trial court deemed such evidence sufficiently clear to warrant the verdict rendered.

11. Rape ⇨52(1)

Evidence warranted conviction of brother-in-law for rape of 13 year old sister-in-law.

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Eugene Owsley was convicted for rape, and he appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Dep. Atty. Gen., for respondent.

PEEK, Justice.

Appellant was charged by an information with the crime of rape, to which he pleaded not guilty. The jury found him guilty as charged and recommended that he be imprisoned in the state prison. This appeal is from the judgment of conviction and the order of the trial court denying his motion for a new trial.

At the time of the alleged act, Eleanor, the thirteen year old prosecuting witness, was visiting her sister Edna, the wife of appellant, in the latter's home in Rohnerville, Humboldt county. Two or three days after her arrival it was agreed she could visit another sister, aged sixteen, who was staying with a Mrs. Peggy Shirley in Fortuna. On the afternoon of October 11, 1945, the prosecutrix was driven to the Shirley house by appellant and his wife. Approximately one hour after midnight of the same night, appellant returned to the Shirley house, pounded on the door, and according to Mrs. Shirley, in answer to her inquiry, announced: "It's Gene, Peggy; We've come for Eleanor." The girls, who were sleeping together, were aroused by her; Eleanor hurriedly put on her sweater and slacks and, leaving her shoes behind in her haste, joined appellant in his car. The prosecutrix testified that she expected to find her sister there also, but was told by appellant that Edna had stayed home. She further stated that when she noticed he was driving in a direction away from his home, she asked where he was going, and was told in effect to shut her mouth or he would rape her then and there; that he drove to a point near a river where he and Edna sometimes went fishing, turned off into a lane, and parked the car in a secluded spot. Her testimony regarding the act itself was that appellant forced her

down on the front seat, forcibly removed part of her clothing, and, after telling her he would use a contraceptive so that she could not get in "a family way", had sexual intercourse with her, causing her severe pain. She testified further that after consummating the act, he told her that if she did not tell what had happened he would buy her a pair of shoes, and if she did he warned that he would kill her; that in his car was a club which looked like a hammer handle, one end of which had been carved into the shape of a knot; that he then drove home, and she immediately went to bed; that she said nothing to her sister Edna because she was afraid of him and what he might do to her in carrying out his threat; that she stayed awake the remainder of the night, and as soon as it was light left the house, went to the home of her brother Frank who lived only a block or two away, and immediately told him and his wife what had happened. When appellant came to the house approximately an hour later and asked Frank if he was going hunting as they had planned he was confronted by the prosecutrix, and in the presence of Frank, and at his request that she tell appellant what she had just told them, she accused appellant of attacking her the night before. Although appellant categorically denied the accusation, he made no other comment nor asked for the details of her story. He then left the house saying that if he was wanted he would be at his home. Shortly thereafter Eleanor, accompanied by her brother and sister-in-law, was examined by a physician who testified concerning the physical condition of the girl; that her condition could have been the result of many factors; that he could not say it was solely the result of sexual intercourse or that she had participated in such an act during the preceding twenty-four hour period; but that the condition could have been the result of the alleged act of appellant.

In testifying in his own defense, appellant admitted calling for Eleanor on the night in question and taking her to the river, but he denied parking the car as she testified or attacking or otherwise molesting her. He stated that he drove to a point on the river where he intended to

gaff fish if any were coming over the riffle; that for approximately half an hour they listened for fish, and that for the remainder of the time he was at the water's edge and the girl was in the car. He explained that his wife had asked him to bring Eleanor home from the Shirley house before he went on his proposed hunting trip with Frank, that he had been with a friend fishing until about midnight, and that it occurred to him it would be a good time to take Eleanor fishing, as she had always asked to go with him and Edna. He admitted that he did not have his gaff hook with him, and did not take a flashlight to the water's edge. He could not definitely state when it was that his wife had asked him to bring Eleanor home, and gave no reason for failing to call for Eleanor when he and his friend passed through Fortuna on their way to Rohnerville, some time before midnight on the same evening.

Other witnesses detailed certain incriminating facts, including the brother and sister-in-law of the prosecutrix, who testified to the frightened and tearful appearance of the child and the blood-stained and torn condition of her slacks a few hours after the alleged commission of the offense.

[1,2] Counsel for appellant in his opening brief, after summarizing the evidence, refers to portions of the testimony which he states he desires to call to the attention of this court, and next specifically sets out four instructions, among them the so-called cautionary instruction, which he requested be given to the jury, but which were refused by the court. He then states that three questions are involved in the appeal: "1. Was the trial court justified in refusing certain requested instructions of appellant? 2. Did the trial court misdirect the jury in matters of law? 3. Is the verdict of the jury sustained by the evidence?" However, only two of the questions are argued: a portion of the first, the failure to give a proposed cautionary instruction, and the insufficiency of the evidence as stated in the third. While we would be warranted in assuming that the remaining assignments of error have been

abandoned (*People v. Thompson*, 69 Cal. App.2d 80, 85, 158 P.2d 213; 8 Cal.Jur. pp. 544, 546, §§ 549, 550), nevertheless we have carefully examined all of the instructions given and refused and from such an examination conclude that the instructions requested by appellant and refused by the court were either partially erroneous or inapplicable or were substantially embodied in the instructions that were given.

[3-5] It remains to be seen whether the failure of the trial court to give a cautionary instruction requires a different conclusion. With regard to the action of the trial court in this respect, that is, the failure to give the cautionary instruction proposed by appellant or another appropriate instruction of a similar character phrased in the language of the court itself, it would appear that the sole question thereby presented is whether such failure, under the circumstances disclosed by the record, constitutes reversible error. The right of a defendant in a case of this kind to have a cautionary instruction given to the jury is no longer open to question. *People v. Putnam*, 20 Cal.2d 885, 889-891, 129 P.2d 367; *People v. Lucas*, 16 Cal.2d 178, 182, 183, 105 P.2d 102, 130 A.L.R. 1485; *People v. Trumbo*, 60 Cal.App.2d 681, 682-684, 141 P.2d 225. See, also, *People v. Dail*, 22 Cal.2d 642, 655, 656, 140 P.2d 828. However, as the court in the *Putnam* case observed: "The circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error." *People v. Putnam*, *supra*, 20 Cal.2d at page 892, 129 P.2d at page 370. From this it follows that such failure is not error if, as in the *Lucas* case, the evidence clearly points to the defendant's guilt, or, as in *People v. Fleming*, 58 Cal.App.2d 37, 47, 48, 136 P.2d 88, the testimony of the prosecuting witness is amply corroborated, or there are other factors in the case which show that the defendant has been given a fair trial. *People v. Stangler*, 18 Cal.2d 688, 694, 117 P.2d 321.

[6,7] Such is the situation in the present case. Here the prosecuting witness, though still a child, was not of such a tender age as to give rise to the inference

that her testimony was given without understanding or that she did not comprehend the nature of the acts to which she was testifying (*People v. Putnam*, supra, 20 Cal.2d at page 890, 129 P.2d 367; *People v. Vicencio*, 71 Cal.App.2d 361, 162 P.2d 650; *People v. Gallagher*, 108 Cal.App. 128, 132, 291 P. 626); there was no evidence of coaching of the prosecutrix, every indication being that her testimony was the result of actual experience rather than a fancy or figment of her imagination (*People v. Stangler*, supra, 18 Cal.2d at page 694, 117 P.2d 321); neither is her testimony characterized by such inherent improbability that it cannot be said that the corroborating evidence, even though circumstantial, does not lend plausibility to her testimony. *People v. Stangler*, supra, 18 Cal.2d at page 694, 117 P.2d 321. Here the record discloses evidence of corroborating facts and circumstances, such as the physical condition of the victim and of her clothing (*People v. Hoyt*, 20 Cal.2d 306, 313, 125 P.2d 29; *People v. Garner*, 60 Cal.App.2d 63, 66, 140 P.2d 146), and her direct accusation against her alleged assailant. See *People v. Long*, 63 Cal.App. 2d 679, 681, 147 P.2d 659. Moreover, the jury was instructed that the defendant is presumed to be innocent and that his guilt must be established by competent evidence and beyond a reasonable doubt, and the meaning of reasonable doubt was explained by the court. *People v. Lucas*, supra, 16 Cal.2d at page 183, 105 P.2d 102, 130 A.L.R. 1485; *People v. Fleming*, supra, 58 Cal. App.2d at page 48, 136 P.2d 88.

[8] In determining the effect of the failure to give a particular instruction, we cannot be unmindful of the general principle that the sufficiency of a court's charge to the jury depends primarily upon the answer to the question whether, in the light of a fair and reasonable construction and without straining at particular phrases or expressions, it can be said that the charge as a whole adequately, fairly and correctly states the law applicable to the case. *People v. MacPhee*, 26 Cal.App. 218,

221, 146 P. 522. In the present case the charge amply meets this test.

[9] While appellant was permitted over objection to testify as to a quarrel alleged to have taken place in 1943 between himself on the one hand and the mother, sister and stepfather of prosecutrix on the other, as a consequence of which, he stated, he has never since felt friendly toward them, still he made no attempt to show that this feeling was reciprocated. In the light of the trivial nature of the alleged altercation, its remoteness in point of time, and the fact that prosecutrix was permitted to visit his home thereafter, the evidence on this phase of the case would not have warranted the jury in concluding that the testimony of either the prosecutrix or her mother was motivated in any degree by animosity, malice, or a desire for vengeance. See *People v. Stangler*, supra, 18 Cal.2d at page 694, 117 P.2d 321.

[10] Appellant's final contention is an attack upon the sufficiency of the evidence to show penetration, based entirely upon the homely language used by the prosecutrix in describing the act of sexual intercourse. Not only is the phraseology of the child's testimony unmistakably explicit in this respect when viewed in cold type, but the jury and the trial court must have deemed it sufficiently clear to warrant the verdict rendered; and therefore the question is concluded as far as this appeal is concerned. *People v. Newland*, 15 Cal.2d 678, 681, 682, 104 P.2d 778; *People v. Fleming*, supra, 58 Cal.App.2d at page 46, 136 P.2d 88.

[11] In view of all of the circumstances of this case, we are compelled to conclude that appellant had a fair trial, that no prejudicial error was committed, and that there was sufficient evidence to sustain the verdict of the jury and the determination of the trial court.

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

76 Cal.App.2d 142

PEOPLE v. HICKS.
Cr. 3985.

District Court of Appeal, Second District,
Division 3, California.
Sept. 18, 1946.

1. Infants ⇨20

Evidence sustained conviction for commission of lewd and lascivious acts on a female child. Pen.Code, § 288.

2. Criminal law ⇨543(2)

In prosecution for commission of lewd and lascivious acts on two 10 year old girls, sufficient foundation was laid to permit reading of testimony of one of the girls at a preliminary examination by proof that due diligence had been used to procure her attendance as a witness, where girl and her mother had been subpoenaed about three weeks before the trial to attend the trial, and there was evidence that 10 days before the trial girl and her family had gone to a distant state without knowledge of the District Attorney.

3. Criminal law ⇨1153(6)

Ruling that a witness cannot with due diligence be found within the state and that therefore witness' testimony taken at a preliminary hearing may be read at prosecution, may be questioned only for abuse of discretion.

4. Criminal law ⇨1169(11)

In prosecution for commission of lewd and lascivious acts on two 10 year old girls, admission of testimony of police officer that defendant had stated to him that one of the girls had stated that if defendant did not give her some money she would tell what defendant did to her sister, if error, was not prejudicial on ground that it tended to show that defendant may have mistreated the sister of one of the prosecuting witnesses, where the sister herself testified that defendant had never touched her.

5. Witnesses ⇨380(2)

In prosecution for commission of lewd and lascivious acts on two 10 year old girls, admission of testimony of police officer that defendant had stated to him that one of the

girls had stated that if defendant did not give her some money she would tell what defendant did to her sister, was not error, though it allegedly tended to show that defendant may have mistreated the sister of one of the prosecuting witnesses, where officer's testimony was contradictory of defendant's testimony in a material respect.

6. Witnesses ⇨380(2)

Where impeachment of defendant is proper, it is immaterial that impeachment may suggest the possible commission of offenses other than those for which the defendant is on trial.

Appeal from Superior Court, Los Angeles County; Martin De Vries, Judge.

James J. Hicks was convicted of committing lewd and lascivious acts on a female child, and he appeals.

Judgment affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Appellant was charged with two offenses of violation of section 288 of the Penal Code, one against a 10 year old girl, Marilyn, and the other against a 10 year old girl, Rebecca. In a trial before the court he was acquitted upon the first count and convicted upon the second. The arguments presented in his behalf upon the appeal from the judgment are (1) insufficiency of the evidence; (2) error in receipt in evidence of the testimony given by Marilyn at the preliminary examination; (3) questioning of the defendant and the admission in evidence of the testimony of a police officer which, it is claimed, tended to show that the child Rebecca had indirectly accused defendant of a third offense against her 8 year old sister, Ramona.

[1] The evidence was sufficient to support the judgment. Defendant owned a small house in San Pedro which he occupied with another man; the two owned

a trailer which stood beside the house, and which was rented to and occupied by two women. Nearby was a pony track frequented by children. A short time before the Sunday when the offenses were alleged to have been committed, the three little girls came to defendant's house with the parents of Rebecca. Defendant on that day gave the children 25 cents with which to buy fruit and they returned to his house with cherries. He took the little girls into his bedroom to show them a small Victrola. On Sunday, June 3, the three girls came to his house, asked him for money and he gave them 50 cents to pay for pony rides. They later returned, asked for more money, and he gave Rebecca a dollar. Later Rebecca returned, asked for more money, which, according to one of defendant's witnesses, was given to her and, according to defendant, was refused. Upon several of these occasions Rebecca, without invitation from defendant, sat upon his lap. Marilyn, upon his invitation, also sat upon his lap. During the afternoon and while the children were about the house, defendant had guests, consisting of a man and his wife and baby, and after they left a sailor, and two women. After the latter left, according to the testimony of Marilyn, the three girls were in the bedroom and defendant then gave Rebecca money for a pony ride. The alleged offense against Marilyn, according to her testimony, was committed upon defendant's bed and consisted of defendant's fondling her person under her clothing. Her testimony was substantially corroborated by that of the third child, Ramona, 8 years of age, who testified that at the time of the occurrence she was standing in the room. It was also corroborated by the testimony of Rebecca that she returned to the house, looked through the window and saw defendant on the bed with Marilyn.

Rebecca testified that the offense against her was committed upon defendant's bed in the absence of the other two children. As described by the witness, the act of which defendant was accused appears to have been one of attempted rape. Rebecca testified that the two other children returned while the act was in progress, attempted to open the door, that defendant got up to let them in, gave Rebecca a dollar

and told her not to tell anybody what had occurred, and that she left the bedroom and went into the living room where the other two girls were. Ramona testified that she and Marilyn returned to the house while Rebecca was in the bedroom with defendant; that they looked through the window, that she saw defendant lying on the bed with Rebecca, disarranging her clothes, and that Rebecca was crying; that she, Ramona, started to go home to call her mother, but a boy chased her, and that she returned to the window where Marilyn was; that after she entered the house, defendant gave her 25 cents and told her not to tell, and that he gave Rebecca a dollar. The mother of Rebecca testified that no complaint was made to her by Rebecca on the day of the occurrence but that it was made upon the following day. A more detailed statement of the testimony is unnecessary. The stories told by the children, if believed, were sufficient to prove the commission of the offense charged in count II. Testimony was given by defendant and by his several visitors which, if believed, would have proven the stories of the children to be untrue. Some visitors were there during the entire afternoon and the substance of their testimony was that defendant was not alone with the children at any time. Defendant testified that he left the house immediately after the last of his visitors left. The children testified that the offenses were committed after the callers had left.

In pronouncing defendant guilty upon count II, the court said, in part: "I have searched, ever since this trial has commenced, every way in my own mind for some reasonable theory on which to acquit this defendant, but to me the record is so convincing as to the guilt of the defendant, especially on count II, that the court must find the defendant guilty on count II." This conclusion, reached after a careful weighing of the evidence, finds ample support in the record and may not be disturbed.

[2, 3] The child Marilyn did not appear as a witness at the trial and her testimony at the preliminary examination, when she was not cross-examined, was received in evidence over the objection of defendant. It is now urged that no sufficient foundation was laid by proof that due diligence had

been used to procure the attendance of the witness. The trial was set for July 24, 1945. Marilyn and her mother had been subpoenaed on July 2 to attend the trial. The mother of Rebecca and Ramona was called as a witness, testified that she was acquainted with Marilyn and her mother, that they had resided close to her home, that on July 14 they left, saying that they were going to New York, that she had known them for about four months, that they visited each other, and she gave the following testimony: "Q. Did you see them pack up to leave? A. Yes. Well, they tell us they had gone to the City Hall in San Pedro to tell them about it. They tell them they are leaving and they had O.K.'d this for them. I went out there myself to find out about this and they told me it was O.K., the father had been there with them, over at the City Hall at the Juvenile office." Defendant's objection was then overruled and the testimony of Marilyn was read. Aside from her description of defendant's mistreatment of her, there was nothing in her testimony which was in substantial conflict with that given by the defendant. She did not testify to any act of misconduct of defendant with Rebecca. Before the case of the People was closed, the court allowed counsel for the defense to question Rebecca's mother further with respect to her testimony as to the departure of Marilyn's family, and she testified on cross-examination as follows: "Q. Did you ask them whether they were getting gasoline from the ration board to go back to New York? A. Well, I didn't have to ask that. They told me and I saw the stamps they got. They got over 200 stamps, I mean over 200 gallons; that is what they got. I seen that myself." A police officer of the Juvenile division who had investigated the case testified for the People that Marilyn's father had come to him about the 9th of July, informed him that he had to take his family to New York, and asked if there was not some way to advance the case so that it could be tried before they left. He was told that he should see the District Attorney about the matter, but it does not appear whether he did so. This witness did not report the incident to the District Attorney,

and the People apparently relied upon the subpoenas which had been served to insure the presence of Marilyn and her mother. For aught that appears, the departure of the witnesses was discovered by the District Attorney at the time of trial. No lack of diligence up to that time was shown. When the mother and daughter failed to appear at the trial, the facts as to their movements were disclosed and testified to by Rebecca's mother and the police officer. Their testimony constituted substantial evidence that the missing witnesses had left the jurisdiction some 10 days before the date of trial. It was sufficient to make it appear highly probable that a search for them within the jurisdiction would have been unavailing. It was not an abuse of discretion for the court to hold that due diligence had been used to produce the girl Marilyn at the trial and to permit her testimony to be read. Such rulings may be questioned only for abuse of discretion. *People v. Bernstein*, 70 Cal.App.2d 462, 161 P.2d 381, 384, and cases therein cited.

[4-6] During the cross-examination of defendant, he was asked whether he had not stated to Officer Smith that Rebecca said to him that if he did not give her money she would tell what he had done to her. He denied having made the statement. He was then asked if he had told Mr. Smith that Rebecca had said to him, "If you don't give me some money, I will tell what you did to my sister," and he replied, "I don't remember saying anything like that." Then he was asked, "I will ask you if you did not further say in that same conversation with Mr. Smith that the 'Major' then spoke up and said, 'Well, if you get into any trouble with this little girl, I will be a character witness for you,'" and defendant answered, "I don't remember saying that to Mr. Smith; no, sir." Officer Smith, in rebuttal, testified that on June 3 defendant told him that one of the little girls came in and, while Major and Mrs. Goldblum were there, said: "If you don't give me some money I'll tell what you did to my sister." He did not testify that Rebecca was the author of this statement. He further testified that defendant had said to him that Major Goldblum, following the child's statement, said,

"Well, if you get into any trouble with this child or any of these kids I will be a character witness for you." This testimony of the officer was given without objection by defendant. It is now urged that it was error to permit this cross-examination of defendant and to allow the officer to testify to the alleged statements of defendant. The grounds of the objection to the cross-examination were that it was not proper impeachment and was hearsay. The ground now urged is that the questions tended to suggest that defendant may have been guilty of some act of mistreatment of Rebecca's sister Ramona. The objection is without merit. The questions appear to have been asked in good faith upon cross-examination, even though some of them named Rebecca as the author of the alleged statement, while the testimony of Officer Smith did not. If there was a suggestion of additional wrongdoing in the questions asked upon cross-examination with respect to Rebecca's alleged statement, and which laid a foundation for impeachment, it could not have operated prejudicially to defendant in view of the fact that Ramona testified that defendant had never touched her or been guilty of any act of misconduct toward her. Furthermore, Major Goldblum, also referred to as Mr. Goldblum, was a witness for defendant and testified that no such incident as the one allegedly related by defendant to Officer Smith had occurred. Also, defendant had testified fully as to his conversations with the children when he gave them money, and the statements to Officer Smith, if made, would have been contradictory of his testimony in a material respect. Impeachment being proper, it is entirely immaterial that it may suggest the possible commission of offenses other than those for which defendant is on trial. *People v. Tomlinson*, 102 Cal. 19, 24, 36 P. 506; *People v. York*, 134 Cal.App. 507, 509, 25 P.2d 514; *People v. Romer*, 218 Cal. 449, 23 P.2d 749.

For the reasons stated, the judgment is affirmed.

DESMOND, P. J., and WOOD, J.,
concur.

WILSON v. WILSON.

Civ. 12998.

District Court of Appeal, First District,
Division 1, California.

Sept. 18, 1946.

As Corrected Oct. 4, 1946.

1. Husband and wife ⇨263

Wife's testimony that immediately after husband bought house he told her that it was community property, could be used in wife's divorce suit as evidence of husband's intent to make a gift of a community interest to the wife, or of a contract between the parties to that effect.

2. Divorce ⇨127(1)

In wife's suit for divorce, trial court was entitled to disbelieve that portion of husband's testimony favorable to himself and to believe husband's testimony that was favorable to the wife.

3. Husband and wife ⇨264

In suit for divorce, evidence sustained finding that community funds were used to buy house in which the parties lived entitling the wife to a one-half interest therein.

4. Husband and wife ⇨262(1)

All property acquired after marriage, except that acquired by a married woman, or by a married woman and another by an instrument in writing, is strongly presumed to be community property.

5. Husband and wife ⇨262(2)

One asserting that property is separate rather than community property, has the burden of establishing that fact.

6. Appeal and error ⇨1008(1)

Husband and wife ⇨262(1)

The presumption that all property acquired after marriage, except that acquired by a married woman, or by married woman and another, by an instrument in writing, is community property, is a rebuttable presumption, and whether the evidence adduced to overcome the presumption is sufficient, is a question for the trial court.

7. Husband and wife ⇨262(1)

The presumption that all property acquired after marriage, except that acquired by a married woman, or by a married woman and another, by an instrument in writing, is community property, may outweigh the evidence adduced against it, and notwithstanding controverting testimony the presumption alone will support a finding in accordance therewith.

8. Husband and wife ⇨262(1)

In wife's divorce suit, wife's evidence that house was bought after marriage was sufficient to raise presumption that house was community property, without showing that funds used in the purchase of the house were acquired after marriage.

9. Husband and wife ⇨262(1)

In wife's divorce suit, presumption arose that furniture and furnishings in house, which were purchased after the marriage, were community property.

10. Husband and wife ⇨264

In wife's divorce suit, evidence sustained finding that furniture and furnishings which were purchased after the marriage, were community property, and were not purchased with money that was husband's separate property.

11. Divorce ⇨286

Wife's failure to introduce in her divorce suit a list of community bills did not require a reversal of decree determining that wife should be held harmless for such bills not to exceed \$4,829, since husband could not be held liable on bills until wife showed that debts were incurred prior to filing of divorce suit and that total amount did not exceed \$4,829.

12. Divorce ⇨254

Provision of divorce decree that husband should pay all income taxes levied by the federal or state government against wife up to first day of year during which divorce suit was brought by wife, was proper, where wife had no income except from occasional sale of a work of art. 26 U.S.C.A. Int.Rev.Code, § 22(k).

13. Internal revenue ⇨796

Provision of Internal Revenue Code that in the case of a wife who is divorced

or legally separated from her husband under a decree of divorce or separate maintenance, periodic payments in discharge of the legal obligation by the husband shall be included in wife's gross income and not in husband's gross income, applies to alimony payments made subsequent to a divorce or separate maintenance decree, and not to alimony pendente lite. 26 U.S.C.A. Int.Rev.Code, § 22(k).

14. Trial ⇨404(4)

Trial court's specific findings that were in conflict with its general findings, were controlling over the general findings.

15. Divorce ⇨254

In divorce suit, it was proper for trial court to determine in its interlocutory decree the status of community property and how it ought to be assigned on entering of final decree. Civ.Code, §§ 146, 147.

16. Divorce ⇨287

On appeal from interlocutory divorce decree disposing of community property, District Court of Appeal struck from decree all words presently disposing of the community property, and inserted words to the effect that in the final decree the parties were entitled to have assigned to them the specified portions of the community property enumerated in the interlocutory decree. Civ.Code, §§ 146, 147.

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Suit for divorce by Barbara Wilson against Francis A. Wilson. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment modified and, as modified, affirmed.

Arthur B. Dunne, Dunne & Dunne, and Young, Hudson & Rabinowitz, all of San Francisco, for appellant.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant appeals from an interlocutory decree of divorce granted to his wife after

an extended and bitterly contested trial. So far as pertinent here, the decree awarded the wife an undivided one-half interest in the former residence of the parties, together with the sole right to the use and occupancy of the same, awarded her all the furniture and contents of the home, awarded her certain art objects created by her after marriage, awarded her \$500 a month alimony, ordered the husband to discharge all community bills contracted prior to the filing of the complaint in the amount of \$4,829, ordered the husband to pay all federal and state income taxes levied against the wife up to January 1, 1945, and granted to the wife's lawyer attorney's fees in the sum of \$1,500. Although the defendant has appealed from the entire judgment he makes no attack on those portions granting his wife the right to a divorce or granting her alimony and counsel fees. The main attack is made on the property provisions of the decree, and upon certain other provisions of the decree hereafter mentioned.

The record is a lengthy one. It shows that defendant was an evasive witness. It shows that he failed to make a full and fair disclosure of his assets and income, and that he attempted to conceal information on these subjects. It shows that he was in tax difficulties with the federal government, and that in at least one case he was found to have fraudulently concealed assets. It also shows that although he was a businessman of much experience that he frequently resorted to the answer "I don't remember" concerning facts that must have been known to him. Under the circumstances disclosed by the record the awards of property, alimony and counsel fees were quite fair to defendant. The record would have sustained more liberal allowances in all of these categories.

The parties were married in New York on January 15, 1931. Shortly thereafter they established their domicile in San Francisco, and resided here until they separated on December 28, 1940. They have no children. This action was filed by the wife on January 19, 1942. The complaint charged the husband with extreme cruelty and desertion. Subsequently an amendment was added charging the husband with adultery,

but this charge was dismissed by the trial court. The divorce was granted on the grounds of cruelty. The defendant denied the material allegations of the complaint and cross-complained for a divorce on the ground of extreme cruelty. Although the defendant testified in support of his cross-complaint in an obvious attempt to blacken his wife's reputation, he did not produce a single witness to corroborate his charges. The plaintiff, on the other hand, produced many witnesses to corroborate her charges of cruelty. Inasmuch as defendant does not challenge this portion of the decree, no useful purpose would be served by setting forth in this opinion a summary of the evidence on this issue, much of which is highly degrading to defendant. Suffice it to say that the evidence of plaintiff and of her many witnesses amply supports the findings that defendant was guilty of many acts of extreme cruelty against his wife, and amply supports the conclusion of the trial court that much of defendant's testimony was not entitled to belief.

The trial court found that the residence of the parties in San Francisco was community property and awarded the plaintiff a one-half interest therein, together with the exclusive right of use and occupancy. This, and part of the furniture in the house, which was also awarded the wife, was found to be the only substantial community property of the parties after nearly ten years of married life. The defendant is admittedly a man of substantial means. Most of his property he acquired by way of gift or inheritance from his parents and by his management of this property thereafter. Prior to his marriage he was a member of a partnership with his brother and others in a company known as Wilson Bros. & Co. Later, but prior to marriage, this partnership was incorporated as a Nevada corporation, defendant and his brother each owning one-half the stock. This company at one time had extensive lumbering and shipping interests but in recent years its assets have consisted almost entirely of stocks and bonds. Defendant spent an appreciable portion of his time attending to the affairs of this company. This company paid yearly substantial divi-

dends to the two brothers. The court found that the total interest of defendant in this company was his separate property. In addition, defendant owned a stock brokerage firm and was a member of the San Francisco Stock Exchange. Defendant testified that in this business he suffered substantial losses. This business, too, was found to be the separate property of the defendant. Defendant testified that his sole community income was \$6,000 per year paid to him by the corporation. The plaintiff and the court experienced great difficulty in getting defendant to disclose the exact assets and income of this company. Defendant was in the habit of keeping large sums of cash on hand in his office safe and of paying practically all of his bills and expenses in cash. He kept few personal records and many of the records he did have he either destroyed or refused to produce. The inference is quite broad that defendant did these things as part of a plan to defeat his various tax liabilities.

[1] The testimony in reference to the residence is not as clear as might be desired, but this condition of the record was caused by defendant's failure to be frank and fair with the trial court. Admittedly the house was purchased in 1938, some seven years after the marriage, and admittedly title was taken and still stands in defendant's name. Admittedly the house cost \$20,000. Defendant testified that he paid for the house in cash and that the funds used for the purchase were the accumulations of dividends from property owned by him before marriage. Based on this evidence defendant urges as his principal contention on this appeal that it was error to find that the house was community property. In this connection he argues that since he testified that his sole community income was \$6,000 a year, and since his wife testified that she estimated their living expenses at \$3,500 to \$4,000 per month, obviously the community funds were more than exhausted in paying the living expenses, and therefore the house must have been purchased with his separate funds. The plaintiff had no information concerning the source of the money used to buy the house because she had no

knowledge of the facts. The record shows that defendant kept his wife in complete ignorance of his income and assets, and that she knew nothing of his business affairs. She did testify that immediately after buying the house the defendant told her that it was community property. While it is argued that this testimony cannot be used to establish the nature of the property, citing such cases as *In re Estate of Gran-niss*, 142 Cal. 1, 75 P. 324; *In re Estate of McCarthy*, 127 Cal.App. 80, 15 P.2d 223; and *Bias v. Reed*, 169 Cal. 33, 145 P. 516, there is respectable authority that such declarations are admissible as declarations against interest. See *In re Estate of Smead*, 219 Cal. 572, 28 P.2d 348; *In re Estate of Hill*, 167 Cal. 59, 138 P. 690; see cases collected 3 Cal.Jur.Supp. p. 572, Sec. 74. At any rate such statements may be used as evidence of intent to make a gift of a community interest to the wife, or of a contract between the parties to that effect. *In re Estate of Sill*, 121 Cal.App. 202, 9 P.2d 243; *In re Estate of Watkins*, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1; *Tomaier v. Tom-aier*, 23 Cal.2d 754, 146 P.2d 905; *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708.

[2, 3] The position of defendant on this issue is unsound. He testified that he got the cash to pay for the house out of the corporation safe located in his brokerage office. In this safe were several compartments. He had the combination of the safe and keys to the compartments. He testified that his salary from the corporation was kept in this safe in a separate envelope and that periodically he transferred the appropriate amount of cash from the compartment of the corporation to this envelope. He also testified that when he needed money in excess of the \$6,000 he simply removed it from the corporate funds in cash, substituting his personal I.O.U. for the amount so removed. Defendant was vague as to the amount of money that was kept in the various compartments of this safe. The plaintiff was unable at first to estimate their monthly living costs, but finally did estimate them at \$3,500 to \$4,000. This was obviously a guess on her part and is not supported by the facts. The defendant, however, was in a much better position to

know the exact living costs of the parties because he paid most of the household bills in cash. He testified that his wife's testimony as to their living expenses was "absolutely false" (R.T. 515) and that actually it cost them \$300 to \$800 a month for living expenses. (R.T. 516.) Obviously, if the \$300 figure was believed by the trial court there was a substantial part of the \$6,000 a year salary that could have been used to buy the house. The trial court was entitled to disbelieve the defendant's testimony as to the source of the funds, but to believe his testimony as to their living costs. It was entitled to disbelieve his testimony in part or in toto. Moreover, there is substantial evidence that after marriage plaintiff, who is an artist, sold some of her art creations for substantial sums, and that the money so received was treated as community property. There is, therefore, in the record some evidence, weak though it may be, from which it may reasonably be inferred that community funds were used to buy the house. This testimony, without the necessity of relying on presumptions, supports the challenged finding.

[4,5] In addition the finding is supported by the strong presumption that all property acquired after marriage (except that acquired by a married woman, or by a married woman and another, by an instrument in writing) is community property. This presumption is fundamental in the community property system and is an integral part of the community property law not only of this state but of other states and countries where the system is in operation. See discussion and many cases collected and commented upon 3 Cal. Jur. Supp. p. 553, § 61 et seq. Coupled with this presumption is the elementary but fundamental rule that the burden rests upon the person asserting that the property is separate to establish that fact. In *re Estate of Tompkins*, 123 Cal.App. 670, 11 P.2d 886; In *re Estate of Gartland*, 114 Cal.App. 269, 299 P. 757; In *re Estate of Caswell*, 105 Cal.App. 475, 288 P. 102; In *re Estate of Duncan*, 9 Cal.2d 207, 70 P.2d 174; *Rahr Malting Co. v. Koch Brewing Co.*, 9 Cal.App.2d 457, 50

P.2d 476; *Falk v. Falk*, 48 Cal.App.2d 762, 120 P.2d 714.

[6,7] The presumption is, of course, a rebuttable one. But whether the evidence adduced to overcome the presumption is sufficient for the purpose is a question for the trial court. As in other cases of presumptions, the rule is that the presumption may outweigh the evidence adduced against it and that notwithstanding controverting testimony the presumption alone will support a finding in accordance therewith. See cases collected 3 Cal.Jur.Supp. p. 557, § 63.

Counsel for defendant, while giving lip service to these well settled rules, contends that they have no application here for at least two reasons—first, that the evidence controverts the presumption as a matter of law, and, secondly, that the presumption has no place in the present case at all. So far as the first contention is concerned, little need be said. Obviously, whether defendant's evidence rebutted the presumption was a question for the trial court. In view of what has already been said about defendant's testimony, obviously the trial court was justified in disregarding his testimony on this issue and finding in accordance with the presumption.

[8] Defendant's second argument is that evidence that the house was bought in 1938 after marriage was not sufficient to raise the presumption—that in addition plaintiff was under a duty to show that the funds used in the purchase were acquired after marriage. In the absence of such evidence, says defendant, there is no evidentiary basis for the presumption. There is no such limitation on the rule—if there were, there would be but little room for the operation of the presumption. Obviously, if a litigant had to trace the funds used in each purchase to funds acquired after marriage there would be few cases indeed to which the presumption could apply. The true rule is that the burden is on the party asserting the separate character of the property, and that the presumption applies when the one claiming that the property is community offers evidence that that property was acquired after marriage.

The soundness of the presumption is well-illustrated in the present case. The defendant was the one in possession of the true facts relating to his assets and income. He was evasive and tried to conceal the facts relating to these matters. Neither opposing counsel, his own counsel or the court was successful in getting him to make a full and fair disclosure. Under such circumstances it would result in a miscarriage of justice to not indulge in the presumption.

[9,10] The same reasoning applies to the findings relating to the furniture and furnishings in the house. Admittedly most of the furnishings and furniture were the separate property of the plaintiff, she having owned them prior to the marriage. In addition, after marriage, some further furnishings and furniture were purchased, plaintiff testifying that after-acquired articles were purchased for \$5,000, and defendant testifying that he purchased these articles for \$10,000 in cash taken from the office safe, and that all the money so used was his separate property. The same evidence and the same presumption discussed in reference to the house applies to these articles. The finding is amply supported.

The next contention of appellant relates to the finding in reference to the community bills. In reference to these bills, the court found that upon the date the complaint was filed there were community debts totaling \$4,829 and that such community debts should be paid by defendant.

The facts in reference to the bills did not come to light until the last day of the long trial. At that time the trial judge was making an oral announcement of his conclusions. Counsel for plaintiff called the attention of the court to the fact that his client was being harassed by creditors of the community, and that certain utility and repair bills that the court had ordered defendant to pay had not been paid. He also called attention to the fact that his client was being sued for repairs to the house, that defendant had evaded service in that action, and that there was danger the house might be sold to satisfy a small mechanic's lien. These bills were ordered paid by the

defendant and no challenge is made as to that portion of the decree.

Defendant does not contend that he is not liable for the bills incurred by the parties before the date fixed in the findings, nor does he urge that the trial court did not have the power to make an order requiring him to pay such bills. The sole point urged by him as to these bills is that there is no evidence in the record as to the amount of such bills, to whom they are owed, or their nature.

[11] It is true that the list of such bills, although discussed in open court, was not formally introduced into evidence, but this failure to introduce such a list does not require a reversal or modification. The defendant can suffer no injury because of this fact. As between the husband and wife the court determined that the wife should be held harmless for such bills not to exceed \$4,829. Before the defendant can be held liable on these bills so far as the wife is concerned she must show that the debts were incurred prior to January 19, 1942, and that the total amount does not exceed \$4,829. If disputes arise between the parties in the future over whether a particular bill was a community bill, and whether it was incurred prior to the date the action was filed, such disputes may be easily determined by the trial court.

Defendant also objects to that portion of the decree relating to income taxes. In this connection the decree provides that defendant shall "pay and discharge all income taxes levied by the government of the United States, or the State of California, against the plaintiff Barbara Wilson, or which constitute a lien upon any property awarded to her hereby, or in which she is granted any right, title, interest or control hereby, up to the 1st day of January, 1945." (C.T. 169.)

[12, 13] The record shows that after the separation of the parties in 1940 and even after the complaint was filed in 1942 the defendant filed joint returns, and that litigation with the federal government is pending over these returns. It also shows that pursuant to stipulation of the parties defendant has paid plaintiff \$350 a month alimony pendente lite since January, 1942.

It seems to be the contention of the defendant that under appropriate section of the Internal Revenue Code, 26 U.S.C.A. Int. Rev.Code, § 22(k), alimony is chargeable to the wife and not to the husband. It is argued that the decree above quoted, insofar as it affects the alimony pendente lite, varied the terms of the agreement of the parties retroactively without the consent of the parties. It is also argued that until the amount of the taxes are fixed, determined and assessed against the plaintiff she is entitled to no relief. The decree makes no award of any sum to cover the taxes in question—it merely states that defendant shall pay them after they are assessed. The decree was a proper one. Section 22(k) of the Code by its clear language merely applies to alimony payments made subsequent to a divorce or separate maintenance decree. It has no application at all to alimony pendente lite. The regulations expressly so provide. See Regulations 111, p. 80, § 29.22(k)-1. It is clear that defendant is liable for and should pay the tax on these payments. The record shows the wife had no other income except from the occasional sale of a work of art. These works of art were awarded to her. We find no error in reference to this portion of the decree.

[14] The defendant also objects to finding No. V. That is an omnibus finding to the effect that all of the allegations of plaintiff's first cause of action are true and that none of the allegations of defendant's answer or cross-complaint are true. An examination of the first cause of action shows that it contains certain allegations in reference to the property rights of the parties which are in conflict with the specific findings made on that subject. The specific findings of course control. Counsel for plaintiff at the oral argument stated that he had no objection to the elimination of that finding. Out of an abundance of caution that finding will be stricken.

The last contention of defendant necessary to discuss is that the interlocutory decree erroneously attempts to make a present absolute disposition of the community property, it being contended that under §§ 146 and 147 of the Civil Code the power of the court is limited to making the com-

munity property division effective upon the entering of the final decree. While the findings and conclusions use language that speak prospectively, the interlocutory decree undoubtedly attempts to make a presently effective division of the community property. It provides that the plaintiff "is hereby awarded, and there is hereby set over, and her title is hereby quieted as against the defendant" (C.T. 167) to the one-half interest in the house, and substantially similar language is applied to the furniture and to the awards in favor of defendant.

The adoption in 1903 of the interlocutory decree provisions found in the Code, leaving unchanged the sections relating to the power of the court to divide the community property, has led to much confusion and litigation. See discussion and collection of cases 20 Cal.Law Rev. 294; Annotation, 76 A.L.R. 284; cases collected 3 Cal.Jur. Supp. p. 674, § 154. There can be no doubt at all that the trial court has jurisdiction to make a present disposition of the community property in the interlocutory decree, and that upon that decree becoming final, it measures finally the property rights of the parties. But whether it is error to make such an award is a most confusing question.

The Supreme Court has recently reviewed the authorities on this subject at length in *Leupe v. Leupe*, 21 Cal.2d 145, 130 P.2d 697. There in the interlocutory decree there was made a present disposition of the community property by awarding it to the husband and giving the wife a cash award for her interest secured by a lien on the property. No appeal was taken from the interlocutory and it became final. Thereafter the trial court attempted to modify the lien provisions. It was held that no such power existed. The discussion by the Supreme Court is well worth repeating here. At page 147 of 21 Cal.2d, at page 698 of 130 P.2d, it is stated:

"Appellant contends that the court had no jurisdiction to terminate the lien or to change other portions of the interlocutory decree relating to property after it had become final and the time for appeal or for relief under Code of Civil Procedure sec-

tion 473 had expired. Respondent replies that any disposition of property rights by the interlocutory decree was not effective or conclusive until a final decree of divorce was entered, and contends, therefore, that the trial court retained power to modify its decree. This problem has been before our courts many times since the legislation of 1903 creating the present dual-decree divorce procedure. While the decisions have not been entirely consistent, no decision has been found that can sustain the order removing the lien. With the exception of certain language to the contrary, hereafter noted, the decisions establish that the trial court is without jurisdiction to modify an unqualified disposition of property rights made in an interlocutory decree of divorce except in accordance with the methods applicable to judgments generally, time for which had expired in this case before respondent's motion was made. Even though a final decree is not entered, the interlocutory decree becomes a conclusive adjudication and is *res judicata* with respect to all issues determined. [Citing many cases.]

"Language may be found in certain decisions which cannot be reconciled with the foregoing cases. In *Re Estate of Boeson*, 201 Cal. 36, 40, 255 P. 800, relied upon by respondent, it was said that the entry of an interlocutory decree does not sever the marital relation, and that any disposition of property made thereby becomes effective only upon entry of the final decree, until which time property rights remain as before the interlocutory decree. The court cited *In re Estate of Dargie*, 162 Cal. 51, 121 P. 320, and *In re Estate of Seiler*, 164 Cal. 181, 128 P. 334, Ann.Cas.1914B, 1093, but these support only the reference to severance of marital relations. Further, the language in *Re Estate of Boeson*, supra, is dictum, for although the appellant therein was said not to be barred by the decree, she was held barred upon other grounds. *Roberts v. Wehmeyer*, 191 Cal. 601, 615, 218 P. 22, 27, suggests the law to be that 'community property may be divided only upon a dissolution of the marriage and * * * an interlocutory decree is not such a dissolution.' This statement of the law has not been followed and has also been char-

acterized as dictum. *Klebor v. Klebor*, supra, 118 Cal.App. [613] at page 621, 5 P.2d 965. Similarly, in *Radich v. Radich*, 64 Cal.App. 605, 607, 222 P. 182. it was said by way of dictum that the court could not dispose of community property or a homestead until the final decree. Insofar as the language of these cases suggests that a court is without jurisdiction to make an unqualified disposition of property in an interlocutory decree of divorce, it is in opposition to the cases previously cited and must be disapproved.

"An immediate disposal of property upon an interlocutory decree of divorce is thus within the jurisdiction of the trial court. It has been held in certain cases that the trial court should not assign and dispose of the community or homestead property immediately by an interlocutory decree of divorce, but should wait until such time as the marriage is absolutely dissolved. [Citing several cases.] These cases, however, dealt with direct appeals from interlocutory decrees in which error only was claimed and do not involve questions of jurisdiction or the effect of such decrees after the time for appeal has passed. Furthermore, it has been said that the court generally should determine the property issues at the same time it determines the issues with respect to the divorce, although the court may specify that its determination should not become effective or final until the entry of the final decree. *Pereira v. Pereira*, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107; *Webster v. Webster*, 216 Cal. 485, 14 P.2d 522; *Lo Vasco v. Lo Vasco*, 46 Cal.App.2d 242, 115 P.2d 562. This practical solution of the problem was recognized and approved in the *Remley* and *Strupelle* cases, [infra]. We need not decide in this case whether it was error to make an immediate assignment of property in the interlocutory decree or whether the right to so dispose of the property of the parties was within the discretion of the court. The time for appeal having elapsed, the determination of property issues in the interlocutory decree became final and was no longer subject to modification except in accordance with the methods applicable to judgments generally. It follows that the

court could not alter the decree by terminating the lien in the present case."

[15, 16] In the present case we are faced with the problem expressly left open in the Leupe case. Here the appeal is from the interlocutory decree. In *Remley v. Remley*, 49 Cal.App. 489, 193 P. 604, and *Strupelle v. Strupelle*, 59 Cal.App. 526, 211 P. 248, and by implication in other cases (see *Peis v. Mohr*, 126 Cal.App. 300, 14 P.2d 878; *Abbott v. Superior Court*, 69 Cal.App. 660, 232 P. 154; *Webster v. Webster*, 216 Cal. 485, 14 P.2d 522) it has been held to be error to make a present and absolute disposition in the interlocutory. It would appear that a proper solution of this problem would be to hold that the interlocutory may make a present disposition of the community property, but that the title thus conveyed is limited and conditional until the entry of the final decree. A reconciliation before that time or the death of one of the parties, and perhaps other circumstances, would prevent the conditional title from becoming absolute. However, in view of the confusion in the cases it would appear that the Supreme Court or the Legislature are the only bodies that can finally settle this troublesome problem. In the present case it was, of course, proper for the trial court to determine in its interlocutory the status of the property and how it ought to be assigned upon the entering of the final decree. Justice will best be served by striking from the decree all words presently disposing of the community property and inserting words to the effect that in the final decree the parties are entitled to have assigned to the parties specified the portions of the community property enumerated in the decree. *Prout v. Prout*, 73 Cal.App.2d 715, 167 P.2d 1. The plaintiff's right of occupancy pending this appeal is not challenged and is not affected by this modification.

For the foregoing reasons finding No. V is stricken from the findings; the interlocutory decree is modified by striking therefrom all words presently disposing of the community property and inserting words to the effect that upon the entering of the final decree the parties are entitled to have assigned to them the portions of the

community property mentioned in the decree. As so modified the judgment is affirmed as of the date of its entry; plaintiff to recover her costs on this appeal.

WARD, J., and SCHOTTKY, J., pro tem.
concur.



76 Cal.App.2d 113

RENCH v. HARRIS et ux.

No. 13664.

District Court of Appeal, First District,
Division 1, California.

Sept. 17, 1946.

1. Venue ⇐4

Whether a cause of action is transitory or local for venue purposes must be determined from the allegations of the complaint on file at time motion is made and from nature of judgment which might be rendered thereon, assuming truth of the allegations.

2. Venue ⇐72

In determining whether plaintiff has brought himself clearly within terms of some statutory exception to general venue rule, all ambiguities will be construed against the pleader to the end that defendant shall not be deprived of his fundamental right to have case tried in county of his residence.

3. Venue ⇐4, 46

Where the most that complaint alleged was that, in consideration for plaintiff's plan to increase rentals, defendants promised to share with him whatever increased rentals might be procured, and it did not appear that plaintiff was to have anything more than a contractual right, so that plaintiff's rights were against defendants individually and did not amount to an interest in the property from which rents were to be realized, action was not local and venue was properly transferred from county in which property was located to

county of defendants' residence. Code Civ.Proc. § 392.

4. Appeal and error ☞1011(1)

A ruling of trial court upon issues of fact raised by conflicting affidavits is entitled, upon appeal, to the same weight as a finding on conflicting evidence as to issues of fact.

5. Appeal and error ☞1024(3)

Appellate court, being bound by determination of trial court, from affidavits in support of and in opposition to motion to change place of trial, that obligation sued upon was incurred in Alameda county rather than in San Francisco and that there was no special contract that it was to be performed in San Francisco, sustained order changing venue from San Francisco to Alameda County. Code of Civ.Proc. § 395.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by L. Rench against Joseph W. Harris and Celia Harris, his wife, to recover a share of increased rentals which defendants allegedly received from their property as the result of putting into effect a plan devised by plaintiff. From an order changing place of trial from the city and county of San Francisco to the county of Alameda, plaintiff appeals.

Affirmed.

Marvin C. Hix, of San Francisco, for appellant.

Nathan G. Gray, of Berkeley, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from an order changing the place of trial from the City and County of San Francisco to the County of Alameda.

The complaint alleged that defendants are the owners of certain real property located in San Francisco; that in June, 1944, plaintiff submitted a plan and scheme to defendant Joseph W. Harris whereby the rental from said real property would be substantially increased; that plaintiff

and defendants then agreed that the plan would be put into operation and that "plaintiff should have an interest in any leasehold rights thereafter obtained"; that a lease was thereupon made at such increased rental but that defendants refused to account to plaintiff for any part thereof and claim that plaintiff has no interest in or to any part of said rental; that plaintiff claims that he is part owner of such lease and the rents collectible thereunder and "claims to be by reason thereof an owner of an interest in such real property."

The defendants demurred to this complaint, and at the same time served and filed a notice of motion to remove this case from the City and County of San Francisco to the County of Alameda, which notice of motion was supported by an affidavit of merits. This affidavit contained the usual averment as to a meritorious defense, and that the defendants were residents of Alameda County at the time of the commencement of this action, and also contained the following: "That affiant is the sole owner of the real property described in the complaint on file herein, and that his wife, Celia Harris, has never had nor does she now have any right, title or interest therein, nor any right, title, or interest in any rents, issues, or profits derived or to be derived therefrom; that all conversations, negotiations, or any contract alleged to exist between the plaintiff and defendants were had and entered into in the County of Alameda, State of California, and that no contract or [sic] any kind or nature relating to any of the matters alleged in the complaint was made or entered into between plaintiff and defendants, or either of them, in the City and County of San Francisco, State of California, nor did these defendants, or either of them, ever enter into any contract with plaintiff relating to the matters alleged in the complaint which was to be performed by said defendants or either of them in said City and County of San Francisco, State of California; * * *

Upon the hearing of the motion plaintiff presented an affidavit which stated: "Denies that the defendants did not enter into a contract with plaintiff relating to

the matters alleged in the complaint which was to be performed by the defendants or either of them in said City and County of San Francisco, State of California. Alleges that the contract and agreement alleged in the complaint could only be performed in the said City and County of San Francisco and no other place, as the interest in the property claimed is located in said City and County of San Francisco."

Upon this appeal plaintiff contends that the action was a local one and for that reason was not properly transferred to Alameda County, and contends further that the action, even if not local, is one to be performed in San Francisco and was properly commenced in the City and County of San Francisco. We shall discuss these contentions in the order of their statement.

[1,2] As was said by this court in the recent case of *Bybee v. Fairchild*, 75 Cal.App.2d 35, at page 36, 170 P.2d 54, at page 56:

"It is settled law that the question as to whether a cause of action is transitory or local 'must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations.' *Neet v. Holmes*, 19 Cal.2d 605, 607, 122 P.2d 557, 558, citing *Sheeley v. Jones*, 192 Cal. 256, 219 P. 744, and *Eckstrand v. Wilshusen*, 217 Cal. 380, 18 P.2d 931.

"It is also well settled that the normal right of the defendant is to have the action tried in the county of his residence. For the cause to be triable elsewhere the plaintiff must bring himself clearly within the terms of some statutory exception, and in this connection all ambiguities will be construed against the pleader to the end that a defendant shall not be deprived improperly of his fundamental right to have the cause tried in the county of his residence. *Ah Fong v. Sternes*, 79 Cal. 30, 21 P. 381; *Lyons v. Brunswick-Balke, etc., Co.*, 20 Cal.2d 579, 127 P.2d 924, 141 A.L.R. 1173; See cases collected 25 Cal.Jur., p. 866 § 13."

In support of his first contention plaintiff quotes that portion of section 392 of

the Code of Civil Procedure which reads: "* * * the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions: (a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest * * *."

Plaintiff then argues that the complaint alleges an interest in a leasehold in property in San Francisco and that "A leasehold is both an interest and estate in real property." He cites the cases of *Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871, and *Chandler v. Hart*, 161 Cal. 405, 119 P. 516, Ann.Cas.1913B, 1094, but these authorities lend no aid to plaintiff's position as they merely reiterate the undoubted proposition that a lessee under an oil lease has an interest in real property.

Plaintiff also relies upon *State v. Royal Consolidated Min. Co.*, 187 Cal. 343, 202 P. 133, which was an action by the State of California to quiet title to real property and recover the rents, issues and profits thereof. In response to the argument of the attorney general that the action was in part transitory because of the demand for the rents, and in holding that the action should have been commenced in the county where the land was located, our Supreme Court said at page 350 of 187 Cal., at page 136 of 202 P.: "On this point it is sufficient to say that the action, insofar as it relates to rents, issues, and profits, is essentially one to quiet title within the meaning of the Constitution, because the right thereto depends upon the issue of title and an adjudication of the right to rents is necessarily determinative of the right to the land itself." However, as pointed out by the court, the right to the rents was merely incidental to the main issue in the case, which was the title to the property.

[3] In the instant case the most that the complaint alleges is that in consideration for plaintiff's plan to increase rental, defendants promised to share with him whatever increased rentals might be procured. It does not appear that plaintiff

was to have anything more than a contract right to a share of the increased rentals, and therefore plaintiff's rights would be against the defendant lessors and would not be an interest in the property from which the rents were to be realized. And, as hereinbefore pointed out, all uncertainties or ambiguities will be construed against the pleader to the end that a defendant shall not be deprived of his fundamental right to have the cause tried in the county of his residence.

In *Work v. Associated Almond Growers*, 76 Cal.App. 708, at page 711, 245 P. 790, at page 791, the court said:

"Here it is manifest from the allegations of the complaint and from the prayer that the object of the action and the relief sought is to obtain a money judgment. There is nothing in the complaint which asks for any remedy connected with the property. On the contrary, plaintiffs pray that defendant be required to accept or cause the trust company to accept delivery of the conveyance tendered by the plaintiffs. The title or any interest in the land which was the subject of the sale is therefore in no manner involved and the judgment sought, if obtained, will not directly operate upon it.

"It has been frequently held in this state that an action to recover the purchase price of land is not a local action, and may be brought in a different county from that in which the land is situated. *Samuel v. Allen*, 98 Cal. 406, 33 P. 273; *Terry v. River-garden Farms Co.*, 29 Cal.App. 59, 154 P. 476; *North Stockton, etc., v. Fischer*, 138 Cal. 100, 70 P. 1082, 71 P. 438; *Gallup v. Sacramento [& San Joaquin] Drainage Dist.*, 171 Cal. 71, 151 P. 1142; *Paramore v. Colby*, 45 Cal.App. 559, 188 P. 72. Nor does the fact that the prayer of the complaint asks that defendant be required to specifically perform its obligation in any manner alter the situation. *O'Gorman v. Wachter*, 71 Cal.App. 266, 235 P. 57."

And in *Pacific Const. Finance Co. v. Kramer*, 42 Cal.App.2d 190, at page 191, 108 P.2d 723, 724, the court said: "The rule is established that the trial court has no power under section 392 of the Code of Civil Procedure to change the place of

trial to a county where real property is located, unless it appears that title to the land will be directly affected by the judgment of the court. It is not sufficient for the title to the land to be incidentally, collaterally, or even necessarily inquired into if a judgment, if any, as in the present case, can be satisfied by the payment of money. *Work v. Associated Almond Growers*, 76 Cal.App. 708, 711, 245 P. 790."

We are convinced that plaintiff's contention that the cause of action set forth in his complaint is a local action under section 392 of the Code of Civil Procedure cannot be sustained.

Plaintiff's second contention is that the obligation was one which was to be performed in San Francisco and therefore should not have been transferred to Alameda County. Plaintiff asserts that the contract could only be performed in San Francisco.

The affidavit of defendant, hereinbefore set forth, alleged that "all conversations, negotiations or any contract alleged to exist between the plaintiff and defendants were had and entered into in the County of Alameda, State of California, and that no contract or [sic] any kind or nature relating to any of the matters alleged in the complaint was made or entered into * * * in the City and County of San Francisco * * *." Plaintiff in his opposing affidavit merely denies that defendants did not enter into a contract which was to be performed in San Francisco, and alleges that the agreement could only be performed in San Francisco as the interest in the property claimed is located in San Francisco.

The applicable portion of section 395 of the Code of Civil Procedure reads as follows: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed

to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[4, 5] Since it is the law that a ruling of the trial court upon issues of fact raised by conflicting affidavits is entitled, upon appeal, to the same weight as a finding on conflicting evidence as to issues of fact (1 Cal.Jur. 680, 681, sec. 23; 1 Cal.Jur., 10 Yr.Supp., 123, sec. 23), we are bound by the determination of the court below that the obligation was "incurred" in Alameda County and that there was no special contract that it was to be performed in the City and County of San Francisco. There is therefore no merit in plaintiff's contention that he is entitled to have the action tried in the City and County of San Francisco by reason of the provisions of said section 395.

In view of the foregoing we conclude that the trial court correctly granted defendants' motion for change of venue to Alameda County, and that the order granting said motion should be and is hereby affirmed.

PETERS, P. J., and WARD, J., concur.



76 Cal.App.2d 183

MILLER v. DUFAU et al.

Civ. 15062.

District Court of Appeal, Second District,
Division 3, California.

Sept. 23, 1946.

1. Master and servant ⇨330(3)

Municipal corporations ⇨819(1, 7)

In action for injuries sustained when pedestrian fell over linoleum spread across sidewalk in front of apartment house in which linoleum was to be used, evidence warranted findings that linoleum layer spreading linoleum on sidewalk was employee of linoleum seller, and that spread-

ing of linoleum on sidewalk was negligence, and that pedestrian was not contributorily negligent in catching her heel in and tripping over linoleum, rendering seller liable for such injuries.

2. Trial ⇨26

The granting of continuance to afternoon session, but not to the following morning after plaintiff rested her case and motions for nonsuit were allowed as to one defendant and denied as to the other defendant, was not abuse of discretion, where trial was concluded at afternoon session without further request for or evidence of need of continuance.

3. Appeal and error ⇨1058(1)

In action against seller of linoleum for injuries sustained when pedestrian fell over linoleum which linoleum layer spread across sidewalk in front of apartment house in which linoleum was to be used, exclusion of testimony of seller's manager as to seller's conversation with apartment house manager at time of purchase of linoleum was not prejudicial, if erroneous, where purpose of testimony was to prove that seller's manager did not undertake to have the linoleum laid, and seller's manager eventually testified that there was no such agreement and that seller's manager made no agreement with layer for laying of linoleum.

4. New trial ⇨104(1), 150(4)

The denial of motion for new trial for newly discovered evidence was not error where such evidence was largely cumulative and the showing of inability to present such evidence more fully at the trial was meager.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Julia Miller against Eugene Dufau and E. M. Pyle, doing business as Chesterfields', for damages for personal injuries sustained when the plaintiff allegedly fell over a sheet of linoleum which was stretched over a public sidewalk. From a judgment for the plaintiff, E. M. Pyle appeals.

Affirmed.

Irl Solomon, of Los Angeles, for appellant.

Edmund F. Barker, of Montebello, and Harold S. Snow, of Eagle Rock, for respondent.

SHINN, Justice.

This is an appeal by E. M. Pyle, doing business as Chesterfields', from a judgment which awarded plaintiff damages for personal injuries sustained when she fell over a sheet of linoleum which was stretched over a public sidewalk. Appellant's principal contentions are that there was insufficient evidence to prove that the linoleum was placed on the sidewalk by her agent, that there was no evidence that the act of placing it there was a negligent act, and that plaintiff was conclusively shown to have been guilty of contributory negligence.

Plaintiff was employed in an apartment house owned by Mr. and Mrs. Dufau. A Mrs. Haines was the manager and her duties were to collect the rents, keep the books and take care of the first floor. Mr. Dufau authorized her to put linoleum in her apartment kitchen and she purchased the linoleum in question from appellant, at the expense of Mr. Dufau. When it was delivered it was spread out upon the sidewalk by one Trejo and another linoleum layer who had brought it from appellant's store. Plaintiff left the apartment house in the middle of the afternoon, turned to her left as she reached the sidewalk in front of the building, took two or three steps, caught the toe of her shoe on the linoleum and fell. Mr. and Mrs. Dufau were made defendants, but their motions for nonsuit were granted and there is no appeal from the judgment in their favor.

[1] The implied finding was that Trejo was an employee of appellant for the laying of the linoleum; appellant's contention is that he was employed by Mrs. Haines. There was a sharp conflict on this point between the testimony of Mrs. Haines and that of a Mr. DeGregory, appellant's manager. Mrs. Haines testified that she purchased 15 yards of linoleum and understood that it was to be laid by appellant; Mr. DeGregory testified that neither he

nor any of appellant's other employees had anything to do with the laying of the linoleum. Mrs. Haines produced a sales slip for 15 yards at 89 cents and showing the addition of the figures 13.35 and .40, \$13.75, and 4.50, making the total shown of \$18.25, together with the words, "plus sales tax," and, in the handwriting of Mr. DeGregory, "Will pay when laid"; also on the slip were the words, "labor, pd." and the signature "Al Trejo." Mrs. Haines testified that she paid Trejo \$18.25 when he had finished laying the linoleum, and that he placed some figures on the bill and receipted it. She denied having made any arrangement with him for laying the linoleum and testified that \$18.25 was the full sum she paid. Mr. DeGregory produced a sales slip showing the sale of 20 yards at 89 cents, or \$17.80, tax of 53 cents, credit of 8 cents for tacks returned and a balance of \$18.25. He testified that the sale was of 20 yards, which Mrs. Haines denied; that Trejo was one of several workmen whom he kept track of for the benefit of customers; that he made no arrangement with anyone for the laying of the linoleum, and that the \$18.25 was the charge for the merchandise and was paid in full. All the witnesses agreed that the entire price paid was \$18.25. The testimony of Mr. DeGregory was that this sum was paid exclusive of the cost of labor, but the small credit for tacks returned indicated that he had engaged Trejo to do the work and had made his settlement with him after the work was finished and after Mrs. Haines had paid Trejo in full. The court resolved this conflict in favor of the testimony of Mrs. Haines, expressing the belief that she had told the "absolute truth." Appellant failed to produce evidence that Trejo was an independent contractor, and the conclusion that he was an employee of appellant for the laying of the linoleum had support in the evidence. His act of spreading the linoleum on the sidewalk was the act of appellant.

The finding that it was an act of negligence to cover the sidewalk with the linoleum was a fair deduction from the evidence. The material had been unwound from a large roll, and stretched the entire width of the sidewalk without being held

down in any manner. The condition thus created was not necessarily a safe one for pedestrians. Upon the contrary, it could be said with good reason that it was one from which injury to pedestrians should have been anticipated. The probabilities of the situation were for the trial judge to weigh, and he no doubt took into consideration the fact that plaintiff did trip over the linoleum while she was using the street in what he believed to be a careful manner. It is certain that the reasonable probabilities were not all in favor of there being no accident. The finding of negligence is therefore sustained.

Also sustained is the finding that plaintiff was not guilty of contributory negligence. She testified that she looked at the sidewalk as she came to it and turned to the left, but that she did not see the linoleum before she tripped over it. She had taken only two or three steps when this happened. The obstruction was a most unusual one; the linoleum, according to the testimony, was nearly the color of the sidewalk, plaintiff came upon it suddenly, and it was not an object which would necessarily attract immediate attention, or constitute a conspicuous warning of danger. The circumstances in which contributory negligence is established so clearly as to admit of no reasonable difference of opinion over it are rare. Here, it was clearly a question of fact and the finding is amply sustained.

[2] When plaintiff had rested her case, during a morning session, motions were made by the several defendants for judgments of nonsuit. The motions of the Dufaus were granted and that of appellant was denied. Counsel for appellant then moved for a continuance until the following morning upon the ground of his physical inability to proceed with appellant's defense. His motion was denied, but a continuance was granted until the afternoon session. Upon the convening of court at 2 o'clock counsel waived trial by jury and the jury was dismissed. The trial proceeded before the court, and was concluded during the afternoon session, without further request for a continuance, or evidence of any need

of one. It was not an abuse of discretion to refuse a longer continuance.

[3] Appellant claims error in the exclusion of the testimony of DeGregory as to his conversation with Mrs. Haines at the time she purchased the linoleum. It is contended that the purpose of the testimony was to prove that DeGregory did not undertake to have the linoleum laid. He eventually testified that there was no such agreement and that he did not make any arrangement to have it laid by Trejo. The terms of the agreement of purchase were properly to be considered in determining the relationship of Trejo to the parties in the work which he performed, but DeGregory's version of them was made clear. In fact, the trial judge remarked that if he believed the testimony of DeGregory, he would have to render judgment in favor of appellant. If there was error in the rulings, it resulted in no prejudice.

[4] Affidavits of DeGregory, Trejo, and of plaintiff's attorney were presented in support of a motion for new trial upon the ground of newly discovered evidence. The affidavit of DeGregory consisted of mere amplification of his testimony given on the stand, and an explanation of the two sales slips. The affidavit of Trejo, who had not testified at the trial, asserted that he had made an arrangement with Mrs. Haines to lay the linoleum and had placed all the figures on her sales slip at the time she paid the bill. It nevertheless appeared from the two affidavits that Mrs. Haines had paid a total of only \$18.25 for the linoleum and the labor of the men. It was not explained in the affidavit of DeGregory how he could have collected the entire sum of \$18.25 as the price of the merchandise, when Trejo, admittedly, received \$4.50 of it in payment for his labor. The facts stated in the affidavits were largely cumulative and the showing of inability to present them more fully at the trial was meager. There was no error in denying the motion for new trial.

The judgment is affirmed.

DESMOND, P. J., and KINCAID, Justice pro tem., concur.

28 Cal.2d 841

KRIER v. KRIER.

Sac. 5736.

Supreme Court of California, in Banc.

Sept. 11, 1946.

1. Judgment ⇨725(1)

A judgment in a prior action between the same parties on the identical cause of action is *res judicata*, and a bar to a second suit thereon, not only as to issues actually determined therein, but also as to issues necessarily involved.

2. Judgment ⇨713(2)

Even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue in every matter which might have been urged to sustain or defeat its determination.

3. Judgment ⇨713(2)

Where wife had claimed property in her action for separate maintenance solely as community property and had procured a decree therein based on its character as such, wife was precluded under doctrine of *res judicata* from seeking, on cross-complaint in later action by husband for partition and sale of the realty, another award of the property based on a homestead interest existing but unclaimed at the time of the earlier adjudication. Civ.Code, §§ 137, 146.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action for partition by M. H. Krier against Lillian Krier, wherein defendant filed a cross-complaint setting up a homestead interest in the realty. From an adverse judgment, defendant appeals.

Judgment affirmed.

Prior opinion 165 P.2d 490.

Ira B. Langdon, of Stockton, for appellant.

Gumpert & Mazzer and J. Calvert Snyder, all of Stockton, for respondent.

GIBSON, Chief Justice.

Prior to his marriage to defendant in 1929 plaintiff purchased 20 acres of farm

land. During the marriage \$1,000 of community funds were expended in improving the property. The parties separated in 1942, and Mrs. Krier continued to reside on the land.

On May 18, 1943, Mrs. Krier recorded a declaration of homestead on the property and later on the same day she filed an action for separate maintenance. In her complaint in that action she made no reference to the declaration of homestead she had previously filed on the property. Instead, she alleged that the parties were "possessed of certain community property, consisting of a community interest" in the land above mentioned, and prayed for judgment "awarding her all of the community property hereinbefore described." During the trial of the separate maintenance action Mrs. Krier likewise made no reference or claim to any homestead interest in the property, basing her right thereto solely on the alleged community interest. Judgment was entered in September, 1943, granting separate maintenance to Mrs. Krier, directing Mr. Krier to pay her \$75 a month for the support of herself and a minor child, and awarding her one-half of the community property, i. e., one-half of the value of the improvements made with community funds. The judgment in that action has long since become final. Mr. Krier thereafter procured a decree of divorce in Nevada. No disposition of the property was attempted in the Nevada action.

Later, in June, 1944, Mr. Krier brought this action against Mrs. Krier for partition of the property alleging that he was the owner and entitled to its possession as his sole and separate property subject only to the interest (one-half of the value of the improvements made thereon with community funds) created in Mrs. Krier by the prior decree of separate maintenance. She answered and cross-complained, setting up for the first time a homestead interest in the property based on the declaration filed by her prior to commencement of the separate maintenance action but, as stated, not advanced by her during any stage of that proceeding.

It was found and concluded herein that the decree in the separate maintenance action is *res judicata* of Mrs. Krier's interest

in the property, including the homestead interest. Physical partition being impracticable, the court ordered the property sold and, in accordance with the prior decree of separate maintenance, awarded Mrs. Krier one-half of the value of the improvements made with community funds. She has appealed and contends that the court erred in holding that she is barred by the prior judgment from now claiming a homestead interest in the property.

Section 137 of the Civil Code provides that in granting a wife permanent support and maintenance, the court "shall make the same disposition of the community property *and of the homestead*, if any, as would have been made if the marriage had been dissolved. * * *" (Italics added.) See Civ.Code, § 146, with respect to the manner of disposition of a homestead.

[1,2] In the prior separate maintenance action Mrs. Krier sought and procured an adjudication with respect to her interest in the property. She here seeks a second adjudication relative to her interest in the same property. It is settled, however, that a judgment in a prior action between the same parties on the identical cause of action is *res judicata*, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 134 P.2d 242; *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892; see *Todhunter v. Smith*, 219 Cal. 690, 28 P.2d 916; *Rest.*, Judgments, § 63, comment (a); 2 *Freeman on Judgments*, 5th Ed., § 676, p. 1425. And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination. *Sutphin v. Speik*, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; see *Price v. Sixth Dist. Agri. Ass'n*, 201 Cal. 502, 258 P. 387; 2 *Freeman on Judgments*, § 677, p. 1429.

[3] Having claimed the property in the prior action solely as community property and having procured a decree therein based on its character as such, Mrs. Krier is pre-

cluded from seeking in this later action another award thereof based on an entirely different interest (homestead or otherwise) existing, but unclaimed, at the time of the earlier adjudication. Under the circumstances, she was required to advance her entire interest, whether community or homestead, or both, in order to permit the court to make an effective and complete adjudication of the respective interests of the parties. Cf. *Metropolitan Life Ins. Co. v. Welch*, 202 Cal. 312, 318, 260 P. 545. Not having done so, she cannot relitigate the matter, whether it be held that the two suits involved the same cause of action insofar as they concerned her interest in the property, or merely involved a common issue as to her interest in the property.

The separate maintenance suit placed in issue the interests of the parties in particular property, and the court having determined the issue, the judgment on the merits is conclusive.

The judgment is affirmed.

SHENK, EDMONDS, TRAYNOR,
and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the decision herein but wish to point out the inconsistency between it and *Monroe v. Superior Court*, Cal.Sup., 170 P.2d 473, in which I dissented. In the *Monroe* case the issue was whether a decree in an action for separate maintenance determining the issue of future *support*, the amount, or duration thereof, was *res judicata* and hence foreclosed a subsequent modification of the decree. The majority opinion in that case held that it was *not*. In the case at bar the problem is whether a decree in a separate maintenance action determining *property rights* is *res judicata* in a subsequent proceeding involving the same property. The majority of this court holds that it is. The only difference between these cases is that the first involves the right to support and the second the right to property. There is no reason why the rule should not be the same in both cases. If it is *res judicata* in the case of property, and it is so held in the case at bar, it should also be *res judicata* where a support allowance is involved. I pointed

out in my dissenting opinion in the Monroe case that the same rules should apply in separate maintenance actions as in divorce actions; in the latter the decree is res judicata whether the issue involves support or property. Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; Long v. Long, 17 Cal.2d 409, 110 P.2d 383; Tolle v. Superior Court, 10 Cal.2d 95, 73 P.2d 607.

In the instant case reliance is placed upon section 137 of the Civil Code which authorizes the court in a separate maintenance action to make the same disposition of community and homesteaded property as it may make in a divorce action. But in the case of *support the same power exists in both types of actions*. Section 137 of the Civil Code, after providing for separate maintenance actions, and support and disposition of property therein, states: "The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court." Likewise in dealing with support in a divorce action the law provides: "And the court may from time to time modify its orders in these respects." Civ.Code, § 139. Yet the rule has been established that a support determination in a divorce case may be res judicata and beyond the power of the court to modify. Tolle v. Superior Court, supra. The same rule should apply whether it is a property or support right involved. The only reason for making special reference in section 137 to disposition of property interests in separate maintenance actions is the possibility that such determination might not be appropriate inasmuch as the marriage is not dissolved. It was not necessary to mention support rights as that would be taken for granted, being the heart of separate maintenance actions. Hence it was not intended that an adjudication as to property would be final but one as to support would not be.

It is just as important for the parties involved as well as society as a whole that the decree be final in either case. It places them in a position where they may intelligently plan their economic future.

There is as much danger (assuming but not granting there is any) that a lack of finality in property rights will in the future burden society with an impoverished wife as there is where support rights are concerned.

There is clearly no sound basis in principle or legal theory for a distinction between this case and the Monroe case, and the rule should be the same in both cases. Since a majority of this court has now held that the award of property in this case is a final determination, and res judicata, and beyond the power of the court to modify, the Monroe case should be expressly overruled to avoid the conflict and confusion which will exist by leaving that case go unmentioned in the majority opinion in this case.

SCHAUER, J., concurred.



29 Cal.2d 63

STEWART v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 19630.

Supreme Court of California, in Bank.
Sept. 24, 1946.

1. Justices of the peace ☞ 159(10)

Filing of notice of appeal and serving a copy thereof 26 days after judgment was rendered in justice court, and filing of undertaking 2 days after the filing of notice of appeal, satisfied the jurisdictional prerequisites of an appeal to the superior court, so that alleged failure to serve timely notice of the filing of undertaking on appeal was not a jurisdictional defect requiring dismissal of appeal. Code Civ. Proc. §§ 974, 978, 978a.

2. Justices of the peace ☞ 155(3), 159(10)

The statutory time limits for taking an appeal from a judgment of a justice's court and for filing undertaking on appeal are jurisdictional. Code Civ.Proc. §§ 974, 978, 978a.

3. Justices of the peace ☞140

Statutory changes with reference to procedure in appeals from justice's court are to be construed with reference to intention and purpose of their enactment, and they will not be deemed jurisdictional unless the statute so declares either expressly or by reasonable implication. Code Civ. Proc. §§ 974, 978, 978a.

4. Justices of the peace ☞159(6)

Justification of sureties on undertaking on appeal from a justice's court is not a necessary step in the taking of appeal, but is merely a collateral proceeding in which respondent may exercise a right granted him to determine the adequacy of the security given for his protection on appeal, which right he may waive. Code Civ. Proc. § 978a.

5. Mandamus ☞57(1)

Where a superior court erroneously dismisses an appeal from a justice's court on the theory that it has no jurisdiction, mandamus will lie to compel it to proceed to hear and decide the cause.

Original proceeding on the petition of L. A. Stewart for a writ of mandamus against the Superior Court of Los Angeles county to compel respondents to hear an appeal from the justice's court of El Monte township.

Peremptory writ issued.

Laurence B. Martin and Chauncey E. Snow, both of Los Angeles, for petitioner.

Harold W. Kennedy, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, Thomas P. Walker, Alfred R. Meyers, and Michael M. Moser, all of Los Angeles, for respondents.

SPENCE, Justice.

This is a proceeding in mandamus to compel the Superior Court of Los Angeles County to hear an appeal from the Justice's Court of El Monte Township.

Petitioner was the defendant in the justice's court action and judgment was rendered against him on November 3, 1944. He served and filed his notice of appeal to the superior court on November 29, 1944,

and on December 1, 1944, he filed in the justice's court his undertaking on appeal. Some time later written notice of the filing of the undertaking was served upon plaintiff in the action. The date of such service is in dispute—December 29, 1944, according to petitioner's recital as against January 9, 1945, according to affidavit of plaintiff's counsel. Meanwhile, and on December 20, 1944, the case papers were duly transmitted to the superior court and on January 9, 1945, plaintiff moved therein to dismiss the appeal. The motion was denied. On November 16, 1945, the case was assigned for trial to respondent judge and the latter, upon motion of plaintiff, dismissed the appeal for lack of jurisdiction as related to the service of the written notice of the filing of the undertaking.

Petitioner maintains that he has followed the jurisdictional steps prescribed by the Code of Civil Procedure for taking the appeal, and that the dismissal of the appeal was therefore erroneous. His position is well taken under the undisputed facts.

[1, 2] Section 974 of the Code of Civil Procedure declares that an appeal may be taken from a justice's court to the superior court "at any time within thirty days after notice of the rendition of the judgment." Petitioner met this initial requirement "by filing a notice of appeal * * * and serving a copy" thereof 26 days after judgment was rendered. Section 978 provides that an undertaking on appeal must be filed and that unless it is filed, the appeal "is not effectual for any purpose." Section 978a requires such filing to be "within five days after the filing of the notice of appeal." Petitioner met this effectuating proviso by filing the undertaking two days after the filing of the notice of appeal. These are jurisdictional prerequisites and they must be done within the required time. *McCracken v. Superior Court*, 86 Cal. 74, 75, 24 P. 845; *Bardwell v. Superior Court of Los Angeles County* 137 Cal.App. 491, 493, 31 P.2d 401.

But distinguishing the statutory provision for the service of the notice of the filing of the undertaking is the absence of a time limit prescribed for said service. Thus section 978a, so far as here pertinent, provides that "written notice of the filing of

the undertaking must be served upon the respondent, who may except to the sufficiency of the sureties within five days after service of such notice. Unless within five days after notice of such exception, the sureties excepted to, or other sureties, justify before the justice upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given, * * *

The significance of this code provision, since its amendment in 1935, is the added protection it affords the respondent in the exercise of his right to except to the sufficiency of the sureties. Thus, prior to 1935, the section merely required that "notice of the filing of the undertaking must be served upon the respondent"—accordingly, such notice could be oral or written and there was no requirement that it be served upon the respondent. *Rigby v. Superior Court of Marin County*, 162 Cal. 334, 339, 122 P. 958. And, prior to 1935, the time limit of five days allowed the respondent for exception to the sufficiency of the sureties ran from the date of the *filing of the undertaking*—accordingly, the time might run within which such exception might be taken *before* the respondent had any notice of the filing of the undertaking. *Rigby v. Superior Court of Marin County*, *supra*. The correction of these deficiencies in the old provisions—by correlating the respondent's *timely* right of exception with his receipt of notice of the filing of the undertaking and so eliminating his duty of searching the records to find when in the jurisdictional period the undertaking was filed—was manifestly a reasonable and appropriate procedural change.

[3, 4] Such statutory changes are to be construed with reference to the intention and purpose of their enactment; they will not be deemed jurisdictional unless the statute so declares, either expressly or by reasonable implication. As was said in *Rigby v. Superior Court of Marin County*, *supra*, at page 339 of 162 Cal., at page 960 of 122 P.: " * * * Provisions conferring the right of appeal and prescribing the procedure are remedial and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court." So here

the requirement for service of written notice of the filing of the undertaking and its identification with the respondent's right to except to the sufficiency of the sureties do not make such service a jurisdictional prerequisite. No fixed time limit is prescribed for making such service and it will not be interpolated contrary to legislative provision. *Golden Gate Tile Co. v. Superior Court of California in and for City & County of San Francisco*, 159 Cal. 474, 483, 114 P. 978. Instead of becoming a step in perfecting the appeal, service of the specified notice appears still to remain a part of the collateral proceeding regulating the justification of the sureties. It serves to bring home to the respondent the knowledge that the appeal is already perfected and to invite the respondent to inspect the undertaking already filed in order to determine the sufficiency of the sureties executing it. At that time the respondent is accorded the full benefit intended by the statutory change in that he has five days thereafter to make his exception.

Contrary to these views is the case of *Bradshaw v. Superior Court of San Bernardino County*, 56 Cal.App.2d 934, at page 938, 133 P.2d 639 at page 642, where in ordering the dismissal of the appeal because of the appellant's failure to serve on the respondent written notice of the filing of the undertaking, the court stated: "The written notice of the filing of the undertaking and the opportunity to except to the sufficiency of the sureties are therefore intricate parts of the procedure by which *jurisdiction* is now vested in the superior court." (Emphasis added.) But the justification of the sureties is not a necessary step in taking an appeal. As above stated, an appeal is *taken* by *timely* filing and serving a notice of appeal (§ 974); it is *perfected* or *made effectual* by *timely* filing an undertaking "for the payment of the costs on the appeal." §§ 978, 978a. The qualification by the sureties, upon this undertaking, in the absence of exception, is a full and complete justification. A further justification may be required by the respondent by excepting to the sufficiency of the sureties. This further justification is a collateral proceeding in which the respondent may exercise a right granted him

to determine the adequacy of the security given for his protection on the appeal. This right he may waive, and if he does, the appeal remains perfected and effectual under the undertaking as originally filed. *W. P. Jeffries Co. v. Superior Court of State of California in and for County of Los Angeles*, 13 Cal.App. 193, 197, 198, 109 P. 147. Consistent with our conclusion that service of the written notice of the filing of the undertaking is not jurisdictional, the case of *Bradshaw v. Superior Court of San Bernardino County*, *supra*, is hereby disapproved.

[5] Where a superior court erroneously dismisses an appeal on the theory that it has no jurisdiction, mandamus will lie to compel it to proceed to hear and decide the cause. *Golden Gate Tile Co. v. Superior Court of California in and for City & County of San Francisco*, *supra*, 159 Cal. 474, 114 P. 978.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



28 Cal.2d 846

PEOPLE v. DORMAN et al.
Cr. 4703.

Supreme Court of California, in Bank.
Sept. 13, 1946.

Hearing Denied Oct. 10, 1946.

1. Criminal law ⇨614(1)

Where trial did not commence until seventh day after defendant employed private counsel, public defender, appointed as defendant's counsel by court had preparation of case for over a month and remained to render assistance until trial started, and defendant was ably represented by counsel of his choice, refusal to grant defendant further continuance to permit further preparation did not deny

defendant any substantial constitutional rights. Pen.Code, § 1050; U.S.C.A.Const. Amend. 14.

2. Kidnapping ⇨5

Undisputed evidence that defendants transported victim to isolated spot and killed and robbed him supported jury's finding that defendants intended to kidnap deceased, without further evidence of such specific intent, in view of statutory provisions that person holding or detaining any individual to commit extortion or robbery or aiding or abetting any such act is guilty of felony. Pen.Code, § 209.

3. Homicide ⇨309(3)

In prosecution for murder, robbery, and kidnapping for purpose of robbery, in perpetration of which victim's death ensued, instruction on manslaughter was properly refused as unnecessary and improper, in absence of evidence tending to prove that crime was or might have been manslaughter. Pen.Code, §§ 189, 209.

4. Criminal law ⇨53

Homicide ⇨28

The fact that defendants, charged with murder, robbery, and kidnapping for purpose of robbery, had been drinking intoxicating beverages, constituted no excuse, where evidence did not disclose that they did not know what they were doing and each made statements to officers indicating awareness of events. Pen.Code, § 209.

5. Criminal law ⇨53

Voluntary intoxication is not excuse for crime.

6. Criminal law ⇨1173(2)

Refusal of instruction that jury could disregard any confessions not freely and voluntarily made by defendant or obtained while he was irrational of mind was not prejudicial error, in absence of assertion that any inducement or promise was offered to defendant or that he was subjected to any threat or violence.

7. Criminal law ⇨526

The fact that defendant was under influence of intoxicating liquor at time of his confessions did not deprive them of spontaneity required to render them free and voluntary.

8. Criminal law Ⓒ526

Defendant's claimed intoxication when arrested was insufficient to invalidate confession then made by him, under circumstances.

9. Criminal law Ⓒ781(1)

Where no rational conclusion could be drawn from evidence other than that defendant's confessions of crimes charged were voluntary, instruction to jury on such subject was unnecessary, and refusal of requested instruction that jury might disregard any confessions not freely and voluntarily made or obtained while defendant was irrational of mind was not error.

10. Homicide Ⓒ308(5)

Where facts, on any view of evidence, admitted of no other finding than of defendant's guilt of first degree murder, instructions defining degrees of murder were erroneous.

11. Homicide Ⓒ340(4)

Where facts found by jury would have justified imposition of death penalty on conviction of first degree murder, robbery, and kidnapping for purpose of robbery, but jury fixed punishment therefor at life imprisonment, error in giving instructions defining degrees of murder was not prejudicial to defendant. Pen.Code, §§ 189, 190, 209.

CARTER and EDMONDS, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Neal Dorman and Merlin James Smith were convicted of first degree murder, robbery, and kidnapping for the purpose of robbery, and defendant Smith appeals.

Affirmed.

Prior opinion, Cal.App., 164 P.2d 317.

Frederick W. Kant, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHENK, Justice.

The defendants William Neal Dorman and Merlin James Smith were indicted for the murder of Ralph William Bigelow in Los Angeles County on April 17, 1944; also of robbing Bigelow of money, a watch and an automobile, and of kidnapping Bigelow for the purpose of robbery. The defendants were convicted by a jury on all counts, the punishment for the murder, found to be first degree, being fixed at life imprisonment, and for the kidnapping, imprisonment for life without possibility of parole. The defendant Smith alone has appealed from the judgment and the order denying his motion for a new trial.

At the time of the events hereinafter related Smith was a sergeant in the United States Army. He was 19 years old and weighed about 165 pounds. Dorman was a sailor in the United States Navy, 24 years old, and weighed about 130 pounds. Bigelow, the deceased, was a mechanic, 41 years old, 5 feet 6 inches in height, and weighed 135 pounds.

Dorman and Smith met in a cafe called the "Brite Spot" on April 15, 1944. The next day, Sunday, Smith met Bigelow in the same cafe. Bigelow bought the drinks and they stayed until midnight. They were unsuccessful in obtaining food in a restaurant across the street because of some difficulty Smith had had with a waitress the previous night. So they drove to the home of Hutson, Bigelow's employer, where they had something to eat and spent the remainder of the night. Next morning about 9:30 Hutson took them in an automobile to Bigelow's home where Smith met Bigelow's family. At that time Bigelow had about \$70 in his possession. About an hour later Smith and Bigelow went to the "Brite Spot" where a Mr. McKee met them. Dorman came in at noon and joined the group which sat drinking in a booth. Dorman and Smith repaired to the rest room. In a discussion while there, according to Smith's statement to police officers, Dorman suggested that they "roll" Bigelow, but Smith remonstrated, saying that Bigelow was a "good guy" and was buying the drinks. Between 3 and 4 o'clock in the afternoon McKee took them in an auto-

mobile to Bigelow's car. Smith, Bigelow and Dorman got into the front seat of Bigelow's car with Smith at the wheel. McKee watched them until they drove away. They stopped in a park where they got out of the car and one or the other or both of the defendants struck Bigelow. Dorman and Bigelow returned to the rear seat of the car. At 6 o'clock they were seen driving at a high rate of speed, with the sailor beating the civilian. They parked for about 3 minutes in an alley where Smith leaned over the front seat and struck at Bigelow, whose head and face were blood-smeared. Bystanders shouted that they would call the police, whereupon Smith drove off at high speed, cutting across a vacant lot. They went some distance, stopped, and one or the other of the defendants (each said it was the other) used a rock about twice the size of a man's fist and dealt Bigelow the final and fatal blows. They demonstrated to police officers the size of the rock. When he was asked by officers why he did not stop Dorman, Smith replied: "Well, I told him I didn't think he needed to hit him so many times." They took Bigelow's watch and money, about \$30, and rolled his body over an embankment. They drove away in Bigelow's automobile as far as Tehachapi, where they abandoned it and proceeded north. Smith pawned Bigelow's watch in Stockton. Both defendants were arrested in Sacramento. Human blood was found in the rear seat of Bigelow's car, and on Smith's garrison cap. Buttons missing from Smith's shirt were also found in the car. Bigelow's body was discovered on April 23 in an advanced state of decomposition. The immediate cause of death was determined to be subdural hemorrhage due to basal fracture of the skull. In addition there were lacerations and contusions around the eyes, nose and lips, and other places on the front and sides of the head.

The indictment was presented on May 5, 1944, and arraignment set for May 9. On that day the court appointed the public defender as counsel for Smith. After entry of the plea of not guilty, the trial was set for June 16. On Wednesday, June 14,

Smith appeared in court with appointed counsel and attorney James O. Warner, when a motion was made to substitute Warner as his attorney. The judge asked Mr. Warner whether he was prepared to go ahead on Friday the 16th. He replied that he didn't know, that there were still some witnesses he wished to interview, and that the defendant Smith had been in a position to employ private counsel only within the last two days. The judge stated that he would not permit a substitution of counsel if it meant a continuance and that the defendant had competent counsel of his choice with ample time for preparation. Codefendant's counsel, also in the court room with her client, reported that she was prepared to try the case, was ready to go to trial, but would ask for a little more time if it would "assist counsel." After a conference with the defendant and his counsel, Mr. Warner stated that he was willing to accept the responsibility of going on with the trial on Friday. The judge denied the motion for substitution, but permitted Mr. Warner to appear as counsel associated with appointed counsel, saying to the latter that he was still in the case for the purpose of rendering assistance, that his duty was to remain with the defendant and not abandon him unless he was represented by counsel prepared to go to trial.

On Friday, June 16, the case was called, a motion for continuance was denied, but because of the congested condition of the calendar the trial was postponed until Monday, June 19th. When the case was called on the 19th the public defender asked to be relieved and his request was granted. Mr. Warner thereupon asked for a week's continuance, which was denied on the ground that the case had been pending for a sufficient time to permit reasonable preparation and that no unusual circumstances appeared which required a continuance. The trial proceeded and occupied eight days in the introduction of evidence and two days in argument.

[1] The first ground of the appeal is that the trial court violated the appellant's constitutional rights by refusing the requested continuance.

Section 1050 of the Penal Code reflects the legislative policy in the trial of criminal cases. It is there provided that the court shall set all criminal cases for trial for a date not later than 30 days after the date of entry of the plea, that no continuance of the trial shall be granted except upon affirmative proof in open court that the ends of justice require it, and for no longer than is affirmatively proved that the ends of justice require. That section discloses a policy which the law generally enjoins upon the courts, namely, an orderly and expeditious administration of justice. The first question then, in substance, is whether the trial court abused its discretion in determining that there was no affirmative showing that the ends of justice required a continuance, that is to say, in determining that there was in this case no showing that the time for preparation of the defense was inadequate.

A similar question was involved in *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377. The sole question there presented was whether, in violation of the Fourteenth Amendment, the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial, where, after appointment of competent counsel, the trial court denied a continuance. The Supreme Court observed that the disposition of a request for continuance was a matter for the exercise of the court's discretion and not ordinarily reviewable. However, it was pointed out, the denial of any representation at all would constitute a clear violation of the Fourteenth Amendment; and denial of opportunity by appointed counsel to confer, to consult with the accused, and to prepare his defense, could convert the appointment into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel, and would not satisfy the Constitution's guarantee. Cf. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. In the *Avery* case the petitioner was convicted of murder and the death penalty was imposed. He had been arraigned on March 21, 1938, when the

court appointed two practicing attorneys to represent him. His trial was set for March 23. It was not reached then but was called the next day when the attorneys moved for a continuance on the ground that, being busy with other trials, they had not had time to prepare the defense. Apparently the motion was denied for the trial proceeded, and a motion for new trial, made on the ground that denial of a continuance deprived the defendant of equal protection of the laws, was denied. In concluding that the petitioner had not been deprived of the benefit of counsel guaranteed by the Fourteenth Amendment, the court examined the record and found that appointed counsel "performed their 'full duty intelligently and well.' * * * Their appointment and the representation rendered under it were not mere formalities." [308 U.S. 444, 60 S.Ct. 324.] At page 452 of 308 U.S., at page 325 of 60 S.Ct., 84 L. Ed. 377, it was said: "That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted." The distinguishing features of the *Powell* and *Avery* cases were noted in *Betts v. Brady*, 316 U.S. 455, 463, 464, 62 S.Ct. 1252, 86 L.Ed. 1595.

In *People v. Whinnery*, 55 Cal.App.2d 794, 131 P.2d 33, on appeal from a judgment of conviction of robbery committed in Los Angeles County, it was contended that the defendant was denied a fair trial by the refusal to grant a continuance and a substitution of counsel. The defendant appeared with counsel at his arraignment, a plea of not guilty was entered, and the trial was set for a date one month later. Ten days before the trial date the defendant, in court personally, was informed by the judge that his counsel was in the county jail, that his trial would go on at the time set, and that he should be prepared to go to trial either with his then counsel or another. On the trial date he appeared with his attorney and sought to substitute other counsel, which the trial judge said

he would permit only if counsel sought to be substituted, who had been engaged seven days previously, was prepared to proceed. The court permitted new counsel to be associated with original counsel and continued the trial four days, but at the latter time the defendant again moved to substitute associate counsel and to obtain a continuance. When the request was refused the defendant chose to withdraw his plea of not guilty and substitute a plea of guilty, which he did only after full admonition by the court as to the meaning and consequences of his act. Considering the zealous regard for the defendant's rights and the coordinate right of the People to the orderly processes of administration and effective execution of the laws, the District Court of Appeal concluded that the record showed no abuse of discretion in the trial judge's refusal to grant a substitution and continuance. Any observation that the guilty had been brought to justice was properly rejected as a controlling factor, since the question of prejudice is not necessarily cognizable when the result is due to arbitrary action of the trial judge; furthermore that the mere fact that the record shows the defendant's guilt is not determinative on the matter of miscarriage of justice. *People v. Mahoney*, 201 Cal. 618, 627, 258 P. 607; *People v. Cowan*, 44 Cal.App.2d 155, 159, 112 P.2d 62. The same trial judge denied the requests for substitution and continuance in the present case under somewhat similar circumstances. Here the trial did not commence until at least the seventh day after employment of private counsel, and appointed counsel, who had the preparation of the case for more than a month, remained to render assistance until the trial started. The conduct of the defense was full and fair. The fact that 33 witnesses testified for the People and only three in addition to the defendants appeared in support of the defense does not necessarily show lack of time for preparation. Considering the rights of the state as well as of the defendant, the time allowed for preparation was not unreasonable. The record discloses that the defendant was ably and energetically represented by counsel of his choice. Representation was not a mere formality, but was repre-

sentation in fact. None of the defendant's substantial rights was denied him by the action of the trial judge in refusing to grant a further continuance when the case was finally called for trial. See, also, *People v. McNabb*, 3 Cal.2d 441, 45 P.2d 334; *People v. White*, 137 Cal.App. 467, 30 P.2d 555; cf. *People v. Simpson*, 31 Cal.App.2d 267, 88 P.2d 175.

[2] It is contended that there is no evidence from which the jury could find that the defendants had an intention to or that they did kidnap the deceased. The applicable language is found in section 209 of the Penal Code which reads: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, *or who holds or detains, such individual* for ransom, reward or to commit extortion or robbery * * * *or who aids or abets any such act*, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm * * *." It is urged that the relations existing between the defendant and Bigelow were friendly, that the suggestion by Dorman that they rob the deceased was rejected by Smith, and that such evidence does not support a plan to kidnap for the purpose of robbery. The all sufficient answer is contained in the italicized words in the quoted language of the statute, and in the undisputed acts of transporting Bigelow to an isolated spot, and of killing and robbing him. Those acts support the jury's finding without any further evidence of specific intent.

[3-5] The court did not err in refusing to give a requested instruction on manslaughter. Manslaughter is not involved in a case where the death of the victim ensues in the perpetration of robbery (Pen.Code, § 189), or in the act of kidnapping for the purpose of robbery (Pen. Code, § 209). Such an instruction is unnecessary and improper in a case such as this where there is no evidence tending

to prove that the crime was or might have been manslaughter. *People v. Manzo*, 9 Cal.2d 594, 599, 72 P.2d 119; *People v. Johnson*, 219 Cal. 72, 77, 25 P.2d 408; *People v. Farrington*, 213 Cal. 459, 465, 2 P.2d 814; *People v. Rogers*, 163 Cal. 476, 482, 126 P. 143. The defendant stresses the fact that they (Dorman and Smith) had been drinking intoxicating beverages. The evidence does not disclose that they did not know what they were doing. Each made statements to the officers describing and indicating an awareness of the events, although Smith later purported to explain that he was merely repeating what Dorman had told him. Voluntary intoxication is not an excuse for crime. *People v. Diaz*, 26 Cal.2d 318, 158 P.2d 194, *People v. Cavazos*, 25 Cal.2d 198, 153 P.2d 177; *People v. Fellows*, 122 Cal. 233, 239, 54 P. 830.

[6-9] It is also contended that the trial court erred prejudicially in refusing an instruction to the effect that the jury could disregard any of the confessions of the defendant which was not freely and voluntarily made or which was obtained from the defendant while he was irrational of mind. It is not asserted that any inducement or promise was offered to the defendant or that he was subjected to any threat or violence. He relies mainly on testimony that he was under the influence of intoxicating liquor. That condition, if it existed, did not deprive the confessions of the required spontaneity to make them free and voluntary. *People v. Farrington*, 140 Cal. 656, 661, 74 P. 288; *People v. Ramirez*, 56 Cal. 533, 535, 536, 38 Am.Rep. 73; *People v. Aguilar*, 140 Cal.App. 87, 94, 35 P.2d 137, 142; *People v. Samenigo*, 118 Cal.App. 165, 176, 4 P.2d 809, 5 P.2d 653. His claimed intoxication when he was arrested in Sacramento was insufficient to invalidate his confession. Similar statements were later made by him in Los Angeles, and it is not asserted that at the latter time he was intoxicated. All of the testimony bearing on the voluntary nature of the confessions was heard by the jury. This defendant does not dispute the fact that he was told by the officers that the charge was serious, that the evidence against him was such that he might be convicted of first degree murder, that he

would be permitted to call an attorney, and that in the absence of an attorney he could refuse to answer any question. Both in Sacramento and in Los Angeles he was advised of his constitutional rights, and that any statement made by him would be used against him in court. He expressed his willingness to make a statement of his part in the crime. There is no evidence of any hope or promise held out to him or of any pressure exerted upon him which could reasonably be considered a valid ground for disregarding his confessions as involuntary, or for believing that his willingness to talk was in any degree the result of the conduct of the officers. Where, as here, no rational conclusion can be drawn other than that the confessions were free and voluntary, there is no necessity for an instruction on the subject, and the refusal to give the requested instruction was not error. *People v. Hubbell*, 54 Cal.App.2d 49, 75, 76, 128 P.2d 579; *People v. Chan Chaun*, 41 Cal.App.2d 586, 592, 107 P.2d 455.

[10, 11] The defendant's final contention is that the court erred in defining the degrees of murder. In defining them the court gave the instructions which were criticized and condemned in recent cases in this court, the last of which is *People v. Bernard*, May 17, 1946, 169 P.2d 636, at page 640, where it was said that when the facts impel a conviction of murder of the first degree "there is no occasion whatsoever to give instructions as to the differences between the degrees of murder." So it must be said that where, as here, the facts upon any view of the evidence do not admit of a finding other than of murder of the first degree the giving of the challenged instructions was erroneous. But on the whole record the error was not prejudicial. The facts, as found by the jury, would have justified the imposition of the death penalty. Pen.Code, §§ 189, 190, 209. In the exercise of its discretion the jury would seem to have extended to the appellant all the leniency which the law permitted.

The judgment and the order are affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I dissent.

The majority opinion fails to make either a full or correct statement of the factual situation relative to the arbitrary action of the trial judge in denying appellant an opportunity to be represented by counsel of his own choice prepared to try his case. The facts as disclosed by the record are as follows: Appellant, Merlin James Smith, a boy of 19 years of age, a soldier in the United States Army, with the rank of sergeant, after engaging in a drinking orgy for several days found himself faced with an indictment returned May 5, 1944, in which he was charged with the crimes of murder, robbery, and kidnapping alleged to have been committed in Los Angeles County on April 17, 1944. His home was in Idaho. He was without friends or means to defend himself. On May 9, 1944, he was arraigned on said indictment in the superior court, and being unable to employ counsel, the public defender was appointed to represent him. At that time his case was set for trial for June 16, 1944. On June 12, 1944, relatives arranged with Mr. James O. Warner of the Los Angeles Bar to represent the appellant, and on June 14, 1944, the matter of substitution of attorneys was brought before the court, appellant having been represented up to that time by the deputy public defender. The latter, together with Mr. Warner, appeared in court at that time, and the public defender made a motion to substitute Warner in his place. In reply the court stated, and the following ensued:

"Are you prepared to go ahead on Friday [June 16, 1944], Mr. Warner?"

"Mr. Warner: I don't know, your Honor, at this time; there are some witnesses I want to interview.

"The Court: I am not going to substitute counsel two days before the trial of a case that has been set for more than a month—

"Mr. Warner: Your Honor, for the sake of the record—

"The Court (Continuing):—to force a continuance. Mr. Warner: *This man has only been in a position to employ counsel*

within the last two days; he desires to have private counsel and his family desires him to have private counsel.

"The Court: That may be true, but if we recognized that as a ground for a continuance, all a man would have to do would be to get different counsel all the time and we would never get to trial. * * *

"The Court: In other words, he has competent counsel right now; he has counsel of his choosing at the time. Merely because he wants to change horses in the middle of the stream, two days before trial, and thus force a continuance—

"Mr. Warner: There has never been a continuance granted in this case, your Honor. I understand the man was without funds to employ counsel—I do not argue against the competency of the Public Defender's office; do not misunderstand me,—but a man who has counsel furnished for him because of lack of funds, I think, when he is in a position at the earliest possible time to obtain funds and hire counsel within a short time—there has been no other continuance in this case.

"The Court: All a defendant is entitled to is to be represented by counsel who are competent to try his case. He has such counsel. He is not entitled to a continuance because he desires to make some change. He has been furnished with adequate and competent counsel at the expense of the County. I haven't any objection to his changing counsel or his being without counsel. But that does not entitle him to a continuance, nor does it entitle him to force his codefendant to endure a continuance, postpone the time, when that man could be tried.

"Mr. Warner: Well, the only thing, this motion is a motion for substitution. If there is a motion for a continuance—I am not making that motion at this time, but if I do make the motion—

"The Court: I am not going to furnish you or any defense counsel with grounds for a continuance, Mr. Warner. If I allow a substitution of counsel at the present time, you could come in tomorrow or the following day with the showing you are unprepared to proceed and I would be forced to grant a continuance, because at

that time the defendant would be without counsel who were prepared to try the case. At the present time he has counsel who are prepared.

"Mr. Warner: May I confer with counsel? (Conference between Mr. Warner and Mr. Robinson.)

"Mr. Warner: Your Honor, in the matter of James Smith, I have talked with the defendant and Mr. Robinson, and I am willing to accept the responsibility of going to trial on Friday. I do not think that the conditions of substitution—the conditions that are imposed on the defendant's counsel precludes any subsequent developments that might arise—I do not know that I am going to make a motion for a continuance, but I am going to have to put some intensive time in on this matter. Anything which develops which I feel justifiably should be brought to the court's attention in the defense of a serious charge, I want it understood that I would bring it to your Honor's attention whether you grant it or not.

"The Court: I appreciate that situation, but I am not going to put the record in such shape so that counsel can come in—it is not a matter personally with you; you might be discharged overnight and we would find ourselves with another situation. We now have counsel who are prepared to try the case, and presumably the codefendant is prepared to go to trial.

"Mrs. Kellogg: I am, your Honor. I am prepared to try the case, but *I would like a little more time*. I was not present at the time this case was set; the Public Defender represented me at that time, and the case was set for the 16th of June. However, I am ready to try the case.

"The Court: Well, our calendar is in such shape now a continuance of the matter would mean a continuance for a long period of time. I think these cases ought to be disposed of. In other words, there has been ample time to prepare these cases for trial.

"Mrs. Kellogg: Could your Honor set it a week hence?

"The Court: No, I cannot very well do that because of other cases on the calendar.

"Mrs. Kellogg: I am ready to go to trial, but I thought if there was any way I could assist counsel—

"The Court: I will permit Mr. Warner to appear here as counsel for the defendant, associated with the Public Defender. On the day of trial I will permit the Public Defender to withdraw, but I am not going to make an order of substitution which is going to force a continuance upon the basis that Mr. Warner coming into the case now is not prepared and would not be prepared on Friday to try the case. *Obviously nobody can prepare a murder case in two days.*

"Mr. Warner: As far as I know, I will be ready for trial. I have talked with Mr. Robinson and he advises me he has some other cases that are pending that he would like to try on those days, that he was going to have to make other arrangements in these cases—I understand he has continued them—he would like to be relieved of the case.

"The Court: Well, I will relieve him as soon as the trial starts.

"Mr. Robinson: If your Honor please, we do not know whether we are supposed to go ahead and get ready or not.

"The Court: You are still in the case; you are under obligation to defend the client for whom you have been appointed."

The case was called on June 16, 1944, at which time the court postponed the trial until June 19, 1944, because of a congestion in the calendar and the public defender again asked to be relieved from representing appellant because Warner had been retained, to which the court again replied that it would not allow a substitution to obtain a continuance. Warner asked for a continuance and the court stated: "Your motion or your contention is upon the basis that you personally have not had time to prepare. That is because you just have been very recently hired. It is not a question of whether you are personally prepared. The question is whether the defendant himself has had the case set for a sufficiently long time after plea to enable preparation to be made. I am assuming the Public Defender has made all the

preparations the defendant indicated were necessary for his defense.

"Mr. Warner: There are certain witnesses in North Hollywood that possibly may be obtained. This defendant was drinking in a bar with strangers and the Public Defender's office, because of the number of cases they have to try, have not had time to seek these witnesses out.

"The Court: The Public Defender has not made any motion for a continuance on the ground he has not had time to prepare.

"Mr. Thomas [public defender]: I will say, your Honor, I was speaking with Mr. Matthews about it last week, and said *I thought we should have more time to prepare if we were to stay in the case.* He said he had a large number of witnesses, so I did not press it further at that time. A further reason I did not press it further at that time was because the defendant was talking about securing other counsel. The case is, of course, a desperate case from the standpoint of the defendants, and I feel that they should be given every opportunity to fully present their defense.

"The Court: I think so too. But I am under the impression a month and half is quite ample time unless a most unusual situation appears, and none does appear. I, personally, have had a slight experience in the defense of murder cases and the prosecution of murder cases. Not infrequently I have had to try cases on very much shorter notice than that. I think we all recall the Clara Phillips case. I had just one week to prepare that case for trial.

"Mr. Thomas: I am told by the District Attorney they have some thirty-three witnesses for the prosecution, which would indicate the scope of preparation and investigation required for this case. *I will say we have not, by any manner of means, contacted nor ascertained the nature of the testimony of those witnesses, what testimony we will have to meet.*

"The Court: I can see no grounds for a continuance at the present time other than the immediate calendar situation. By reason of the congested condition of the cal-

endar the case is continued at this time until next Monday morning at 9 a. m. All witnesses ordered to return here at that time."

On June 19, 1944, the trial was commenced. Warner was substituted for the public defender. Warner again asked for a continuance and was refused, the court stating: "I do not think so under the circumstances. The case has been pending for a sufficiently long time to provide for reasonable preparation. As I have stated previously, it may be a little more difficult for you to proceed, having been in the case only a short time, but the rule for continuance applies to the defendant and not to his counsel."

It is clear that the time allowed to Warner to prepare for trial was too short, considering the seriousness of the charge, the many witnesses called by the prosecution and the lack of opportunity to interview them, the possibility of uncovering other evidence, and the length of the record. The trial judge stated that the time was too short. It is also apparent from the foregoing quotation from the record that the public defender felt he had not made sufficient preparation inasmuch as he was expecting appellant to employ other counsel. Moreover he did not participate in the trial. Hence it is plain that no adequately prepared counsel was available to appellant. The majority opinion cites cases as to various periods of time being sufficient, but each case depends upon its own circumstances. Here the charge was of the most serious character and the trial judge stated the time was insufficient.

It should be equally clear that if the trial court abused its discretion the error was prejudicial and requires a reversal. True, from the record it appears that defense counsel Warner presented a vigorous defense, but it is impossible to appraise the result that may have flowed from a full investigation of the case and the evidence available. It is aptly said in *Powell v. Alabama*, 287 U.S. 45, 58, 53 S.Ct. 55, 60, 77 L.Ed. 158, 84 A.L.R. 527: "Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts." In *People v. McNabb*, 3

Cal.2d 441, 45 P.2d 334, and *People v. White*, 137 Cal.App. 467, 30 P.2d 555, the charge was much less serious and there were not the same circumstances bearing upon the opportunity for preparation. Under the circumstances in the instant case the mere fact that the defense was vigorous is not enough to show lack of prejudice in the denial of the continuance. The shortness of the time in the light of the circumstances here presented indicates prejudice to appellant.

We thus have a situation in which neither the public defender, nor counsel of defendant's own choice, were prepared to try the case, and if the public defender were or should have been prepared he did not participate in the trial. He was relieved of his representation of appellant. Appellant was first denied the right to have counsel of his own choice unless the public defender also acted or unless no continuance for preparation would be asked. Having private counsel was of little value to appellant under those circumstances. Counsel not having an opportunity to prepare is tantamount to no counsel. *Powell v. Alabama*, supra. And a defendant in a criminal case is entitled to select and engage private counsel. In *re Ades*, D.C., 6 F.Supp. 467; *McCleary v. State*, 122 Md. 394, 89 A. 1100; *People v. Price*, 262 N.Y. 410, 187 N.E. 298; *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

The majority opinion argues, however, that the policy of the state to have speedy trials and expedite the administration of justice must be given consideration and that a defendant should not be permitted by last minute changes of counsel to obtain continuances and thwart that policy; that in the instant case appellant had ample time to procure private counsel. The controlling principles that must be observed in such cases are stated in *Glasser v. United States*, supra, 315 U.S. at page 69, 62 S.Ct. at page 464, 86 L.Ed. 680:

"The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal

proceeding in a federal court 'to have the Assistance of Counsel for his defense.' *This is one of the safeguards * * * deemed necessary to insure fundamental human rights of life and liberty*' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. *Johnson v. Zerbst*, 304 U.S. 458, 462, 463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 [146 A.L.R. 357]. Even as we have held that the right to the assistance of counsel is *so fundamental* that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be *untrammeled and unimpaired by a court order* requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

"To preserve the protection of the Bill of Rights for hard pressed defendants, *we indulge every reasonable presumption against the waiver of fundamental rights*. *Ætna Insurance Co. v. Kennedy*, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S.Ct. 724, 81 L. Ed. 1093. * * *

"*Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused*. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused Mr. Justice Sutherland said that such duty 'is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and *with a caution increasing in degree as the offenses*

dealt with increase in gravity.' Patton v. United States, 281 U.S. 276, 312, 313, 50 S.Ct. 253, 263, 74 L.Ed. 854, 70 A.L.R. 263. The trial court should protect the right of an accused to have the assistance of counsel. 'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 [146 A.L.R. 357]." (Emphasis added.)

Likewise, by analogy in the instant case, we should indulge in the presumption that there was no scheme or plan by appellant to secure a postponement of the trial by the device of changing counsel. Otherwise the fundamental right is whittled away with the knife of a mere supposition that persons accused will impose upon the courts. Prior to June 14, 1944, appellant was endeavoring to obtain funds from relatives to pay the fee of an attorney to be engaged by him for his defense. Presumably the chosen counsel appeared at the earliest opportunity to obtain a continuance, two days before the trial date. There is no showing or indication of bad faith on the part of either appellant or his counsel Warner. The public defender joined in the proceeding and was apparently satisfied with the endeavor of appellant to obtain counsel. The prosecuting attorney made little protest and advanced a feeble reason why a continuance would not be proper. The court in remarking that because of the many cases scheduled for trial in the future, the trial might be delayed a long time, may well have been correct, but the fundamental right here involved should not swing on the congestion of the courts for which appellant is not to blame. By virtue of the same reasoning his attorney could be limited to two hours for preparation.

I think it is obvious that the trial court was not sufficiently solicitous in protecting the constitutional right of the appellant to

the assistance of counsel as that right is defined in the Glasser and Powell cases. It used as a weapon to prevent appellant from having a counsel of his own selection, the threat of either not making such a choice or taking an unprepared counsel by the device of denying a continuance, all upon the supposition that appellant was attempting to obtain an unjustified delay in the trial. The policy to expedite the administration of justice must be considered in the light stated in Williams v. Kaiser, 323 U.S. 471, 476, 65 S.Ct. 363, 366, 89 L.Ed. 398: "Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accommodated to the constitutional guarantees of the individual." And in Powell v. Alabama, supra, 287 U.S. at page 59, 53 S.Ct. at page 60, 77 L.Ed. 158, 84 A.L.R. 527: "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." There is undoubtedly large discretion vested in the trial court in passing upon requests for continuances, but in light of what I have said and the presence of the fundamental issue of right to counsel, there was clearly an abuse of discretion in this case.

There is nothing in the cases of Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, and Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377, which compel a contrary result. In the Avery case, it is stated that a mere denial of a continuance alone does not deny a person the right to assistance of counsel. It is there conceded that "But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

[308 U.S. 444, 60 S.Ct. 322.] Moreover the court laid stress on the point that the scene of the crime was a rural community, contrary to the case at bar, where investigation would be simple, and stressed that the policy of Alabama should be given weight and consideration. We believe the policy of this court for this state should be as above stated. Likewise in the Betts case the court was concerned with the application of the Fourteenth Amendment to state court proceedings and merely said that in that case there was not a lack of due process of law. I am here merely holding that prejudicial error was committed.

There is language in *People v. Shaw*, 46 Cal.App.2d 768, 117 P.2d 34, 37, quoted in *People v. Whinnery*, 55 Cal.App.2d 794, 131 P.2d 33, to the effect that courts should be zealous in guarding the rights of accused but: "To hold that a defendant charged with a crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, would be subversive of the prompt administration and execution of the laws—upon which depends largely their effectiveness. It is at once apparent that the trial court must in the nature of things have some control over such matters, to the end that judicial business may be dispatched in an orderly manner." But in the *Shaw* and *Whinnery* cases the counsel who was to be substituted out of the case participated therein, and there the circumstances were not the same as here.

The majority opinion relies upon section 1050 of the Penal Code the material parts of which provide: "The court shall set all criminal cases for trial for a date not later than thirty days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the court shall enter in its minutes the facts proved which require the continuance." But in the instant case no objec-

tion was made by the prosecution as to the procedure followed in attempting to obtain the continuance and the court accepted the claim of lack of time for preparation as true and did not mention or make any point that a better showing should have been made of any facts pertinent to the subject, and ordered the case to go to trial with an admittedly unprepared counsel without any association or assistance by the former counsel. Under these circumstances, keeping in mind the fundamental right involved, I do not believe that the position taken in the majority opinion is meritorious. Certainly the policy stated in that section cannot be expanded to impair that sacred right.

In order to sustain the arbitrary action of the trial judge in this case the majority opinion has glossed over the poignant circumstances which stand out clearly in the record hereinabove quoted. This record discloses that the public defender was not prepared to try the case at the time Warner was employed, and he so informed the court. Warner would have had two days to prepare if the substitution had been allowed on June 14th and the case had gone to trial on the 16th. The court did not allow the substitution on the 14th so both Warner and the public defender were uncertain as to what either should do. In fact the court never ruled on the motion made by the public defender on June 14th to substitute Warner in his place, but stated that he would permit Warner to appear as counsel for defendant associated with the public defender and on the day of trial he would permit the latter to withdraw. The case could not go to trial on June 16th and was continued to June 19th when the trial commenced. At that time the public defender made a motion to substitute Warner in his place and that he be permitted to withdraw. This motion was granted. Warner had a total of four days, which included a Saturday and Sunday, to prepare for trial. The public defender having announced in open court that he was not prepared to try the case could obviously have been of little assistance to him even if he had remained in the case. In the face of these facts, to say that appellant was accorded his consti-

tutional right to be represented by counsel of his own choice and afforded a reasonable opportunity to prepare for trial, should tax the credulity of anyone who has had experience in the trial of criminal cases.

While appellant may have participated in the commission of a heinous and fiendish crime and the punishment meted out to him by the judgment and sentence may be in accord with the popular concept of justice, I cannot yield to the concept, which is the basis of the majority opinion, that judicial expediency may be substituted for constitutional guarantees. Decisions such as this make these guarantees meaningless.

In my opinion the judgment should be reversed.

EDMONDS, Justice.

I concur in the conclusion that the judgment should be reversed because of the violation of the appellant's constitutional rights in the ruling denying a continuance of the trial.

Hearing denied; CARTER, J., dissenting.



29 Cal.2d 52

PEOPLE v. HONEYCUTT.

Cr. 4728.

Supreme Court of California, in Bank.

Sept. 20, 1946.

1. Criminal law ⚡1186(4)

Homicide ⚡286(3)

An instruction that certain kinds of murder carry with them conclusive evidence of premeditation etc., was erroneous, but was not prejudicial where jury was not misled and, upon any rational view of the evidence and instructions, the verdict could not reasonably have been the result of a misconception of the law. Pen.Code, § 189; Const. art. 6, § 4½.

2. Homicide ⚡286(3)

An instruction that there need be no appreciable space of time between intention

to kill and act of killing, and that killing preceded by and result of concurrence of will, deliberation, and premeditation is first-degree murder, was abstractly correct, but was likely to be a misleading statement of the law. Pen.Code, §§ 187-189.

3. Criminal law ⚡823(4)

Homicide ⚡286(3)

An instruction respecting premeditation was erroneous, but was not prejudicial, where correct instructions in conflict with erroneous instruction were given, and jury, in the light of the evidence and all the instructions, was not misled, and the verdict was not the result of a misconception of the law. Pen.Code, §§ 187-189; Const. art. 6, § 4½.

4. Homicide ⚡22(2)

Mere proof of specific intent to kill is insufficient to establish homicide as first-degree murder, but such intent to kill must have been formed after defendant deliberated on his course of action. Pen.Code, §§ 187-189.

5. Criminal law ⚡823(1)

Where question whether jury followed the law as correctly or erroneously set before them in conflicting instructions cannot be determined, new trial will be ordered if by such error the defendant's substantial rights were affected.

6. Criminal law ⚡1186(4)

Erroneous instructions do not require a reversal of judgment where jury, considering all the instructions together and in the light of the evidence, was not misled by the erroneous instructions, and upon any rational view of the evidence and instructions the verdict cannot reasonably be deemed to have been the result of a misconception of the law. Const. art. 6 § 4½.

7. Homicide ⚡253(3)

Evidence that deliberation and premeditation preceded the forming of the intent to kill defendant's wife, and that defendant deliberately resorted to intoxicants to dull any compunctions which might otherwise hamper him in carrying out his plan, warranted conviction for first-degree murder and not merely second-degree murder.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

John Thomas Honeycutt was charged with murder. The jury found that he was guilty. From the judgment imposing the death penalty, an automatic appeal was taken.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant was charged with the murder of Florence Honeycutt, his wife, and with two prior convictions of felony. He pleaded not guilty and not guilty by reason of insanity and admitted the prior convictions. A jury found that he was guilty, made no recommendation as to penalty, and found that he was sane at the time the offense was committed. This is an automatic appeal from the judgment imposing the death penalty. Pen.Code § 1239, subd. (b). Defendant contends, and his contention is correct, that the instructions as to what constitutes murder of the first (as opposed to murder of the second) degree were erroneous in two particulars: First, in that the jury were told that "certain kinds of murder [by enumerated means and on enumerated occasions] * * * carry with them conclusive evidence of premeditation * * *"; and, second, in that the jury were told that "A man * * * can premeditate, that is, think before doing the act, the moment he conceives the purpose. * * *" The People contend that, in the circumstances of this case, such errors could not have prejudiced defendant. For the reasons hereinafter stated we agree with this contention of the People and have concluded that the judgment must be affirmed.

The evidence is without substantial conflict except on the crucial question (as to the degree of the crime) of whether, as defendant repeatedly stated after the homicide, "he had made up his mind to kill her," or whether, as he testified at the trial, he

had never planned or premeditated the killing of his wife.

Defendant first met Florence, the deceased, in August, 1944, in San Francisco. They intermarried in San Francisco and lived together there. Florence's mother and stepfather lived near Roscoe in the county of Los Angeles. In August, 1945, her stepfather went to San Francisco and "brought her down from that city." Florence then lived with her mother and stepfather and worked as a waitress in a cafe owned and operated by the stepfather. Approximately three weeks after Florence left San Francisco defendant came to Roscoe and visited Florence at the restaurant. In early September, 1945, defendant and Florence spent 11 days in Highland Park as guests of Mrs. Greenhaw, a friend of Florence. During this time both defendant and Florence were under the influence of intoxicating liquor "[m]ost of the time." When they left the home of Mrs. Greenhaw defendant and Florence moved to a rented room. They lived there one week. The landlord then requested them to move because of their excessive drinking. Florence returned to the home of her mother and stepfather and defendant moved to another rented room.

Late in September defendant again went to the stepfather's restaurant to see Florence. He was under the influence of intoxicating liquor and "hung around" for more than an hour although Florence's stepfather requested him to leave. The stepfather called the police. Defendant was arrested, charged with drunkenness, pleaded guilty, and spent about three days in jail.

Defendant next saw Florence on November 12, 1945. On that day he started drinking at 9:30 a.m. He went to her family's residence shortly before 6 p.m., knocked at the door, and Florence's mother told him that Florence was not there. However, Florence came out of the house onto the back porch, and she and defendant talked "in a low, normal tone of voice" for a few minutes. She gave defendant six or seven dollars and defendant left. As soon as defendant went away Florence's stepfather barricaded the front door by wedging a

chair under the door knob. Defendant went to a bar, drank "10 or 15 beers," purchased a bottle of muscatel wine and drank most of it. Shortly after 7 p.m. defendant returned to the home. He knocked at the back door; the stepfather refused to admit him. He went to the kitchen window; the stepfather told him to "get away from here." Defendant replied, "I am coming in. * * * You big fat-bellied son of a bitch, if you don't come outside * * * I am coming in. * * * I will kill you." Defendant went to the front porch, onto which a living room window opened. He threw a gallon jar which contained ferns through the window. Florence's stepfather armed himself with a 3-inch square "meat tenderizer" and stationed himself inside this window. The jar hit him in the stomach. Defendant knocked glass remnants from the sash of the shattered window with a flower pot and came through the window. Florence's stepfather struck defendant with the "meat tenderizer" and it became tangled in the curtain. Defendant tore down the window shade. He kicked the stepfather (who was 62 years of age and crippled) in the stomach, knocking him to the floor. The stepfather fell against Florence's mother, knocking her to the floor. The stepfather "grabbed him [defendant] by one foot, and he kept kicking me in the stomach with the other one. * * * I couldn't hold him any longer, because he kept kicking me, and knocked the wind out of me." Defendant went through the living room and bathroom into a bedroom where Florence was. The stepfather left the house, drove to a telephone, and called the police. Florence's mother got up, went into the bedroom, and saw defendant and Florence standing near one another. They were talking but the mother could not hear what they said. Defendant had in his hand a wine bottle which was about one quarter full. Florence's mother ordered defendant to leave. Defendant "said he was there to get Florence and he was going to get her." Florence said, "Johnny, what did you do such a terrible thing for?" Her mother did not hear defendant's reply. Florence and defendant walked into an adjoining room. Defendant grasped Florence's wrist and she said,

"Don't, Johnny, you are hurting me." They walked toward the door which led to the kitchen. Florence then "stood still. And then he hit her on the head with this wine bottle." Florence "kind of teetered around" and defendant knocked her to the floor. She lay there, quiet. Defendant choked her, then jumped with both feet seven or eight times on her head and body. Her mother "tried to scratch his face and pull his hair, and he said * * *, 'Get out of my road, or I will kill you and throw your body on top of hers.'" * * * Then from there he went to the kitchen. * * * He was looking through the drawers, and I asked him what he was looking for, and he said, 'Never mind.' * * * I was so scared that I ran out of the place."

Defendant took a meat grinder from a kitchen drawer and beat Florence (or her body) severely about the head and face until the handle of the meat grinder broke. Three of her teeth were knocked out. Defendant then obtained a butcher knife from a kitchen drawer, cut her throat five times, ripped open her clothes, twice cut her from the pubic symphysis to the lower border of the breasts, pulled out her intestines, and cut each of her thighs.

The police arrived at the residence at about 7:25 p.m. As they approached the house they saw, through the glass of the door, defendant rising from the place where, they later determined, Florence's body lay. As they opened the door defendant was walking into the kitchen, carrying the meat grinder. He started to wash it at the sink and they arrested him. The butcher knife, bent and bloody, was partly concealed under a pile of clothing which lay on the floor near the body. The neck and other pieces of a broken bottle which bore the label, "Muscatel," were on the floor. (There is a conflict in the evidence as to whether this bottle had been carried into the house by defendant.) Defendant did not appear to be intoxicated although it was apparent that he had been drinking. On his head was a superficial cut about one half inch long.

Both on the night of November 12 and on November 13 defendant voluntarily stated to police officers that the killing was

premeditated and expressed the hope that he would receive the death penalty. He said that he repeatedly attacked deceased in the various manners above stated because "she was still breathing and moaning * * * she still seemed to be alive. * * * She wouldn't die." After his arrest he asked "ten or twelve times on the way to the Station—if we were sure that she was dead. * * * And when we assured him that she was dead, he said, 'Well, I did a good job, didn't I?'" When he arrived at the police station defendant, without being requested to do so, said he would like to make a statement. He further said that "he would like to have the representatives of the Press there to get his story." He had previously twice described the killing in detail but had refused to state any reason for his actions. That, he had several times said, was "a secret that I will take to my grave." However, at the station he not only again described the killing in detail but also, in a statement which was reduced to writing, thereafter read by the defendant and signed by him, he said, that "one of the reasons he had done so and had premeditated doing so for quite a long time past, was the fact that his wife had been intimate with * * * her step-father." In the signed statement it further appears that defendant was asked, "Did this killing tonight result in any way from * * * [the step-father's] causing your arrest for drunkenness?" and answered, "It was the arrest and by him being intimate with her. It was both. I even told him that the next time I was arrested I would be arrested for a good charge. I kept my word. Too bad I didn't kill him too. * * * Last week I thought it over but tonight it came to the climax." Such statement also shows the following questions and answers:

"Q. You had planned to kill your wife before you got drunk? A. Definitely.

"Q. When did you start drinking today? A. This morning at 9:30.

"Q. You had planned to kill before you started drinking this morning? A. Yes, absolutely, when I was sober.

"Q. Is there anything more that you want to add to this statement? A. I don't

know. I don't see anything that would help me, because I'm going. I know that.

"Q. Mr. Honeycutt, this statement has been made freely and voluntarily without any promise of reward or immunity or any threat or force or violence used on you?

A. Yes, I asked to make the statement, didn't I?

"Q. If after reading this statement you find it to be true, are you willing to sign it?

A. Yes, if everything is there that I brought up, yes. Why shouldn't I? I'm gone anyway."

Defendant in his testimony did not deny the substance of the above recited matters, but testified that he did not recall his reason for returning to the home of Florence's family on the evening of November 12, that he did not recall speaking with Florence's stepfather through the kitchen window, that he remembered breaking the front window with the jar and flower pot and starting to go through the window and "it felt to me that I was hit on the head with something, and the next thing I remember is that I saw my wife laying there, and she had been cut." He said, in response to specific questions, that he did not remember striking Florence or "doing anything to her." Upon having his attention called to the statement which he had signed, in which he related in detail his hitting her with the sausage grinder, with his fists, stamping her with his feet "in the ribs, in the face, and in the stomach," and being asked if he remembered "making that statement to the officers at that time," he gave the following explanation: "I remember very well making a statement to that effect, but the reason I made that is for the simple reason I saw the meat grinder and the butcher knife and so forth, and evidently any person that would look at it could tell how the body had been mistreated by seeing those weapons laying there, that it had been mistreated by a knife and a sausage grinder." He also explained that he had come to the conclusion that he had jumped on the body because "my feet were sore and then I had blood on my shoes, and lower portions of my trouser legs." As to his statement to the police that the killing was "planned and premeditated, move by

move," he explained that he said that because "after realizing what I had done, I wanted to die. * * * As far as planning it, I never had." He testified, on cross-examination, that he had never accused Florence's step-father of being intimate with her and that he (the defendant) had not felt any ill will toward him on any account.

The jury were instructed in the language of the Penal Code (§§ 187-189) that:

"Murder is the unlawful killing of a human being, with malice aforethought.

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and *premeditated killing*, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murder are of the second degree."

[1] Defendant complains of two instructions given in connection with an explanation of these statutory definitions. The first is the illogical and disapproved former stock instruction that "certain kinds of murder * * * carry with them conclusive evidence of premeditation. * * * Where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statute [Pen. Code, § 189], here the occasion is made conclusive evidence of premeditation. * * *" As pointed out in *People v. Valentine* (1946), 28 Cal.2d 121, 123, 135, 169 P.2d 1, 9-11, and in *People v. Bernard* (1946), 28 Cal.2d 207, 211, 169 P.2d 636, 639 (where the instruction is quoted at length), "the fact that a killing is committed in the perpetration of, or attempt to perpetrate, one of the five felonies, enumerated in section 189 of the Penal Code is not conclusive, or necessarily any, evidence that such killing was willful, deliberate and premeditated.

Even where the killing [murder] in perpetration or attempted perpetration of one of the named felonies is unintended and accidental, nevertheless, as held in *People v. Lindley* (1945), 26 Cal.2d 780, 791, 161 P.2d 227, "the offender "is guilty of murder of the first degree by the force of the statute." * * * Killings [murders] by the means * * * under discussion are murders of the first degree because of the substantive statutory definition of the crime. Attempts to explain the statute to the jury in terms of non-existent 'conclusive presumptions' tend more to confuse than to enlighten a jury unfamiliar with the inaccurate practice of stating rules of substantive law in terms of rules of evidence." Defendant, however, does not point out, and there does not appear to us, any respect in which the giving of the erroneous instruction was prejudicial in this case.

[2,3] Defendant further complains of the giving of the repeatedly criticized stock instruction that "There need be * * * no appreciable space of time between the intention to kill and the act of killing. It is necessary only that the act of killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing. A man may do a thing * * * deliberately * * * from a moment's reflection as well as after pondering over the subject for a month or year. He can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation." The first two sentences of the quoted instruction are abstractly correct (but likely to be misleading) statements of law. The last two quoted sentences are clearly erroneous. It is misleading to encourage a jury to find that an act is truly deliberate though it come instantaneously from but "a moment's reflection as well as after pondering over the subject for a month or year." And it shames the law as it violates the truth to say that a man can premeditate the moment

he conceives the purpose. ("[P]remeditate," according to Webster's New International Dictionary (2d ed.) means to "think on, and revolve in the mind, beforehand; * * * contrive and design previously.") As this court said in *People v. Bender*, (1945), 27 Cal.2d 164, 182-185, 163 P.2d 8, 19, "if an act is deliberate and premeditated even though it be executed in the very moment it is conceived, with absolutely 'no appreciable' time for consideration—then it is difficult to see wherein there is any field for the classification of second degree murder"; even the abstractly correct portion of the instruction (page 185 of 27 Cal.2d, page 20 of 163 P.2d) "emphasizes the rapidity with which thoughts may follow each other, [and in such a case] fairness requires a further instruction placing at least equal emphasis on the true * * * meaning of the terms. In other words, while the jury may be told that the brain can function rapidly they must not be misled into thinking that an act can at the same time be hasty, hurried, and deliberate or impulsive, unstudied, and premeditated. The extent of the reflection in every case, if it is to pass the test, must fairly and reasonably meet the ordinary and unquestioned significations of the test words." (See, also *People v. Valentine* (1946), supra, 28 Cal.2d 121, 169 P.2d 1, 9).

[4] In this case other, correct instructions, conflicting with the above quoted erroneous instruction, were given. Thus, after erroneously telling the jury that "A man may do a thing wilfully, deliberately and intentionally from a moment's reflection as well as after pondering over the subject for a month or year" and that "he can premeditate * * * the moment he conceives the purpose," the court correctly declared the very antitheses of those propositions. It advised the jury that "the adjective 'deliberate' and the verb 'premeditate' are used in these instructions in their common, well-known, dictionary meanings"; specifically, that "deliberate means formed, arrived at, or determined upon as a result of careful thought and weighing of considerations: as a deliberate judgment or plan; carried on coolly and steadily, according to a pre-conceived design; weighing facts and arguments with a view to a

choice or decision; careful in considering the consequences of a step; unhurried, characterized by reflection; dispassionate, not rash. Deliberation means careful consideration and examination of the reasons for and against a choice or measure. The verb 'premeditate' means to think on and revolve in the mind beforehand; to contrive and design previously." Furthermore, the jury were properly admonished (see *People v. Holt* (1944), 25 Cal.2d 59, 90, 91, 153 P.2d 21; *People v. Thomas*, (1945), 25 Cal.2d 880, 902, 156 P.2d 7; and *People v. Valentine* (1946), supra, 28 Cal.2d 121, 169 P.2d 1, 8) that "even though you are satisfied beyond a reasonable doubt that the defendant committed the homicide as alleged in the information and are further satisfied that he did so with the specific intent to kill, * * * the mere proof of such specific intent is not sufficient to establish the homicide as murder of the first degree. You must further be satisfied beyond a reasonable doubt that such intent to kill was formed after the defendant had deliberated and premeditated on his course of action. The verb 'deliberate' means 'to weigh in the mind; to consider the reasons for and against; to consider maturely; to weigh the arguments for and against a proposed course of action. Deliberation means careful consideration and examination of the reasons for and against a choice or measure.' The verb 'premeditate' means 'to think over, and revolve in the mind, beforehand; to contrive and design previously.' Both deliberation and premeditation must precede the forming of the intent to kill to constitute first degree murder."

[5] It is true that "In a case where there is a conflict in the instructions and the court erred in the giving of one or more of them, and where it is impossible to determine whether the jury followed the law as correctly or as incorrectly set before them, a new trial will be ordered if by such error the defendant's substantial rights were affected." (8 Cal.Jur. § 608, p. 633; *People v. Dail* (1943), 22 Cal.2d 642, 653, 140 P.2d 828.) This principle of law will be vigilantly enforced.

[6] But here, considering all the instructions together, and in the light of the

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evidence, we cannot say that in this case the jury were misled by the erroneous instructions of which defendant complains. Upon any rational view of the evidence and instructions the verdict cannot reasonably be deemed to have been the result of a misconception of the law. Under such circumstances a reversal of the judgment is not required. (Cal.Const. art. VI, § 41½.)

[7] Defendant urges that "The very manner and means by which the homicide was committed in themselves negative the elements of 'premeditation and deliberation' as they have been defined in their applicability to first degree murder. These factors together with the defendant's intoxication establish the homicide as one of murder of the second degree," and that this court should exercise its power to reduce the degree of the crime. We agree with the People that the series of violent, criminal acts of defendant, once he had actually started to make his kill, does not establish that, despite the evidence to the contrary, the determination that he would kill could not have been deliberate and premeditated. The jury impliedly found that such acts indicated, rather, a continuity and singleness of purpose. And the question as to the effect of defendant's intoxication, if any, was for the jury and they, adequately instructed on the subject, impliedly found against defendant's contention. It may be noted, in this connection, that the evidence is ample to support a finding that, in the hour before the killing, the defendant deliberately resorted to the use of intoxicants with the object of dulling any compunctions he thought might otherwise hamper him in carrying out the plan he had formed.

Defendant does not contend, and it does not appear, that there was prejudicial error in the trial of the issue of his legal sanity.

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, J., concurred in the judgment.

1. Gifts ⇨47(3)

Where a confidential relation exists between an aged father and daughter and father conveys his property without consideration to daughter to exclusion of other children, a presumption of fraud and undue influence arises, and donee has burden of going forward and establishing that transaction was fair and free from fraud or undue influence.

2. Appeal and error ⇨1010(1)

Whether donee has overcome presumption of fraud and undue influence arising from conveyance of property by aged father without consideration to daughter in confidential relation to exclusion of other children is a question exclusively for trial court, and, to justify reversal of trial court's finding that there was no unfairness, fraud, or undue influence, it must appear that there is no substantial evidence to support such finding.

3. Appeal and error ⇨989

Appellate court's jurisdiction begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, that supports findings of trial court, and, when two or more inferences can be reasonably deduced from the facts, reviewing court is without jurisdiction to substitute its determination for that of the trial court.

4. Gifts ⇨47(3)

Evidence established existence of a confidential relation between father 86 years of age and daughter with whom he lived and that he transferred all his property to her, and hence donee had the burden of going forward with evidence to show that such transaction was fair and free from fraud or undue influence.

5. Gifts 49(2)

Evidence sustained trial court's finding that transaction by which 86-year-old man, one month before death, transferred his realty and bank account to daughter with whom he lived to the exclusion of three other daughters, was free from fraud or undue influence.

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Vincencia Azevedo, as administratrix of the estate of Francisco Rodrigues Camacho, also known as Francisco R. Camacha, deceased, against Christina Thorndike to set aside transfers by gift of realty and a bank account. Upon defendant's death after trial, Dorothy M. Leavitt, as administratrix of her estate, was substituted as respondent on appeal. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

Frank S. Roderick, Augustin Donovan, and Louis B. DeAvila, all of Oakland, for appellant.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for respondent.

SCHOTTKY, Justice pro tem.

Appellant, as administratrix of the estate of her father, commenced an action to set aside certain transfers by gift made by decedent to Christina Thorndike, another daughter. The property involved consists of two parcels of real property and a bank account. The validity of the transaction is attacked in four causes of action, predicated respectively upon the grounds of (1) fraud; (2) undue influence; (3) unsoundness of mind; and (4) lack of proper execution. The trial court found in favor of defendant upon all four causes of action, and this appeal is from the judgment entered in accordance with said findings. After the trial of the action defendant Christina Thorndike died, and the administratrix of her estate has been substituted as respondent upon this appeal.

Appellant has expressly abandoned the grounds of unsoundness of mind and im-

proper execution of the two deeds, so that the only issues before us on this appeal relate to the first and second causes of action, namely, fraud and undue influence.

Appellant's basic contention, urged with great earnestness in her brief and upon the oral argument, is that the evidence was such as to indicate that both fraud and undue influence had been presumptively established, and that the burden was then upon defendant to go forward with proof sufficient to show fairness and lack of undue influence. Appellant contends that respondent has failed to sustain that burden.

Before proceeding to discuss appellant's contentions as to the insufficiency of the evidence we deem it proper to review briefly the general principles applicable to such cases.

It is stated in 20 Cal.Jur. at page 445: "In one case the Supreme Court observed: 'Where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer.' The rule is the same where the disposition of the parent's property is shown to have been effected, not by a transaction *inter vivos*, but by last will and testament. In its operation this presumption requires the beneficiary to assume the burden of showing that the donor acted voluntarily; and, if he fails to establish facts from which volition may be inferred, the transaction will be held to be void."

In *Soberanes v. Soberanes*, 97 Cal. 140, at page 145, 31 P. 910, at page 912, the court said: "There is no doubt as to the principle applicable to cases of this kind. Transactions like the one under consideration are watched by courts of equity with the most scrutinizing jealousy, and are generally held to be presumptively void. They will be set aside upon the discovery of the least fraud, and every presumption ought to be indulged against them. The person who makes the donation and bestows the confidence is not bound to show that any

imposition has been practiced upon him. It is sufficient for him to establish intimate and confidential relations with the donee. Some of the cases hold that undue influence is not to be inferred from the relation of parent and child, where the gift is from the parent to the child (*Millican v. Millican*, 24 Tex. 426, 446); but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer. *Todd v. Grove*, 33 Md. 188, 194, *Highberger v. Stiffler*, 21 Md. 338, 352, 83 Am.Dec. 593."

And in *Campbell v. Genshlea*, 180 Cal. 213, at page 224, 780 P. 336, 341, the court said: "It is to be remembered that in a case involving a purported gift inter vivos based upon an alleged consideration of love and affection, where the donee is a daughter having the control and direction of the aged donor, a strong presumption of confidential relation arises which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property. *Nobles v. Hutton*, 7 Cal.App. 14, 93 P. 289."

In the *Estate of Hansen*, 38 Cal.App.2d 99, at page 116, 100 P.2d 776, 785, in which case a hearing was denied, the court said: "It is true the authorities hold that the establishment of a presumption does not have the effect of shifting the burden of proof from the party upon whom the affirmative of an issue rests. *Scarborough v. Urgo*, 191 Cal. 341, 216 P. 584; *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 P. 481; *Estate of Eakle*, 33 Cal.App.2d 379, 91 P.2d 954; 10 Cal.Jur. 783, sec. 88; 68 C.J. 755, sec. 449. But when a presumption of undue influence is raised by showing the existence of a confidential relationship, coupled with activity on the part of the proponent of a will, a prima facie showing of undue influence is thereby established which, in the absence of evidence to the contrary, necessarily has the effect of invalidating the will

because it is then not the result of the free will or volition of the testator. It logically follows that the presumption necessarily results in invalidating the will on that account. Under such circumstances the presumption becomes controlling. To overcome that prima facie showing it becomes necessary for the proponent to rebut the presumption by evidence which, at least, will have the effect of balancing the prima facie showing, * * *" See also *Jorgensen v. Dahlstrom*, 53 Cal.App. 2d 322, 127 P.2d 551.

[1-3] From the foregoing authorities we believe that the rule may be stated to be that where, as in the instant case, a confidential relation exists between an aged father and a daughter, and the father conveys his property without consideration to said daughter to the exclusion of his other children, a presumption of fraud and undue influence arises, and the burden is then upon the donee to go forward and establish that the transaction was fair and free from fraud or undue influence. The donee must rebut the presumption by evidence which is sufficient to overcome it, and whether the donee has overcome the presumption is a question exclusively for the trial court. Before an appellate tribunal would be justified in reversing the finding of the trial court that there was no unfairness, fraud, or undue influence on the part of the donee, it must appear that there is no substantial evidence to support such finding. As this court said in *Laherty v. Connell*, 64 Cal.App.2d 355, at page 357, 148 P.2d 895, at page 896: "In order to prevail on this ground, the appellants must demonstrate that there is no material, credible evidence or no reasonable inference from the evidence to support the challenged findings. As was stated in the frequently cited case of *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183: '* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted' that supports the findings, and that when 'two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for

those of the trial court.' See also *Albaugh v. Mt. Shasta Power Corporation*, 9 Cal.2d 751, 73 P.2d 217; *Bellon v. Silver Gate Theatres, Inc.*, 4 Cal.2d 1, 47 P.2d 462; *Raggio v. Mallory*, 10 Cal.2d 723, 76 P.2d 660; *In re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689."

With these fundamental principles in mind, we shall give a brief review of the evidence.

On February 2, 1942, the date of the execution of the deeds and the establishing of the joint bank account, decedent, Francisco R. Camacho, was 86 years old and had two daughters beside appellant administratrix and defendant Christina Thorndike. He died on March 1, 1942, at a hospital in Oakland. During December, 1941, and January and February, 1942, decedent was living with defendant at her home in Mill Valley. During the period from December 22, 1941, to January 10, 1942, decedent had to leave defendant's home on two occasions for hospitalization. It also appears that decedent lived with defendant some time during November, 1941, and that he had to go to the hospital "around Thanksgiving."

Defendant testified that her father "had confidence" in her, and "toward the last" he did not have confidence in her other sisters "at all." She also testified that she had told her father—apparently both before and at or about the time of the transfers—that she would "take care of him always," but she likewise said that she would take care of her father if he "wouldn't leave me a red cent." She testified that she believed her father was always of sound mind and that he was always "a very determined man, he had a mind of his own."

Several days prior to February 2, 1942, decedent and defendant went to the law offices of Silverstein & Silverstein, in Oakland; and, as defendant testified, her father told his attorney, Bernard Silverstein, that he wanted to deed his property to defendant as the "others did not care for him at all." Defendant said that her father never talked to her about what he was going to do with his property until he took her to Silverstein's office. She said that

the lawyer told her father that if he deeded his property to defendant she would then own it and he would get the rents during his life, but could not mortgage or sell the property.

The first visit occurred on a Friday, and Silverstein had defendant and her father return the following Monday (February 2, 1942) at which time the deeds were executed. Before the deeds were executed, Silverstein, together with decedent and defendant, went to the bank and had decedent's account changed to the joint account herein concerned. After all the transfers had been concluded, decedent and defendant returned to defendant's home in Mill Valley. During her examination by plaintiff under Code of Civil Procedure section 2055, defendant implicitly denied that her father finally departed her home through any fault or compulsion on her part. In this respect, she said that her father was going to Oakland to collect the rent on his property ("toward the end" of February, 1942), and that she accompanied him as far as San Francisco. He then sent her back to Mill Valley, he saying "Now, don't treat me like a baby because I am capable of taking care of my own affairs." She then went home and, while he was in Oakland, he had a stroke—as the result of which he was taken to the hospital in Oakland. It was while in the hospital (and without ever returning to defendant's home) that the father died.

Plaintiff's witness, Caroline A. Marithew, testified that she had been a neighbor of decedent for more than 15 years prior to his death, and that she knew him very well. She thought that during the last six months prior to his death he was of unsound mind. She said he was forgetful—even to forgetting where he lived. She last saw him about February 25, 1942, when he came to her home in Oakland, the day that he had the stroke. The witness was then asked as to what conversation she had had with decedent on that day, and upon objection being made that such conversation was inadmissible as to the first and second counts (fraud and undue influence), the witness was permitted to answer, but the court limited it solely to the issue of undue

influence. Counsel for appellant indicated agreement with the position of defendant and the court that the conversation with decedent was to be limited to the undue influence issue. Mrs. Marithew testified that on that day decedent told her that he was going to "change" some papers he had made out to his daughter "in regard to the property." Defendant then moved to strike that testimony, and the court stated, "It may be limited only to the ground of undue influence." She also testified that decedent told her that "his daughter had thrown him out," and "he was going down to Oakland to see about that paper in regards to the property." On cross examination Mrs. Marithew said that decedent knew his four daughters, knew his properties and was a very frugal man. She also said that decedent was "at times" a man of considerable determination.

Plaintiff's witness, May Victor, testified that she had known decedent since 1927 and that she knew him "pretty well." She thought there was something the matter with decedent's head the last few months of his life. She said she had seen decedent strike himself on the head and say, "I am crazy, I don't know what I'm doing." She also said decedent wanted to deed her a home, but that she did not want it. She said that in early December, 1941, decedent told her that he would not "leave anything to Mrs. Thorndike" because she had borrowed \$800 from him and failed to return it. (It appears that the witness had housed and cared for decedent in her own home during a several day illness in early December, 1941.) Mrs. Victor testified that on February 15, 1942, decedent told her that he had deeded his property to defendant because she had promised to care for him "as long as he lived." The record shows that the court admitted her testimony of that alleged conversation "limited though to the single ground of undue influence."

After a similar objection by defendant, and an identical ruling by the court—i. e., limiting the testimony to the sole issue of undue influence—Mrs. Victor testified that on February 25, 1942, decedent came to her house in Oakland and told her that "his daughter forced him to give the property to

her" and "after she had the deed in her hands she start to treat the father awful mean," that she told him to "get out of the home and stay out." The witness also testified that decedent told her that he was going to see Silverstein "to have that changed all around." He wanted the witness to go with him, but she would not—and she testified "that's the last I see the old man."

Plaintiff testified that while decedent was still living in Oakland he asked her why defendant never came to visit him. She said that they took decedent from the hospital to defendant's home on December 11, 1941. She also said that on January 28, 1942, her father told her that he was "going home," and that he "wasn't happy" in defendant's home—that he "was neglected and he wasn't getting the attention that he should."

On cross-examination, plaintiff testified that she had never taken care of her father because she had been a "very sick woman" since 1938, although he had lived with her for three years after her mother's death in 1917. She also said that in 1938 defendant suggested to her that they have their father declared incompetent.

Defendant's only witness was Bernard Silverstein, the attorney who interviewed decedent concerning the transfers and then arranged the necessary papers. The witness had apparently handled legal matters for decedent since 1919 or 1920. He testified that he prepared the February 2, 1942, deeds for decedent; and said that several days prior to that date decedent, together with defendant, came to his office without prior appointment. Decedent told him that he wanted to deed his properties to defendant, and wanted to "put her name on his bank account." Decedent told the witness that he desired to do such because defendant "has no husband to take care of her, and the others all have husbands, and I want to give the property to her." Silverstein told decedent that he would need certain "papers" and told decedent to bring them to him and they could "talk it over some more."

Decedent and defendant returned on February 2, 1942, with the original deeds,

insurance policies, title insurance policies and his bank book—and also a will and codicil which Silverstein had previously drawn for him. Silverstein then explained to decedent what would be the result of the transfers, and decedent signified that he understood. He then sent defendant and decedent to the bank to effect the transfer of the bank account, and, after Silverstein dictated the terms of the deeds to his secretary, he went to the bank to meet them. At the bank, Silverstein requested the bank's Portuguese interpreter to explain to decedent the import of the account transfer and the deeds, and decedent indicated his understanding and approval. They then went back to Silverstein's office and the deeds were executed and acknowledged. Decedent then handed Silverstein the will and codicil, asking that he destroy them; but, after Silverstein said that he did not want to "tear up other people's papers," decedent tore up the will and codicil. At decedent's solicitation, Silverstein recorded the two deeds a few days later. Silverstein thought that on February 2, 1942, decedent was of sound and disposing mind, knew his property and the extent thereof, and knew his children. He also testified that at a previous consultation had between him and decedent's daughters (apparently a considerable time before 1942), plaintiff and another of the sisters refused to take decedent into their homes to care for him, and the defendant said that she would take him. At the time the transfer of the bank account was made, decedent told Silverstein that he "trusted" defendant.

[4] It is clear from the evidence that a confidential relation existed between decedent and defendant and that decedent transferred all of his property to her. Therefore, under the authorities hereinbefore set forth it became the duty of defendant grantee to "go forward" with evidence to show that the transaction was fair and free from fraud or undue in-

fluence. However, the conclusions reached by the trial court should not be disturbed unless there is no substantial evidence to support those conclusions. As was said by this court in *Laherty v. Connell*, supra, 64 Cal.App. at page 363, 148 P.2d at page 899: "* * * they did prove the facts that threw the burden upon appellants [donees] to explain and justify the transaction. *Whether they satisfied that burden was a question exclusively for the trial court.*" (Emphasis added)

[5] Appellant contends most earnestly that defendant donee has not satisfied that burden, and by emphasizing the evidence produced by her and by discounting or disregarding some of the evidence produced by defendant, makes a quite persuasive argument that the evidence is insufficient as a matter of law to support the findings. However, the evidence in this case, as hereinbefore summarized, shows clearly that there is ample evidence in this case to justify the findings of the trial court that the transaction was free from fraud or undue influence. For an appellate tribunal to say, upon the record here, that the learned trial judge was not justified in holding that the presumption of fraud and undue influence was overcome by defendant, would, in our opinion, be a usurpation of the legitimate function of the trial court. The trial judge was no doubt satisfied that the decedent was fully aware of the nature and effect of the transaction, that he wished defendant to have his property, that there was no fraud on the part of defendant and that there was no undue influence exerted upon decedent. These were all matters that it was the exclusive province of the trial court to decide, and there is ample evidence in the record to support the conclusion reached by the trial court.

In view of the foregoing the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

76 Cal.App.2d 207

FIRLOTTE et al. v. JESSEE.

Civ. 7250.

District Court of Appeal, Third District,
California.

Sept. 24, 1946.

1. Appeal and error ⇨1010(1)

Determination of trial court resolving, upon substantial evidence, a question of fact, will not be disturbed.

2. Evidence ⇨130

The rule of "res inter alios acta" does not exclude any evidence which affords any reasonable presumption or inference as to the principal fact or matter in dispute. Code Civ.Proc. § 1868.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Inter Alios Acta".

3. Evidence ⇨99

Evidence is relevant if it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred.

4. Evidence ⇨129(1)

Proof of the existence of other facts, the occurrence of other events, the acts or conduct upon other occasions which have a relevant and material bearing upon the fact in issue is admissible. Code Civ.Proc. § 1868.

5. Animals ⇨22**Witnesses** ⇨319

Where sole issue in suit for breach of oral agreement of sale of pasturage was whether vendor had reserved right to pasture his own cattle on the land, testimony that vendor had offered to sell the same pasture to witness without any such reservation was admissible as relevant to disputed issue and as affecting credibility of vendor as a witness. Code Civ.Proc. § 1868.

6. Appeal and error ⇨970(2)

Admissibility of evidence of a collateral fact being addressed primarily to sound discretion of trial court, its action in receiving such evidence will not be reversed unless such evidence is without any weight

in determining the issue before the court. Code Civ.Proc. § 1868.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Suit by J. M. Firlotte and another against N. C. Jessee for breach of oral agreement of sale of pasturage during grazing season. Judgment for plaintiffs, and defendant appeals.

Judgment affirmed.

Peters and Peters, of Chico, for appellant.

Ware and Ware, of Chico, for respondents.

PEEK, Justice.

The present controversy arose out of an oral agreement between plaintiff Firlotte and defendant Jessee wherein it was agreed that defendant would sell to plaintiffs for \$600 the feed on 200 acres of land for the 1944 grazing season, together with the right to dispose of the same or use it as plaintiffs saw fit, reserving, however, to himself the adjoining 56 acres which, separated from the rest of the property by a narrow neck, were to be fenced off by defendant for the purpose of pasturing some of his cattle thereon. Plaintiffs went into possession and immediately put a band of ewes and lambs on the premises. After a period of eleven days the feed had been topped and the flock was temporarily removed and finished on other feed owned by plaintiffs. Approximately six weeks later plaintiffs returned and found cattle belonging to defendant grazing on the land, and all of the feed gone. Thereupon Firlotte demanded the return of a portion of the consideration which he had paid to Jessee upon the consummation of the agreement. Jessee refused his demand, and suit was filed. The trial court found for plaintiffs and entered judgment accordingly. Upon the denial of defendant's motion for a new trial, this appeal followed.

By reason of the nature of the single issue herein presented, a summary of the entire testimony of the parties does not appear to be necessary. Suffice it to

say, in the words of appellant, that "As between the testimony of the parties, there is a complete deadlock; each party contradicted the other on all salient points."

Plaintiffs by their complaint alleged, and it likewise was contended at the trial, that their right to use or dispose of the pasturage was exclusive of any interest of defendant; that defendant made no request for a reservation nor was it otherwise agreed that he should be allowed to pasture stock on said 200 acres; that by pasturing his cattle thereon defendant breached his contract with plaintiffs; and that said action on his part wholly destroyed the value of the pasturage to plaintiffs. Defendant by his answer admitted the making of the agreement with Firlotte, but asserted that he had reserved to himself the right to pasture cattle on said premises.

[1] Counsel for appellant concedes it to be the rule that, where the trial court, upon substantial evidence, has resolved a question of fact, such determination will not be disturbed on appeal. Nevertheless, he contends that the conclusion of the trial court herein was reached, "at least in part," by reason of the admission of improper evidence without which "respondents' testimony would not have had the preponderance required." In addition, he urges that because of the contradictory statements of the parties "if the case were resolved upon their testimony, the preponderance required by law would not be with respondents." His argument in support of this contention is that the introduction of the attacked testimony "turned the preponderance of the evidence."

The testimony in question was given by one Frank Faniani, and was to the effect that defendant Jessee approached him in the city of Chico in the spring of 1944 with the offer to sell him the pasturage on the said 200 acres; that Jessee told him Firlotte had the refusal of it; that he told Jessee he would not look at the property then, but would do so if Firlotte did not take it; that according to his recollection the price asked was \$3 per acre, that Jessee said nothing to him about reserving the right to pasture his cattle on the entire

200 acres but did say he desired to fence off a small piece for that purpose.

It is appellant's contention that, as said testimony related to an offer not made "within the presence of either respondent" and was given by a stranger to the matter in controversy, therefore "the general rule of law long established is that res inter alios acta are incompetent evidence." In support thereof he cites and relies solely upon 20 Am.Jur. sec. 302, page 280, and *Harrington v. Border City Mfg. Co.*, 240 Mass. 170, 132 N.E. 721, 18 A.L.R. 610.

[2,3] While the text cited enunciates the general rule in accordance with appellant's contention, in the same section it is further observed that "This rule obviously excludes evidence of all collateral facts or of those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute." In other words, any evidence which affords *any reasonable presumption or inference as to the principal fact or matter in dispute* is proper evidence. That this is the true meaning of the statement is well illustrated by the only California case cited by the text writer under said section. *Remy v. Olds*, 4 Cal.Unrep. 240, 34 P. 216, 21 L.R.A. 645. In that case one of the grounds urged for reversing the judgment was the action of the trial court in striking certain testimony as being entirely collateral and having "no bearing on the case." The reviewing court, in discussing the question thus raised, stated, at page 246 of 4 Cal.Unrep., at page 218 of 34 P.: "That the evidence was upon a collateral issue is not conclusive against its relevancy. The question was whether the fact it tended to establish would tend to prove or disprove the fact at issue. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred."

[4] Additionally it is to be noted the next succeeding section of the text cited by appellant (20 Am.Jur., sec. 303, p. 281) states, under the heading, "Limitations on General Rule," that "Proof of the existence

of other facts, the occurrence of other events, the acts or conduct upon other occasions which have a relevant and material bearing upon a fact in issue before the court are always admissible in evidence."

The case of *Moody v. Peirano*, 4 Cal. App. 411, 88 P. 380, 382, is pertinent to the question raised by appellant. In that case plaintiff alleged that solely in reliance upon defendant's representation and warranty he purchased certain designated seed from defendant but that the seed was not of the variety warranted by defendant but was of another and inferior grade. At the trial a witness called by plaintiff was allowed to testify over defendant's objection that he likewise purchased seed from defendant under the same circumstances, and that the seed so purchased was of an inferior grade. On appeal defendant contended that said testimony should have been excluded under the doctrine of *res inter alios acta*. The reviewing court held that although evidence at all times is to be confined to the issues, nevertheless, "it is not necessary that it should bear *directly* on the issue. It is admissible if it *tends* to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it." Furthermore, the court said: "Whether the collateral fact upon which the evidence is offered is directly connected with the matter in dispute, and is essential to its proper determination, is by the concluding portion of the section (1868, C.C.P.) placed within the discretion of the trial court for primary determination. Unless it can be seen that the evidence is without any weight whatever in determining the issue, the action of the court in receiving it will not be reversed."

Said portion of section 1868 of the Code of Civil Procedure, referred to in the foregoing opinion, reads as follows:

"Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

Another case in point is *Bone v. Hayes*, 154 Cal. 759, 99 P. 172, 176, which cites with approval the *Moody* case, *supra*, and, quoting from 1 Wigmore on Evidence, section 377, states that "While, ordinarily, evidence that a certain contract was made with A. is not admissible to show that a similar contract was made with B., it has repeatedly been held that such evidence may, in the discretion of the court, be allowed, where the circumstances indicate a strong probability that the course followed in one instance would be followed in others."

[5,6] It is the latter situation which prevails herein. By reason of the circumstance that defendant's sole defense to plaintiffs' action was a question of fact relating to the claimed reservation by him of a right to use the same land for pasturage of his cattle and the circumstance that defendant also had offered the identical land to the witness Frank Faniani without such a reservation, said testimony therefore could reasonably be said to have a direct connection with the question in dispute, and to be essential to its proper determination, as well as affect the credibility of the defendant as a witness. Even if it be concluded that such testimony was collateral, said code section requires only that such issues are to be "avoided," not excluded. And as said section provides that the admissibility of such testimony is addressed primarily to the sound discretion of the trial court, therefore unless it can be said that the evidence "is without any weight whatever in determining the issue, the action of the court in receiving it will not be reversed." *Moody v. Peirano*, *supra*, 4 Cal.App. at page 418, 88 P. at page 382.

The other authority cited by appellant (*Harrington v. Border City Mfg. Co.*, *supra*) is of no benefit to the solution of the precise problem we have been discussing.

For the foregoing reasons the judgment appealed from is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

76 Cal.App.2d 243

PEOPLE v. PETITT.

Cr. 4007.

District Court of Appeal, Second District,
Division 3, California.

Sept. 25, 1946.

1. Criminal law ⇨982

Court had power to grant probation for five years to one who pleaded guilty to first degree burglary, since punishment for burglary in the first degree is imprisonment in the penitentiary for not less than five years and a trial court has power to grant probation for any term not longer than maximum time for which defendant could have been sentenced. Pen.Code, §§ 461, 1203.1.

2. Criminal law ⇨982

Order revoking probation of one who was convicted of crime during probation was timely, where revocation order was made during probationary period.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Ben Edward Petitt was convicted of burglary in the first degree on his plea of guilty, and he was granted probation for five years on condition that he serve the first six months in the county jail and make restitution. From a judgment revoking the defendant's probation after his conviction in federal court for violating the Dyer Act, he appeals.

Judgment affirmed.

Ben Edward Petitt, in pro. per.

Robert W. Kenny, Atty. Gen., and Alberta Gattone, Dep. Atty. Gen., for respondent.

WOOD, Justice.

Defendant, appearing for himself, appeals from the judgment and sentence imposed upon him.

On January 8, 1942, the defendant, represented at that time by the public defender, pleaded guilty to a charge of burglary. His request for permission to apply for probation was granted, and the matters

of probation, fixing the degree of the crime, and pronouncing judgment were continued to January 29, 1942. On said date, the court found that the crime was burglary of the first degree, suspended the proceedings, and granted the defendant probation for five years upon the conditions that he serve the first six months in the county jail and that he make restitution.

On October 13, 1942, the court made the following order: "Probation is modified as follows: Defendant is allowed to leave the State." The record herein does not show the reason for such modification, but the defendant states in a letter to this Court, which letter he sent in lieu of a brief, that "I asked and received permission from the probation department to join the army." It appears from the original file in the office of the clerk of the trial court that said order was based upon a report of the probation officer recommending the modification, and stating that "A letter is written asking permission to return to his home at Coffeyville, Kansas, where a better job can be obtained."

On September 7, 1944, the court made an order as follows: "Violation of probation is filed. Probation heretofore granted is revoked and a bench warrant is issued for the appearance of said defendant." That order was based upon a written report of the probation officer, filed on September 7, 1944, which stated that defendant had been convicted on March 20, 1944, in the Federal District Court at St. Louis of the crime of violating the National Motor Vehicle Theft Act, Dyer Act, 18 U.S.C.A. § 408; that he had been sentenced to the federal reformatory at El Reno, Oklahoma, for two years; and that he had arrived at the reformatory on March 24, 1944.

On October 13, 1945, the defendant was present in the trial court herein with his counsel, the public defender. On said date the court sentenced defendant to the penitentiary at San Quentin for the period prescribed by law. Soon thereafter he was taken to the penitentiary, and he is there now.

Defendant's letter to this Court, above referred to, will be regarded as his brief. The substance of his contention is that his

period of probation had ended before the court revoked the order of probation, and therefore the court did not have the power to sentence him. Apparently he considers that the order modifying probation whereby he was permitted to leave the State was an order terminating probation. He stated in his letter that he received mail stating that the probation was set aside. The record herein does not show that probation was terminated prior to the order of revocation on September 7, 1944, and the original file in the office of the clerk of the trial court does not show that probation was terminated before that date.

When the defendant was sentenced, a further report of the probation officer, filed October 11, 1945, was before the court. The reporter's transcript herein shows that the trial judge, prior to pronouncing judgment, submitted that report to defendant's counsel, and that his counsel, after having read it, stated "it would seem the defendant states his side of the story in the report." The defendant's statement, as shown therein, was in part that permission to leave the State was given in order that he might go to Kansas to work for a construction company in doing war work; that he got permission to join the army, but the army would not accept him; that he received two letters from "probation department saying that the probation was drop"; that he went to St. Louis and worked for an automobile company; that the owner of the company told him he could use any of the company's cars; he took an automobile of the company, with the owner's permission, and drove it from St. Louis, to his mother's home in Cleveland, Texas; that the reason for so doing was to take his pregnant wife to his mother's home; that he was arrested when he arrived there and was sentenced (in the Federal Court at St. Louis) to two years in the federal reformatory; that he was released from the reformatory on September 16, 1945, but was to be on probation on that charge for six months thereafter; that he came to Los Angeles immediately after his release from the reformatory and ob-

tained work at a warehouse company, which work he continued to do until he was arrested on the charge of violating probation herein; that he and his wife did not get along too well, were separated for a while, and when he tried to get her to come back home she called the police and "that's how they caught up on me on this violation of probation."

Although the defendant implies that he understood that order granting him permission to leave the State terminated his probation, and although he stated that he received mail stating that his probation was set aside, the probation officer's report states that defendant made his monthly probation reports until he was sentenced to the federal reformatory.

The probation report also shows that defendant, when he was a minor, was convicted of attempted "robbery" of a post-office in Texas, and that his sentence to a reformatory was suspended.

[1, 2] The trial court had the power to grant probation for any term not longer than the maximum time for which the defendant could have been sentenced. The punishment for burglary of the first degree is imprisonment in the penitentiary for not less than five years. Pen.Code, § 461. Therefore the court had power to grant probation for a period of five years. Pen. Code, § 1203.1. The order granting probation having been made on January 29, 1942, the five years' period of probation would not have expired until January 29, 1947. Since the order revoking probation was made on September 7, 1944, it was made during the probationary period, and therefore was made within proper time.

The pronouncement of judgment on October 13, 1945, was within proper time after the order revoking probation. *People v. Williams*, 24 Cal.2d 848, 854, 151 P.2d 244.

The court did not abuse its discretion in revoking probation.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

TINGEY et al. v. E. F. HOUGHTON & CO.

HULSIZER v. SAME.

Civ. 15153, 15154.

District Court of Appeal, Second District,
Division 1, California.

Sept. 20, 1946.

Hearing Granted Nov. 18, 1946.

1. Negligence ⇨27

A duty of care exists in the absence of privity of contract not only where article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril.

2. Negligence ⇨121(2)

The doctrine of *res ipsa loquitur* may be applied upon theory that defendant had control at time of alleged negligent act, although not at time of accident, provided plaintiff first proves that condition of instrumentality had not been changed after it left defendant's possession.

3. Explosives ⇨8

Where evidence established that liquid heat quench was a product that was safe for purpose intended if its manufacturer and those who used it exercised proper care and would not explode regardless of temperature unless some foreign substance, such as a nitrate or nitrite, was introduced into it, and evidence disclosed an explosion of such product, an inference of negligence of manufacturer was warranted provided plaintiffs further established that condition of product had not been changed after it left manufacturer's possession.

4. Explosives ⇨8

Plaintiff, to invoke *res ipsa loquitur* against manufacturer, with respect to explosion of a product that would not have exploded if manufacturer and those using it had used due care by showing that condition of product had not changed after product left manufacturer's possession, was merely required to adduce evidence permitting a reasonable inference that product was not accessible to extraneous harmful forces and that it was carefully handled by anyone who may have moved or touched it.

5. Explosives ⇨8

Substantial evidence warranted finding that decedent and injured plaintiff exercised due care for their own safety, that defendant's product was not tampered with after it left defendant's possession and that explosion was caused by a defect in defendant's product thereby authorizing application of doctrine of *res ipsa loquitur*.

6. Negligence ⇨136(6)

Whether evidence concerning precautions taken in process of manufacture is sufficient to dispel inference of negligence arising from application of doctrine of *res ipsa loquitur* in a situation where injuries result from the use of manufactured product is a question for jury.

7. Explosives ⇨8

Evidence that defendant specially made up the product of liquid heat quench to fill a particular order instead of taking it out of stock and that product, after delivery to plaintiffs' employer, was not accessible to extraneous harmful forces and that it was carefully handled but nevertheless exploded, authorized inference that defendant was negligent in preparing product.

8. Explosives ⇨8

Where evidence disclosed that explosions of liquid heat quench do not occur unless liquid heat quench salts or draw-temp salts are mixed or certain foreign materials are introduced into one or the other of them, even if evidence presented several probable causes of explosion, questions of where such contamination of products occurred and through whose negligence it was brought about were for jury.

9. Appeal and error ⇨1068(5)

Where record disclosed that the doctrine of *res ipsa loquitur* should have been submitted to jury, the fact that trial court did not instruct jury upon such doctrine did not deprive plaintiffs of its benefit where verdicts and judgments rendered thereon could legally be predicated upon doctrine under facts disclosed in record.

10. Explosives ⇨8

In actions for damages caused by explosion of liquid heat quench, manufactured by defendant, while such product

was being used in the manner in which its use was contemplated, evidence supported verdicts for plaintiffs.

Appeals from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Val Tingey and Gloria Tingey, minors, by and through their guardian ad litem, Virginia D. Tingey, and Virginia D. Tingey, individually, against E. F. Houghton & Company for the wrongful death of Neville Tingey, consolidated for trial with action by Raymond Hulsizer against E. F. Houghton & Company for personal injuries. From judgments for plaintiffs, defendant appeals.

Judgments affirmed.

Chase, Barnes & Chase, Stanley N. Barnes, and Donn B. Downen, Jr., all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod and Angus C. McBain, all of Los Angeles, Leonard J. Dieden, of Oakland, for respondents.

WHITE, Justice.

The two actions here involved were consolidated for trial and are presented on appeal upon a single set of briefs. One action is by the children and widow of Neville Tingey for his wrongful death; the other is by Raymond Hulsizer for personal injuries. Both actions are the outcome of an explosion which occurred in the plant of Fray Tool & Reamer Company, in which plant Tingey and Hulsizer were employed, the gravamen of the respective causes of action being the asserted negligence of defendant, E. F. Houghton & Company, in furnishing to Fray Tool & Reamer Company a chemical product represented and warranted to be a "liquid heat quench salt," suitable for use in heat-treating steel, but which in fact, because of the alleged negligence of the defendant, "was a different chemical compound that constituted an inherently and abnormally dangerous, noxious and explosive product" which exploded when heated to a temperature of 500 degrees. By its answers defendant admitted the sale of the product represented and warranted to be a heat-treating

salt effective for use in quenching high-speed steel and that it could be safely used and heated to 1500 degrees, but denied that it was guilty of negligence. As affirmative defenses defendant asserted that the explosion was an unavoidable accident, and further, that it was caused by the contributory negligence of plaintiff Hulsizer and the deceased Tingey. Trial before a jury resulted in verdicts in favor of the heirs of Neville Tingey for \$35,000 and in favor of plaintiff Hulsizer for \$7,500. From the judgments entered upon such verdicts these appeals are prosecuted.

The accident occurred April 9, 1943. For some time prior thereto decedent Tingey had been day foreman and respondent Hulsizer night foreman in the shop of Fray Tool and Reamer Company, located in Glendale, California. Both men were under the supervision of the witness James T. Partrick, the plant superintendent. The company was engaged in the manufacture of tools for the aircraft industry. Being unable to purchase cutters necessary for its operations, the company undertook to make its own, using an oil bath to quench the steel after it had been heated. The oil bath, however, was not satisfactory, and it was decided to use quench salts. About six weeks before the accident Mr. Partrick had a conversation with defendant's salesman, Mr. McCabe, who stated, according to the testimony of Mr. Partrick, that a salt manufactured by defendant under the trade name of "Liquid Heat Quench" was suitable for use in heat-treating steel at a "draw" of less than 1000 degrees and would transfer heat up to 1500 degrees. Mr. Partrick ordered from defendant, through Mr. McCabe, 100 pounds of "Liquid Heat Quench," 100 pounds of a salt which functioned at a lower temperature—approximately 400 degrees—, known as "Draw-Temp," and a 50-gallon drum of quench oil. These products were shipped from defendant's San Francisco plant to Fray Tool & Reamer Company, arriving a few weeks prior to the accident.

The witness Mr. Partrick further testified that the salts upon arrival were contained in two drums, one 28 to 30 inches high and 12 to 14 inches in diameter, with a snap-

lid cover; the other about 15 inches in diameter and about 25 to 28 inches high, with a screw-on cover; that the larger drum had no label, but bore a stencil on the top reading, "Liquid-Heat-Quench"; while the smaller bore a label with the warning not to use its contents in a container which had previously held potassium cyanide. About a week or so before the accident Mr. Partrick and decedent, Tingey, opened the containers and observed the contents. The liquid heat quench was a yellowish granular substance, slightly coarser than table salt, while the "Draw-Temp" was a solidified mass, a "hard chunk" of crystals, slightly lighter in appearance than the liquid heat quench. During this inspection Mr. Partrick took up a few grains of the liquid heat quench in his fingers. The covers were then replaced and the drums set along the west wall of the plant until the day of the explosion.

For the purpose of heat-treating the steel, the company had installed some weeks prior to the explosion, a "draw-pot" oven, consisting of a heavy cast-iron container, holding about 5 gallons, from one-half to one inch thick, supported in a gas-heated oven. Two other ovens, a pre-heating oven and a high-heat oven, were located near the draw-pot oven. The draw-pot oven had never been used prior to the explosion and the draw-pot itself was brand-new and perfectly clean.

On the afternoon of the explosion, Mr. Partrick testified, the drum of liquid heat quench was moved to within three or four feet of the draw-pot and the cover loosened. The draw-temp drum was "alongside" the liquid heat quench drum, but the liquid heat quench drum was between the draw-temp drum and the draw-pot. The decedent Tingey, had lighted the gas burner, but it was not yet hot when Mr. Partrick left the plant. At that time no salt had been placed in the pot. The explosion occurred, according to Mr. Partrick, "probably less than ten minutes" after he had left the plant. Upon examining the premises immediately after the explosion Mr. Partrick found part of the rim of the cast-iron pot on the draw-pot oven had been broken off—otherwise the pot was intact.

The standard in which it rested had been forced down about an inch, the gas was shut off, the connections to the oven were broken and the electrical connections twisted. He found pieces of the drum of liquid heat quench scattered over a thirty-foot radius. The bottom of the drum was in its original position and was coated with a substance resembling molten salt. The draw-temp drum was intact except for some dents. Its cover "was loosened, but it was not off." Several days later Mr. McCabe, appellant's salesman, called and took the drum of draw-temp away with him.

The plaintiff Raymond Hulsizer, a machinist by trade, had worked as foreman in the plant for about three months before the date of the explosion. After describing the premises and the equipment therein, the witness testified that the pre-heat oven and the high-heat oven had been in use for about three weeks prior to the explosion, but that the draw-pot oven had never been used. Each of the three ovens had its individual thermometer on the wall behind the ovens. Mr. Hulsizer described the draw-pot itself as one-half inch thick, eight to ten inches across, twelve or fourteen inches deep, holding about 2½ gallons. The standard into which it was set was of sheet iron, circular in form, containing a gas burner, and had a six-inch opening in front and two smaller holes beneath the burner.

Mr. Hulsizer arrived at the plant on the day of the explosion between 2:30 and 3 o'clock in the afternoon. The decedent Tingey was standing before the draw-pot looking into it. The witness stood alongside Tingey and observed salt in the draw-pot. He also observed a drum of salt three or four feet from the draw-pot. The cover of this drum was off. The salt in the drum was at a level four or five inches from the top of the drum and had the same appearance as the salt in the draw-pot. The draw-pot was about ⅔ full of salt. Mr. Hulsizer turned the drum around and found an inscription or label to the effect that the melting point would begin at 300 to 350 degrees F. At that time the salt showed no appearance of melting. He

described the salt in the pot as being grayish in color and slightly coarser than table salt. A minute or so after looking at the thermometer, the witness half-turned his head in response to a call from a workman, and at that moment an explosion occurred, followed by a second and much stronger explosion. Mr. Hulsizer testified that the draw-pot was still within his range of vision at the time of the first explosion, and that the flash of the explosion came from the draw-pot or was "in" the draw-pot.

The foregoing does not purport to bring out all the details developed by the direct and cross-examination of plaintiffs' witnesses. Reference to such further matters will be made in our discussion of the points on appeal made by appellant.

The plant manager of defendant company testified, substantially, that he had been with the company for five years and held a degree in chemistry; that Liquid Heat Quench was a "copyrighted" name of the product in question; that in determining what went into their products the company used a system of "precision control"; that representative samples were taken of each raw material chemical shipped to the defendant's plant, in accordance with a procedure set forth by the American Society of Chemists; that chemicals were identified by code numbers in order to prevent disclosure of trade-secret formulas. As an illustration, the witness stated that in a shipment of 100 barrels, 4-ounce samples would be removed from 25 barrels at random, consolidated, and tests run in the plant laboratory, operated by qualified chemists. For instance, "on potassium nitrate we run tests for impurities and for the percentage of nitrate in the compound, and tests for color and texture." A written report is then filed with a sample of the material, and if the material is up to standard it is placed in storage. Each preparation made up from the basic chemicals is given a number—whether the particular job is to fill one order or several, the entire batch made up at one time is given the same number. The formula, obtained from a formula book kept in a safe in the manager's office, is written up for the particular batch to be prepared

in terms of the amounts of each chemical, by number, to go into the batch—for instance, 100 pounds of number 27 and 500 pounds of number 5, making a total of 600 pounds of the finished product. Each order so written up contains its formula, by number, and the amount required of each chemical, by its number, together with the name of the product, the date of manufacture, and the tank or drum in which it is being prepared.

The written order, containing the batch number and the amount of each chemical required, is delivered to a compounder, who cuts a stencil of the batch number. Each compounding job is given to one man. When the job is completed, a four-ounce sample is tested in the laboratory according to control tests designated by the research department for the particular product. "Most control tests are based on ASTM, of the American Chemical Society and American Society of Metals, and various other societies interested in the testing of materials."

Defendant's manager went on to testify that the material did not leave the compound room until the laboratory gave an "OK on the product"; that if OK, "it is stencilled with the name of the product, the formula number, and if the product is to have labels, labels are put on and it is put in stock." He further testified that when the material is shipped to a customer the man that handles the shipment takes a sample from every container in the shipment just before it is shipped. This sample is checked in the laboratory for contamination and against the standard sample in the laboratory. No material is allowed to leave the shipping room until an OK is received from the laboratory that the product is "up to standard in every respect." He further testified that the man who prepares the order also fastens the labels to the containers, which labels are affixed with and protected by a silica compound used by express and railroad companies.

With respect to the particular order here in question, the manager identified the "production record" made in defendant's laboratory, showing the formula number, the brand number, the chemist who com-

pounded the ingredients, the date of manufacture (March 17, 1943), and the number of pounds of each ingredient. He explained erasures appearing on the document by stating that it was originally written up for an 800-pound batch, but in order to avoid disrupting other work in the compounding room the record was altered to call for the exact amount ordered, 100 pounds. He testified that the completed liquid heat quench was tested to see that it had the proper percentage of cyanide and was not contaminated by nitrates or nitrites; that in addition, the completed product is weighed to ascertain whether the yield, or total weight of the product, equals the sum of the weights called for by the formula. He identified a copy of a "shipping binder", showing the net weight of the product upon shipment to be 100 pounds. He was unable to explain an erasure appearing on the copy. He also testified that a perpetual inventory was kept of the raw materials on hand, showing the amount used and the amount received, and that the records for the week in which the liquid heat quench was prepared "coincide with the use of this amount of material taken out in that particular order." The other products ordered by Fray Tool & Reamer Co., the draw-temp and quenching oil, were already on hand. The consignment, "one shipment of three pieces," left defendant's plant March 17, 1943.

Mr. Horwitz also testified that the company did not manufacture any salt that melted between 300 and 350 degrees, and had no label describing such a salt. He identified the type of label that was put on all containers of draw-temp, and a second label for draw-temp warning customers to keep it in a dry place. He also identified three labels which were put on liquid heat quench, one containing the name of the product, another giving the melting point and working range and warning not to use in pots formerly containing nitrate, and a third poison label required on packages containing cyanide.

Mr. Horwitz testified that the liquid heat quench formula contained cyanide, carbonates, and a chloride; that it began to melt at 950 degrees and remained in a suitable fluid state for use within the range of 1050

to 1500 degrees; that no explosion would occur regardless of the amount of heat applied, either to liquid heat quench or to draw-temp; that if the two products were mixed in a cold state there would be no danger, but that if cyanide were added to the draw-temp (which contains nitrates), heating the mixture would cause an explosion; that the liquid heat quench is tested for contamination by nitrates or nitrites at the time of manufacture and just before shipment, and that the draw-temp is tested in a like manner for contamination by cyanide; that upon the filing of the instant actions the retained samples from the particular shipment were again tested and found to be up to standard; that liquid heat quench is not, as testified by Mr. Hulsizer, a grayish color, but white.

An expert called on behalf of the defendant testified, in response to a lengthy hypothetical question, that in his opinion the first explosion was caused by an accidental mixing of the liquid heat quench with the draw-temp, and the second explosion followed when some of the material was blown out of the pot and came in contact with the liquid heat quench in the open can. However, his further testimony corroborated that of defendant's manager that no explosion could occur unless the two products were mixed to some extent or certain foreign materials introduced into the one or the other. The expert further testified that, assuming the explosion was caused by a contamination of the one product by the other, such accidental mixture did not take place in defendant's plant, because "if it had been mixed up there, then the explosion would have taken place much more quickly than it did." Upon cross-examination, asked to assume that only one container was used; that salt was taken from it only, and that it was the only container in the immediate vicinity at the time, the expert testified that he would have no opinion as to the cause of the explosion. "It would be a mystery to me."

It was stipulated that the Federal Bureau of Investigation investigated the explosion, and that upon orders of the Attorney General of the United States the results of its investigation could not be disclosed.

As grounds for reversal appellant urges that plaintiffs failed to prove more than the fact of the happening of the accident, and that such proof is legally insufficient to support a finding of negligence; that the doctrine of *res ipsa loquitur* is not applicable because the instrumentality causing the injury was not at the time of the accident under the exclusive control of the defendant, and for the further reason that plaintiffs failed to explain the cause of the accident, which might have been due to any one of numerous causes not chargeable to defendant.

[1] The basis of liability in the present case is negligence. As stated in *Sheward v. Virtue*, 20 Cal.2d 410, 412, 126 P.2d 345, "the courts of this state are committed to the doctrine that the duty of care exists in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in peril. *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481; *O'Rourke v. Day & Night Water Heater Co., Ltd.*, 31 Cal.App. 2d 364, 366, 88 P.2d 191." See also *Restatement of the Law of Torts*, Topic 3, § 395.

[2] Appellant's argument that the doctrine of *res ipsa loquitur* is not applicable because the instrumentality was not under defendant's exclusive control at the time of the injury, is not supported by the later decisions in this state. *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436; *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; *Hinds v. Wheadon*, 19 Cal.2d 458, 121 P.2d 724; *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 618, 140 P.2d 369. In applying the rule to an exploding bottle of carbonated beverage, the court in the case of *Escola v. Coca-Cola Bottling Co.*, *supra*, 24 Cal.2d at pages 457 and 458, 150 P.2d at page 438 said:

"*Res ipsa loquitur* does not apply unless (1) defendant had exclusive control of the thing causing the injury and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the defendant. * * *

"Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession."

[3,4] The evidence in the instant case is to the effect that liquid heat quench is a product that is perfectly safe for the purpose intended if those who manufacture it and those who use it exercise proper care. The expert testimony overwhelmingly supports the view that the product would not explode, regardless of the temperature to which it might be heated, unless some foreign substance, particularly a nitrate or nitrite, were introduced into it. Under the rules above stated, therefore, the jury would be warranted in drawing an inference of negligence, *provided*, the plaintiffs' evidence satisfied the further requirement of showing "that the condition of the instrumentality had not been changed after it left the defendant's possession." As to the evidence necessary to satisfy this last requirement, the court in the *Escola* case, *supra* (24 Cal.2d at page 458, 150 P.2d at page 439), said: "It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it." (Citing *Prosser on Torts* (1941), p. 300.) "If such evidence is presented, the question becomes one for the trier of fact (see e. g., *MacPherson v. Canada Dry Ginger Ale, Inc.*, 129 N.J.L. 365, 29 A.2d 868, 869), and, accordingly, the issue should be submitted to the jury under proper instructions."

In attacking the verdicts and judgments herein, appellant emphasizes a number of

points in the evidence not heretofore referred to. For instance, that in connection with the installation of the draw-pot oven, it appears that the gas and compressed-air plumbing attached to it were installed by an employee of Fray Tool & Reamer Company without any permit being obtained from the City of Glendale and without any inspection by the gas company. However, the evidence reflects that the gas feed line for the draw-pot was installed by a man formerly employed by the Southern California Gas Company, and who had much experience in the installation of gas appliances that after the installation of the draw-pot and the gas feed line leading to it was completed a series of tests of the line was made and the installation was found to be in order. In describing the tests made, Mr. Partrick, the plant superintendent of Fray Tool & Reamer Company, testified, "He first pumped a pressure on the line and fixed a gauge that would read if there had been any change on the internal pressure of the pipe; and it happened that we had other work for him at the time and the gauge was left on for several days, and during that time the gauge did not change, indicating that there were no changes or leaks in the line."

Appellant then contends that neither the decedent, Tingey, nor plaintiff Hulsizer had any previous experience in the use of heat-treating salts; that Mr. Hulsizer, who testified upon direct examination that when he arrived at the plant and observed Tingey standing by the draw-pot it was two-thirds full of some salt, admitted upon cross-examination that in his deposition he had stated that the draw-pot was one-third full upon his arrival. The witness Mr. Partrick testified that the drums of salt were delivered "right in between the store room and the draw-pot, and that is where they stayed * * * right in here along the west wall," and remained there until the time of the explosion; that no one opened or tampered with them, to his knowledge; that when the plant was closed at night the doors and windows were locked. Mr. Hulsizer, however, testified that he had seen the drums "against the south wall between the rest rooms" and "at one time they was setting by this door

here and in the way, and I myself moved them * * * to the south wall between the * * * rest rooms." Appellant makes the point that for a few days the salts were kept outside of the plant, because of the testimony of Hulsizer that he "had observed it there in the back of the shop before we had the storeroom ready. It had set in the back by our air conditioner, and our steel rack was outside. It was moved inside after we built the storeroom." It appears from the entire testimony, however, that the drums were at all times within the shop; that it was the steel rack, not the drum, which was moved inside.

Appellant further points out that no one observed the decedent, Tingey, remove the salt from the drum or drums and place the same in the draw-pot; that for some part of the interval after his arrival Mr. Hulsizer was away from the draw-pot; that it would have been difficult for Mr. Hulsizer, even facing the draw-pot to see whether the explosion originated in the pot itself or in the oven; that a police officer testified that immediately after the explosion Hulsizer told the officer that the temperature at the draw-pot was 600 degrees and that he had walked away from the pot and was headed toward the back of the building when the explosion took place. Appellant also urges that there was no sufficient showing that the draw-pot itself was free from contamination.

Appellant also stresses the fact that "there is no explanation or reason given for the presence of both drums in the vicinity of the draw-pot," nor the evidence of the loosened lid on the drum of draw-temp.

From all of the foregoing, appellant argues that the true cause of the accident remains unexplained; that it reasonably appearing that it might have been due to one of several causes, for some of which defendant would not be responsible, the doctrine of *res ipsa loquitur* is inapplicable, or, stated another way, to quote from appellant's reply brief, "if the evidence relating to the sameness of the condition of the * * * instrumentality * * * at the time it left the physical custody of the defendant is in such a state that it cannot be said that it could lead the minds of rea-

sonable men to but one conclusion, then it follows that the evidence necessarily must be in a state where it could lead the minds of reasonable men to more than one conclusion. If that be the case, then the older limitation upon the application of the doctrine has come into being, namely, that the doctrine does not apply where the establishment of one requisite element to its application must itself rest on inferences which are so far from necessary ones that the contrary or other inferences are at least as tenable as the one sought to be adopted." Appellant, in other words, seeks to qualify the language of the Escola case, supra (24 Cal.2d at page 458, 150 P.2d at page 439), that "the requirement is satisfied if there is evidence *permitting* a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled" (*italics added*), by adding a requirement that the evidence negative any other reasonable inference. To do so would not only infringe upon the province of the jury in the first instance as triers of fact, and the trial judge on hearing of the motion for a new trial, but would be contrary to the plain and unqualified language of the Escola case, supra, that "if such evidence is presented, the question becomes one for the trier of fact * * * and, accordingly, the issue should be submitted to the jury under proper instructions."

[5] Viewing the evidence in the light most favorable to respondents, it must be held that there is substantial evidence to warrant the jury in concluding that the drums of salt were undisturbed from the time they left the defendant's control until they were inspected by the witness Partick; that thereafter they were undisturbed until the time of the explosion; that the decedent Tingey exercised due care for his own safety and did not mix the two salts in the draw-pot; that the explosion was not due to a defective gas line or to excessive temperature, but was caused by a defect in the product itself. The doctrine of *res ipsa loquitur* is therefore applicable.

[6] To rebut the inference of negligence which the jury was at liberty to draw, the defendant introduced evidence,

as hereinbefore narrated, concerning the precautions taken in the process of manufacture. Whether such evidence dispels the inference of negligence is ordinarily a question of fact for the jury to determine. *Escola v. Coca-Cola Bottling Co.*, supra, 24 Cal.2d at page 461, 150 P.2d 436; *Druzanich v. Criley*, 19 Cal.2d 439, 444, 122 P.2d 53; *Michener v. Hutton*, 203 Cal. 604, 610, 265 P. 238, 59 A.L.R. 480. Appellant contends that "the trial court must rule as a matter of law whether or not such inference has been dispelled", basing its contention upon *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868, 870. In that case, in discussing the permissible inference that an automobile driven by an employee of the owner was being operated with the owner's permission, the court said: "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738, 739, § 60."

From what we have herein stated it is manifest that eliminating every remote possibility of mishandling or tampering with defendant's products after it lost control, there is evidence permitting a reasonable inference that the explosions occurred during a time when defendant's product was being used in the manner and under the conditions which defendant contemplated, and, at least impliedly, authorized. The case of *Blank v. Coffin*, supra, relied upon by appellant, is therefore not in point or controlling.

[7] Furthermore, aside from and regardless of the application of the doctrine of *res ipsa loquitur*, from the evidence in this case it is clear that the jury was authorized to draw an inference that appellant was negligent in preparing its product, known as Liquid Heat Quench, which it sold to the Fray Tool & Reamer Company. It is noteworthy that at the time defendant received the order for the Liquid Heat Quench, the same was not in stock. It was defendant's practice to make up this product in 800-pound batches, but being busy with other important war work and not desiring to disrupt the existing operations

in its compounding room, defendant made up this particular order on a 100-pound basis. In other words, this order was not taken from stock on hand, but was specially made to fill a particular order.

There is positive evidence that upon receipt of the products and examination by plant superintendent Partrick in the presence of decedent Tingey, both drums were placed between the store room and the draw-pot, where they remained. On this phase of the case, superintendent Partrick testified:

"Q. (By Mr. McBain, one of plaintiffs' counsel.) Now, Mr. Partrick, did the drums of salt remain in the location you have just described up until the time of the explosion? A. They did. * * *

"Q. Did anyone open or tamper with the two drums of salt at any time after their delivery to the plant and until the time of the explosion, so far as you know? A. No."

It is not necessary to here restate the evidence already narrated as to the handling of the products which appellant sold and delivered to the Fray Tool & Reamer Company. Suffice it to say that evidence of the handling of each of such products reasonably warranted the inference by the jury that it was not "accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it." *Escola v. Coca-Cola Bottling Co.*, supra, 24 Cal.2d at page 458, 150 P.2d at page 439.

In support of its claim that the cause of the accident remains unexplained and that it reasonably appears that the same might have been due to any one of several causes for which it would not be responsible, appellant advances various theories as to the cause of the explosions. In this regard appellant calls attention to the fact that after the drums of heat-treating salts were delivered to the Fray Tool & Reamer Company and inspected by Partrick and Tingey, the products were accessible to other employees who could have opened and mixed their contents. However, such a contention finds no support in the evidence, while there is positive testimony that the drums

were not tampered with between the date of delivery and the date of the explosions. Next appellant suggests possible sabotage by reason of the fact that the Fray Tool & Reamer Company was engaged in the manufacture of high-priority war materials, but there is no evidence to support such a theory other than the fact that an investigation was made by the Federal Bureau of Investigation, which is totally insufficient to reasonably justify the suggested inference.

Appellant's argument that plant superintendent Partrick, in making his original examination of the containers, may have mixed the salts so as to render them likely to explode, or that some other employee of the plant may have done so, is answered by the testimony of appellant's own expert, who testified that had the salts been so mixed at appellant's plant the explosion would have occurred almost immediately after the salts were deposited in the draw-pot and subjected to heat. It is only reasonable to assume that the same result would have ensued had the salts been mixed upon or after their arrival at the Fray Tool & Reamer Company some weeks before the explosion.

Appellant asserts that "the most peculiar and wholly unexplained fact proven by plaintiffs and respondents is that both containers, weighing in excess of 100 pounds each, were removed from their previous position a considerable distance away from the draw-pot over to a position within 3 or 4 feet of it * * *. It is possible but highly improbable that both of these heavy containers would be moved up to the draw-pot oven unless decedent had intended to use both products." Whether the two containers were moved to a position near the draw-pot oven prior to the explosions is in conflict. Plaintiff Hulsizer testified there was only one drum so moved. In any event, there is positive testimony in the record that only one container was opened and that following the explosions investigation revealed the fact that the drum containing draw-temp salt was intact and its cover was on.

Finally, appellant asserts that the only reasonable inference to be drawn from the evidence is that the two types of salt were

mixed. Undoubtedly this argument is based upon the testimony of appellant's expert, who was permitted to testify that in his opinion the first explosion was caused by an accidental mixing of the liquid heat quench with the draw-temp. At the trial and on this appeal, appellant earnestly asserts, in consonance with testimony introduced by it at the trial, that no explosion could occur unless the two products were mixed to some extent or certain foreign substances introduced into one or the other. Appellant insists that no such contamination could have taken place at its plant because, to use the language contained in *Escola v. Coca-Cola Bottling Co.*, supra, 24 Cal.2d at page 460, 150 P.2d at page 440, the tests made at appellant's plant are "pretty near" infallible, and further, because, to quote from the testimony of appellant's expert, "if it had been mixed up there, then the explosion would have taken place much more quickly than it did." The same expert witness, when asked to assume that only one container was used, and that salt was taken from it alone, testified that the cause of the explosion "would be a mystery to me". If the explosion was caused by mixing the products after they left appellant's plant, the latter was in possession of the means to prove that fact, because a few days after the accident appellant's representative, Mr. McCabe, called at the Fray Tool & Reamer Company plant and took with him the drum of draw-temp salts, and the same remained in the possession of appellant at all times thereafter. Its failure to produce the drum at the trial or any testimony in explanation of the condition of its contents entitled the jury to infer that its production or testimony concerning the condition of its contents might have militated strongly against appellant's claim that the salts had been mixed or contaminated after delivery by appellant to the Fray Tool & Reamer Company plant.

[8-10] Assuming that the evidence at the trial presented several probable causes of the explosion involving the foregoing elements, it was, however, disclosed that explosions such as the ones here under consideration do not occur unless the products are mixed or certain foreign materials introduced into one or the other of them.

The questions of where such contamination of the products occurred and through whose negligence it was brought about, were thus questions for the jury to unravel. We are persuaded that there is in the record evidence of sufficient substantiality to reasonably warrant the jury in finding that the condition of the products in question had not been changed, nor had they been mixed or contaminated, after they left appellant's possession, and that appellants therefore had control of the products at the time of the alleged negligent act which gave rise to the injuries; that the evidence justified the inferences by the jury that the salts after they left defendant's possession were "not accessible to extraneous harmful forces" and that they were "carefully handled by plaintiff or any third person who may have moved or touched" them. *Escola v. Coca-Cola Bottling Co.*, supra, 24 Cal.2d at page 458, 150 P.2d at page 439. The doctrine of *res ipsa loquitur* was therefore applicable and the issue should have been submitted to the jury under proper instructions. However, the fact that the trial court did not instruct the jury upon this doctrine does not deprive respondents of its benefits, where, as here, the verdicts and judgments rendered thereon may legally be predicated upon the doctrine under the facts disclosed in this case. Furthermore, as heretofore indicated, without regard to the application of the doctrine of *res ipsa loquitur*, the facts herein presented warranted an inference by the jury that appellant was negligent in the preparation of its product, known as liquid heat quench which was delivered to Fray Tool & Reamer Company, and that such negligence was the proximate cause of the explosion and resultant damage to plaintiffs and respondents. *O'Rourke v. Day & Night Water Heater Co.*, 31 Cal.App.2d 364, 366, 88 P.2d 191; *Sheward v. Virtue*, 20 Cal.2d 410, 414, 126 P.2d 345. We conclude, therefore, from a careful examination of the entire record, that there was sufficient evidence to furnish support for the verdict in each of these cases.

The judgment in each case is therefore affirmed.

YORK, P. J., and DORAN, J., concur.

76 Cal.App.2d 75

**SHAPIRO v. EQUITABLE LIFE ASSUR.
SOC. OF UNITED STATES.**

Civ. 15187.

District Court of Appeal, Second District,
Division 2, California.
Sept. 11, 1946.

As Amended Oct. 7, 1946.

Hearing Denied Nov. 4, 1946.

1. Insurance ⇨76, 92

Where insured sought to charge insurer with acts of third party as the alleged agent of insurer, burden rested upon insured to prove existence of such agency and that third party was authorized by insurer to do on its behalf the acts of which insured complained.

2. Insurance ⇨92

In action by insured against insurer to recover loans made on life policies as the result of alleged forgery of loan applications and loan checks by insurer's alleged agent, uncontradicted evidence that agent's authority was limited to canvassing for applications for insurance and that insured left policies with agent to care for them negatived allegation that agent had unlimited authority and that agent, as respects the forgeries, was acting as insurer's duly authorized representative.

3. Insurance ⇨87

Where insured places life policies with insurance agent for safe-keeping, agent, in holding policies, is agent of insured and not of insurer.

4. Insurance ⇨87

Where agent was employed by insurer for limited purpose of canvassing for applications for life insurance, neither the fact that he worked out of office of an agency manager nor his procurement of a printed receipt form invested him with power to sign, on behalf of insurer, a receipt for life policies placed with agent by insured for safe-keeping.

5. Notice ⇨6

Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such

inquiry, he might have learned such fact. Civ.Code, § 19.

6. Limitation of actions ⇨100(13)

Where insurer mailed to insured in properly addressed envelopes notices regarding policies, status of loan accounts, interest and premiums due and none of the envelopes was returned and insured's bookkeeper received notices and, as directed by insured, paid insurer interest called for and gave insured memoranda of respective amounts, insured was chargeable with knowledge that he was paying interest on amounts larger than sums he admitted having borrowed so as to start running of limitations on right to recover loans allegedly made on forged applications and interest paid thereon. Civ.Code, § 19; Code Civ. Proc. § 338, subd. 4, and 1963, subd. 24.

7. Principal and agent ⇨177(1), 182

Under rule that notice given to, or possessed by an agent within scope of his employment is notice to principal, it is duty of agent to communicate, and he is presumed to have communicated, to principal all knowledge which he received respecting subject matter of agency, and, likewise, principal is presumed to know all that agent learned concerning a specific transaction, whether it is actually communicated to principal or not. Civ.Code, § 2332.

8. Evidence ⇨265(17)

Where forgery of insured's signature on life policy loan checks was in issue, although insured refused to admit that signatures on loan applications were his but admitted that they looked like his, the submission, by insured's counsel to a handwriting expert as exemplars of genuine signatures of insured, of loan applications, among other documents, for purpose of comparison with alleged forged indorsements, required that signatures on applications be deemed genuine.

9. Limitation of actions ⇨100(13)

Where signatures on life policy loan applications were genuine and amount of check issued by insurer for the loan corresponded with an amount deposited in account of third party six days after date of application, and insured claimed never to have received loan, such occurrence, more

than eight years prior to time insured claimed to have discovered the fraud, alone was sufficient to put him on inquiry so as to bar claim against insurer by limitations. Code Civ.Proc. § 338, subd. 4.

10. Limitation of actions ◊193

To escape the effect of the three-year statute of limitations on relief on ground of fraud or mistake, running from discovery of facts constituting fraud or mistake, plaintiff must allege and prove when fraud was discovered, circumstances under which it was discovered and facts to show that he was not at fault for having failed to make discovery sooner. Code Civ.Proc. § 338, subd. 4.

11. Limitation of actions ◊199(2)

Where statute of limitations is pleaded as a defense to action predicated upon fraud or mistake, whether plaintiff had notice of circumstances sufficient to put him on inquiry is a question for trier of fact. Code Civ.Proc. § 338, subd. 4.

12. Limitation of actions ◊100(13)

Under statute barring relief on the ground of fraud or mistake unless action is commenced within three years of discovery of facts constituting the fraud or mistake, means of knowledge are equivalent to knowledge. Code Civ.Proc. § 338, subd. 4.

13. Appeal and error ◊882(3)

Where plaintiff, in trial court, relied upon Code section declaring that three-year limitation on actions for fraud commences to run from discovery of facts constituting fraud, and requested instructions on that subject which were given, he could not on appeal contend that Code section did not apply. Code Civ.Proc. § 338, subd. 4.

14. Insurance ◊156(1)

Generally, the relation between insurer and insured is contractual and contract of insurance does not create a trust as between the parties, even though the insurer is a mutual life insurance company.

15. Limitation of actions ◊102(2)

Where insured borrowed money from insurer, a debtor and creditor relationship, rather than a trust relationship, was established between the parties precluding contention that court should apply rule that

statute of limitations does not run against a trust until actual knowledge has been brought home to beneficiary and there has been either a demand by beneficiary or a repudiation by trustee.

16. Account stated ◊6(2) Insurance ◊179½

The purpose of submitting periodical statements of principal and interest unpaid on life policy loans was to apprise insured of amounts claimed to be due, and it was his duty to examine statement and to report to insurer at once any error found, so that his failure to do so constituted assent thereto and each statement became an account stated.

17. Account stated ◊1, 7

An "account stated" is a writing that exhibits state of account between parties and indebtedness claimed to be due from one to another, and if assented to by debtor, either expressly or impliedly, it becomes a new contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Account Stated".

18. Account stated ◊6(4)

Assent of debtor to statement of account between parties is implied from failure to object within a reasonable time.

19. Account stated ◊8

Where insured, by his own acts, permitted creation of a new contract annually between himself and insurer in the form of an account stated regarding life policy loans and interest thereon and, for more than ten years, annually paid without protest amounts shown on each account to have been due, insured could not dispute correctness of sum presently owing by him as shown by the several accounts stated, regardless of the alleged forgery by insurer's alleged agent of life policy loan applications and checks.

20. Appeal and error ◊1170(5)

Where findings and judgment with reference to existence of an account stated between the parties were in accord with the evidence, failure of defendant to plead defense of account stated did not result in a miscarriage of justice so as to require a reversal. Const. art. 6, § 4½.

21. Evidence ⇨89

The presumption against fraud is not overcome by shadowy evidence.

22. insurance ⇨179½

In action by insured against insurer to recover loans on insured's life policies allegedly made on forged applications and forged indorsements of loan checks and to recover interest paid on such loans, insured had burden to prove that he did not sign or authorize signing of the applications and insurer was not required to prove their genuineness.

23. Evidence ⇨75, 77(1)

Where plaintiff had his bookkeeper present in court but expressly declined to call him as a witness, whereupon defendant called him and elicited testimony adverse to plaintiff, and plaintiff failed to produce other evidence referred to in testimony and within his power to produce and which it would have been natural for him to produce, failure to bring documents or witnesses before court justified an inference that evidence was unfavorable to plaintiff. Code Civ.Proc. § 1963, subd. 5, and § 2061, subds. 6, 7.

24. Appeal and error ⇨882(12)

Plaintiff waived objection to instruction by requesting another instruction of the same purport but in different language.

25. Appeal and error ⇨882(1)

One may not complain of error which he himself has invited.

26. Appeal and error ⇨882(3)

Where appellant adopted a theory at the trial, judgment would not be reversed because trial court instructed jury according to that theory.

27. Limitation of actions ⇨195(5)

While statute of limitations ordinarily is an affirmative defense and burden rests on defendant to prove such defense, in an action for fraud, which is commenced more than three years after fraud occurred, burden is not on defendant to show that knowledge of facts was brought home to plaintiff but is on plaintiff to prove that he did not discover facts constituting fraud within three years prior to commencement of action, and to further show time and

circumstances under which facts were brought to his knowledge. Code Civ.Proc. § 338, subd. 4.

28. Evidence ⇨87

Where a certain burden is thrown upon plaintiff by law until the burden is met by plaintiff, defendant may remain silent.

29. Trial ⇨295(1)

A reviewing court will not consider one instruction separate and apart from all others but instructions must be considered in their entirety, each in connection with all the others.

30. Appeal and error ⇨1170(9)

Alleged error in giving or refusing instructions was not ground for reversal where the findings of the trial court were adverse to appellant on all the issues raised, so that it did not affirmatively appear that there had been a miscarriage of justice. Const. art. 6, § 4½.

31. Appeal and error ⇨931(1), 1011(1)

Where a conflict in the evidence exists, the findings of the trial court are conclusive and every substantial conflict must be resolved in favor of findings.

32. Appeal and error ⇨931(1), 1010(1)

An appellate court will view the evidence in light most favorable to respondent, will indulge all intendments which favor sustaining the findings of fact, and will not disturb a finding if there is substantial evidence in the record to support it.

33. Appeal and error ⇨994(2, 3)

Evidence ⇨588

Where first cause of action was tried to jury and second cause to court, as to first cause of action, the jury, and as to second cause of action, the court, was sole judge of credibility of witnesses including plaintiff, and both jury and judge were free to disbelieve plaintiff's testimony even though uncontradicted, if any rational ground existed for so doing. Code Civ. Proc. § 1847.

34. Evidence ⇨75, 77(1)

Witnesses ⇨313, 315

Trier of facts in weighing testimony of particular witness had right to consider

manner in which he testified, fact that on direct examination his memory was clear and his answers positive while on cross-examination concerning same matters he frequently answered that he did not remember, and fact of his failure to call available witnesses and to produce available evidence.

35. Insurance ⇨179½

In action by insured against insurer to recover principal and interest on life policy loans allegedly effected by insurer's soliciting agent by forging loan applications and indorsements of loan checks, evidence authorized findings against insured.

36. Judgment ⇨203

Generally, there can be but one judgment in an action.

37. Judgment ⇨203, 272

Where first cause of action was tried to jury and second cause of action was tried to court without additional evidence and court had not concluded portion of case tried to it at time verdict was rendered, judgment entered by clerk upon the verdict was premature and void, so that judgment entered by court after it made its findings of fact and conclusions of law, and which referred to both causes of action was the only judgment. Code Civ.Proc. § 664.

38. Judgment ⇨272

Where special issues which form only a portion of controversy are submitted to a jury and remaining issues are to be tried by court and findings of fact made thereon, no judgment can be entered at time jury renders verdict, since case has not been tried, the trial not being concluded until court renders its decision disposing of all issues submitted to it. Code Civ.Proc. § 664.

39. Judgment ⇨272

The Code section directing the entry of a judgment within 24 hours after verdict is rendered is directory and it is not necessary to validity of a judgment that it be entered within such time. Code Civ.Proc. § 664.

40. New trial ⇨4

A motion for a new trial following entry of judgment by clerk on verdict when

other issues remained to be tried to court would be premature.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Joseph Shapiro against the Equitable Life Assurance Society of the United States to recover amount of alleged forged policy loan, and for declaratory relief. From a purported judgment for defendant, on first cause of action after verdict of jury and from judgment by court sitting without a jury on second cause of action for defendant, plaintiff appeals.

Appeal from first purported judgment dismissed and second judgment affirmed.

Harold A. Fendler and Bertin A. Weyl, both of Los Angeles, for appellant.

Sheppard, Mullin & Richter and Gordon F. Hampton, all of Los Angeles, for respondent.

WILSON, Justice.

Appellant is the owner of several life insurance policies sold to him by respondent. In his complaint he alleged that one Adolph Frankel, who he asserted was an agent of respondent, had forged appellant's name on applications for loans on some of the policies and on checks issued by respondent payable to appellant for the amounts of the several loans made on the forged applications, and had applied the proceeds to his own use. Appellant sought to recover, (1) by his first cause of action, the amount of the alleged forged policy loans, together with interest which he had paid thereon prior to the time of his alleged discovery of the fraud; and (2) by a second cause of action, a declaratory judgment that the amount admittedly borrowed by him on his policies be declared to be the amount of his true obligation to respondent, and that the latter be ordered to cancel all other claimed indebtedness. Respondent answered denying the material allegations of the complaint and particularly denying that Frankel was its agent except to canvass for applications for insurance and to collect the first premiums thereon, and for no other

purpose, and pleading the statute of limitations.

The first cause of action was tried by a jury which rendered a verdict in favor of respondent, and judgment was purportedly entered in accordance with the verdict. The second cause of action was tried by the court without a jury upon the evidence that had been presented to the jury, upon which findings and a separate judgment were rendered in favor of respondent. Appellant has appealed from the judgment of the court and has attempted to appeal from the purported judgment entered on the verdict of the jury.

Appellant and Frankel had known each other since 1906. The complaint alleges that since 1917 they had been close friends and a relation of trust and confidence existed between them, by reason of which appellant entrusted Frankel, at the latter's solicitation and request, with the care and physical custody of appellant's life insurance policies hereinafter mentioned.

In 1912, in Portland, Oregon, appellant purchased two life insurance policies from respondent. Upon arriving in Los Angeles in 1916 he renewed his acquaintance with Frankel and the latter's brother. In 1916 and 1918 the Frankels sold appellant two policies. In 1927 Adolph alone sold him two additional policies, and a final policy in 1932, making seven in all.

The alleged forgeries extended over a period of nearly three years—from August 15, 1933, to June 5, 1936. Adolph Frankel committed suicide in September, 1940. Notwithstanding the fact that an intimate and confidential friendship had existed between the two men since 1917, and that appellant had entrusted Frankel with possession of his life insurance policies for many years, appellant asserts that he had no knowledge of Frankel's death until March, 1942.

1. *Frankel's authority as respondent's agent.* Appellant's case is predicated on the theory that Frankel was an agent of respondent with unlimited authority to bind the latter, and that all of his acts complained of by appellant were done as respondent's agent and duly authorized

representative. The complaint alleges that Frankel, in his capacity as agent of respondent, retained physical custody, possession and control of appellant's life insurance policies; that appellant applied to Frankel in his capacity as such agent to secure loans on his policies; that in such capacity Frankel retained the applications for loans in his custody; that Frankel committed suicide because of defalcations made by him during the period he was acting in the capacity of agent for and on behalf of respondent.

[1,2] Appellant having sought to charge respondent with the acts of Frankel as the alleged agent of respondent, the burden rested on him to prove the existence of such agency and that Frankel was authorized by respondent to do on its behalf the acts of which appellant complains. *Ewing v. Hayward*, 50 Cal.App. 708, 715, 195 P. 970; *Nofsinger v. Goldman*, 122 Cal. 609, 616, 55 P. 425. Appellant failed to prove any of the allegations in the complaint necessary to bind respondent for Frankel's acts. The uncontradicted evidence is to the contrary.

Frankel's authority and duties as respondent's agent were expressly defined and limited by an agreement in writing and he was without power to represent or to bind respondent in any manner other than as thereby authorized. The agreement provides that "The agent shall canvass for applications for insurance in the Society and shall collect the first premiums thereon. * * * The agent is not authorized to make, alter or discharge contracts for the Society, * * * or to bind the Society, in any way, * * * and his powers shall extend no further than as herein expressly stated."

[3] Appellant delivered his policies to Frankel and his brother upon their proposal that a disability and double indemnity clause, which could be had for a small additional expense, be added to them. After Frankel obtained possession of the policies he suggested that they be left with him because appellant was traveling much of the time, and that he, Frankel, could take care of them in case appellant should suffer an accident. In so doing he was

the agent and representative of appellant and not of respondent.

[4] The fact that Frankel, as an agent for the limited purpose of canvassing for applications for insurance, worked out of the office of an agency manager of the company did not add to his powers as an agent. The receipt which he gave to appellant when the latter's policies were delivered to him had been lost and appellant testified that the receipt was on a blank form bearing the name of respondent. (The right of the jury and the court to disbelieve appellant's testimony is discussed hereinafter.) If the statement be true, nevertheless Frankel's authority as agent, restricted as it was by the agency agreement, did not invest him with power to sign a receipt for the policies on behalf of the company, and if he procured a blank form and used it in an unauthorized manner respondent was not bound by it. As agent of respondent Frankel was without right to retain custody of the policies, to apply for or to accept applications for loans thereon for appellant, to retain such applications in his possession, or to receive checks issued by respondent in favor of appellant. Such acts as Frankel performed in those matters were done at the request of appellant and as the latter's agent, for the result of which respondent is not answerable.

2. *The statute of limitations.* In order to avoid the effect of the statute of limitations (Code Civ.Proc. § 338, subd. 4), and in anticipation of that defense, appellant alleged in his complaint that Frankel at all times concealed from him any knowledge or information concerning the alleged forged applications for loans or the alleged forgeries of his name on the checks, and that he had no knowledge or information of the same until March 1, 1942; he then immediately visited the office of respondent in Los Angeles and began his investigation, which resulted in the discovery that his name had been forged on the checks and that they had been deposited in a bank in the account of Ad. Frankel & Co.; upon such discovery he signed affidavits in respondent's office that the endorsements were forgeries and that

he had not received any of the proceeds of the checks.

By demurrer and by answer respondent pleaded that both causes of action set forth in the complaint were barred by subdivision 4 of section 338 of the Code of Civil Procedure. The complaint was filed in January, 1944, but it was stipulated that for the purpose of the action it was deemed to have been commenced as of March 1, 1942. This is the approximate date on which appellant claims to have received his first knowledge of Frankel's defalcations, when, in conversation with an agent of respondent in Redlands, he learned that Frankel had committed suicide in September, 1940, and was advised to look after his insurance because Frankel "had done all kinds of crooked work."

In 1917 appellant became a stockholder in the California Sanitary Canning Company whose plant was located in Los Angeles. Continuously since that date he has been actively engaged in the business of the company. His duties have required him to travel constantly in the territory comprising all of California south of Fresno and Santa Maria for the purpose of seeing that vegetables were planted, grown, harvested, and delivered to the cannery for processing. Beginning in 1928 appellant procured loans from respondent from time to time upon his insurance policies. He testified that because of his long absences from Los Angeles he gave instructions to the bookkeeper at the cannery to see that all amounts due on his insurance policies, both annual premiums and interest on policy loans, "interest payments, everything," were paid when notices were received from respondent; the payments were to be made "if I am in town or not." Appellant left his insurance matters entirely with the bookkeeper and never, as a prudent man would have done, made any computations of the amounts of interest which the latter had paid.

[5, 6] Though he had the means of knowing whether he was paying interest on an amount greater than his admitted borrowings he made no effort to ascertain the correct amount. Beginning in November, 1928, and continuing until 1942, statements

were sent from respondent's office addressed to appellant at the office of the cannery at least once each year, in some years more often, showing the amount of principal and interest unpaid on the loans. A separate notice was sent showing the loan status of each policy and the amount of interest due on each individual loan. In 1934 a notice was mailed to appellant showing interest due on a loan on a policy against which he claims not to have borrowed previously to the time the notice was sent. It was stipulated that the notices were sent by mail in envelopes properly stamped and addressed; that on the face of each envelope respondent's name and address were printed; that no one of said envelopes was returned; that each notice contained a statement of the amount of the loan and the interest due to the date of mailing against the policy which the notice represented. The presumption that the notices were received in the regular course of the mail (Code Civ.Proc. § 1963, subd. 24) is made certain by the evidence of the bookkeeper who testified that the notices were received by him at the cannery and that, as directed by appellant, he paid the interest called for by each of the statements; he made the payments out of the petty cash of the canning company, gave appellant memoranda of the respective amounts when he returned from a trip, and the latter repaid the money. All payments were made in accordance with notices received from respondent. This method was followed for a period of ten years or longer prior to March, 1942, the date on which this action was stipulated to have been commenced. At least once each year appellant was thus explicitly informed of the status of his account with respondent, the amounts of interest demanded by it and paid by him on his loans, and the numbers of the policies on which the loans had been made. He therefore knew, or had timely means of knowing, that during all those years he was paying interest on amounts much greater than the sums he admits having borrowed. The notices were such as to put an ordinarily prudent man on notice of the amounts of the loans outstanding on each of the insurance policies. "Every person who has actual notice of

circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Civ.Code, § 19; *Scott v. Henry*, 196 Cal. 666, 671, 239 P. 314; *Henrici v. South Feather L. & W. Co.*, 177 Cal. 442, 446, 170 P. 1135; *Henigan v. Yolo Fliers Club*, 208 Cal. 697, 699, 284 P. 906.

[7] The bookkeeper was acting under the express direction of appellant, within the scope of his agency and within the limitation of his authority as agent. His acts were therefore the acts of appellant, and his knowledge of the facts relating to the insurance, the amounts upon which interest was paid, and the numbers of the policies on which loans were outstanding, was likewise appellant's knowledge. *Watson v. Sutro*, 86 Cal. 500, 516, 24 P. 172, 25 P. 64; *Atkinson v. Foote*, 44 Cal.App. 149, 165, 186 P. 831. It was the duty of the agent to communicate to his principal all knowledge which he had received respecting the subject matter of the agency and the presumption is that he performed that duty. Notice given to or possessed by an agent within the scope of his employment is notice to the principal. Civil Code, sec. 2332; *Shamlian v. Wells*, 197 Cal. 716, 720, 242 P. 483; *Early v. Owens*, 109 Cal.App. 489, 494, 293 P. 136; *Waldeck v. Hedden*, 89 Cal.App. 485, 491, 265 P. 340. One who acts through an agent will be presumed to know all that the latter learns concerning the transaction, whether it is actually communicated to the principal or not. There is no difference in this respect between actual and constructive notice. It is of no avail that the agent failed to communicate to his principal what he had ascertained. The *Distilled Spirits* case (*Harrington v. United States*), 11 Wall. 356, 367, 78 U.S. 356, 367, 20 L.Ed. 167, 171. The finding of the court that each of the loan interest notices was received by appellant in due course of mail after their respective dates of mailing is sustained by the evidence.

[8,9] Respondent offered in evidence three applications for loans, one dated January 3, 1934, and two dated January 4, 1934. Appellant would not admit on the

witness stand that the signatures on the applications were his but as to each one he said that "it looks like my signature." However, these same applications, among other documents, were presented by his counsel to a handwriting expert as exemplars of the genuine signatures of appellant for the purpose of comparison with the alleged forged endorsements of appellant's name on the checks above mentioned. The signatures on the applications for the loans must therefore be deemed to be his genuine signatures. Appellant testified that he never received the amount of the loan procured upon these applications and that he never made any complaint or inquiry concerning it. The amount of the check issued by respondent for the loan corresponds with an amount deposited in the account of Ad. Frankel & Co. six days after the date of the applications. This occurrence was more than eight years prior to the time appellant claims to have discovered the fraud and alone was sufficient to put him on inquiry.

[10, 11] An action for relief on the ground of fraud or mistake is barred unless commenced within three years after the discovery of the facts constituting the fraud or mistake. Code Civ.Proc., § 338, subd. 4. In order to escape the effect of this provision one who seeks to maintain such an action as this must allege and prove (1) when the fraud was discovered; (2) the circumstances under which it was discovered; (3) facts to show that he is not at fault for having failed to discover the fraud sooner. He "must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them * * * as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts." *Lady Washington Consol. Co. v. Wood*, 113 Cal. 482, 487, 45 P. 809, 810; *Consolidated Reservoir & Power Co. v. Scarborough*, 216 Cal. 698, 702, 16 P.2d 268; *Henigan v. Yolo Fliers Club*, 208 Cal.

697, 704, 284 P. 906. Whether appellant had notice of circumstances sufficient to put him on inquiry was a question of fact to be determined by the jury or the trial judge. *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.*, 174 Cal. 308, 312, 163 P. 47; *West v. Great Western Power Co.*, 36 Cal.App.2d 403, 411, 97 P.2d 1014; *Young v. New Pedrara Onyx Co.*, 48 Cal.App. 1, 20, 192 P. 55.

[12] The facts above related, especially the annual receipt of interest statements by appellant and his payment thereof, and his failure to complain or to investigate when he did not receive the amount of the loan applied for in 1934, were sufficient to lead him to knowledge of the forgeries of the checks. He will be presumed to have known whatever with reasonable diligence he might have ascertained. *Wood v. Carpenter*, 101 U.S. 135, 140, 25 L.Ed. 807, 808. Business prudence would have compelled him to make inquiry and his failure to make it was inexcusable negligence. *Simpson v. Dalziel*, 135 Cal. 599, 603, 67 P. 1080. Means of knowledge are equivalent to knowledge. *Shain v. Sresovich*, 104 Cal. 402, 405, 38 P. 51; *People v. San Joaquin etc. Ass'n*, 151 Cal. 797, 807, 91 P. 740; *Vertex Inv. Co. v. Schwabacher*, 57 Cal.App.2d 406, 417, 134 P.2d 891. Nothing was concealed by respondent. We are not concerned with Frankel or his acts since the rights and liabilities of respondent are not to be determined by his conduct. Upon appellant must rest the responsibility for his own disregard of known facts and for his dilatoriness and negligence in having failed to investigate the facts when he had been on notice for so many years.

[13] Appellant argues that subdivision 4 of section 338 of the Code of Civil Procedure has no application to the case, and that "both defendant and the trial court have completely misconstrued and misconceived the nature of the present action and plaintiff's position." Nevertheless he pleaded facts in his complaint in essaying to avoid the effect of that provision by alleging failure to discover the fraud within three years of its commission, and at the trial he considered the statute to be

of such import that he himself requested and the court properly gave an instruction that said section "provides that a cause of action for relief on the ground of fraud or mistake is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." He concedes in his brief that "this was a concealed fraud on the part of Frankel," but his protestations that "normally [it] would not have been discovered by the plaintiff" and that "he had a right to rely on the accuracy of the defendant's notices" are without merit for reasons above pointed out.

[14, 15] Appellant contends that the statute of limitations is not applicable because (a) respondent is a mutual company and holds in trust for its policyholders the funds representing the guaranteed cash surrender values, loan values, and dividends applicable to its issued policies, and (b) the statute of limitations does not run against a trust until actual knowledge has been brought home to the beneficiary and there has been either a demand by the beneficiary or a repudiation by the trustee. It is not necessary to enter into a discussion of the character of the funds and dividends referred to, since they are not the subject of this action and since appellant's contention must be rejected for other reasons: (1) The relation between insurer and insured is contractual (*Richards v. Metropolitan Life Ins. Co.*, 184 Wash. 595, 55 P.2d 1067; *Trinity Universal Ins. Co. v. Willrich*, 13 Wash.2d 263, 124 P.2d 950, 954, 142 A.L.R. 1) and the contracts of insurance did not create a trust as between appellant and respondent. *Mutual Benefit Life Ins. Co. v. Ellis*, 2 Cir., 125 F.2d 127, 130, 138 A.L.R. 1478, certiorari denied sub nomine *Eisenlord v. Ellis*, 316 U.S. 665, 62 S.Ct. 945, 86 L.Ed. 1741; *Equitable Life Assurance Soc. of United States v. Brown*, 213 U.S. 25, 46, 29 S.Ct. 404, 53 L.Ed. 682, 691. The relationship of a mutual life insurance company to its policyholder members is not that of trustee and cestui que trust but simply that of debtor and creditor. *Lubin v. Equitable Life Assurance Soc.*, 326 Ill.App. 358, 61 N.E.2d 753, 758; *In re Moreland's Estate*,

351 Pa. 623, 42 A.2d 63, 66; *Crossman Co. v. Rauch*, 263 N.Y. 264, 188 N.E. 748, 751; *Holmes v. John Hancock Mut. Life Ins. Co.*, 288 N.Y. 106, 41 N.E.2d 909, 911. (2) When appellant borrowed money from respondent the relationship between them as to the funds borrowed was that of debtor and creditor, whatever may have been their status otherwise. (3) As we have pointed out, appellant had had both actual and constructive knowledge of the facts for many years prior to the commencement of this action and the burden with which he is charged of proving that he did not have the means of discovering the fraud within three years prior to the commencement of the action (*Gray v. Yarbrough*, 61 Cal.App. 724, 731, 215 P. 914; *Reilly v. Richardson*, 18 Cal.App.2d 352, 353, 63 P.2d 1180; *Prewett v. Dyer*, 107 Cal. 154, 159, 40 P. 105; *Kelly v. Longan*, 5 Cal.2d 274, 53 P.2d 971) has not been sustained.

[16-18] 3. *The interest statements became accounts stated.* The purpose of submitting the periodical statements of principal and interest unpaid on the policy loans was to apprise appellant of the amounts claimed to be due and unpaid from him. It was his duty to examine the statements and to report to respondent at once any error found, and his failure so to do constituted his assent thereto and each statement became an account stated. *Union Tool Co. v. Farmers, etc., Bank*, 192 Cal. 40, 53, 218 P. 424, 28 A.L.R. 1417; *Adler v. Granelli*, 112 Cal.App. 688, 690, 297 P. 592; *San Jose Brick Co. v. Rhodes-Jamieson Co.*, 112 Cal.App. 558, 560, 297 P. 619. An account stated is a writing that exhibits the state of the account between parties and the indebtedness claimed to be due from one to another, and if assented to by the debtor, either expressly or impliedly, it becomes a new contract. *Lacy Mfg. Co. v. Gold Crown Mining Co., Ltd.*, 52 Cal.App.2d 568, 577, 126 P.2d 644; *Wright v. Strobeck*, 139 Cal.App. 552, 561, 34 P.2d 781; *Hendy v. March*, 75 Cal. 566, 568, 17 P. 702; *Mayberry v. Cook*, 121 Cal. 588, 590, 54 P. 95. Assent to such a statement is implied from failure to object within a reasonable time. *Wright v. Stro-*

beck, *supra*; Hendy v. March, *supra*; Luse v. Peters, 219 Cal. 625, 629, 28 P.2d 357; Atkinson v. Golden Gate Tile Co., 21 Cal. App. 168, 171, 131 P. 107; Auzerai v. Naglee, 74 Cal. 60, 64, 15 P. 371. At least once each year for more than ten years prior to the stipulated date of the commencement of this action an interest statement became an account stated between appellant and respondent.

[19] Having by his own act permitted the creation of a new contract annually between himself and respondent, and having annually paid without protest the amounts shown on each account to have been due, appellant cannot now dispute the correctness of the sum presently owing by him as shown by the several accounts stated.

[20] Appellant maintains that the defense of an account stated, not having been pleaded in the answer, has been waived. Section 4½ of Article VI of the Constitution provides that no judgment shall be set aside or new trial granted for any error as to any matter of pleading or procedure unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. We have examined the evidence and have concluded that the findings and judgment are in accord with it and that the failure of respondent to plead an account stated has not resulted in a miscarriage of justice.

Appellant's complaint that in order to prevent his policies from being canceled he will be compelled to pay interest in the future on the fraudulent loans is answered by the fact that he paid interest thereon without objection until the notices ripened into accounts stated and until his right to object had been barred by the statute of limitations.

[21, 22] 4. *The evidence of forgery.* The presumption is against fraud (Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114; Ryder v. Bamberger, 172 Cal. 791, 800, 158 P. 753; Abrams v. Daugherty, 60 Cal.App. 297, 304, 212 P. 942; Everett v. Standard Acc. Ins. Co., 45 Cal.App. 332, 338, 187 P. 996 and is not overcome by shadowy evi-

dence. Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26; Rice v. California-Western etc. Co., 21 Cal.App.2d 660, 668, 70 P.2d 516; Raine v. Spreckels, 54 Cal.App.2d 169, 173, 128 P.2d 709; Trousdell v. Equitable Life Assurance Soc., 55 Cal.App.2d 74, 76, 130 P.2d 173, 990. The burden rested on appellant to prove his allegation that he did not sign or authorize the signing of the several applications for loans which he claims were forged. Respondent was not required to prove their genuineness. There is no evidence that appellant did not sign them. The court found that the allegation to that effect was not true. The applications were not offered in evidence although appellant had the opportunity either by notice to produce or by subpoena duces tecum to require their production; or, if they were in respondent's home office in New York, depositions of the custodians of the documents could have been taken and the applications attached as exhibits. Appellant admitted having signed sundry applications for loans in the Los Angeles office of respondent and having received the amounts of the loans. His testimony that he did not sign the applications is no more satisfactory than that given by him with reference to those which he would not admit having signed but which his counsel subsequently submitted as bearing his genuine signatures. If the disputed applications had been produced the handwriting expert who testified in reference to the checks could have readily determined whether the signatures were genuine or forged. It is not outside the bounds of possibility that they would have been shown to be in the same category as those which appellant signed in 1934, when he did not receive the amounts applied for and failed to complain.

A handwriting expert testified that the checks payable to appellant and deposited in the account of Ad. Frankel & Co. had been endorsed in handwriting other than that of appellant. While there was no evidence that the endorsements were made by Frankel, the disputed checks, 11 in number, extending over the period from August 16, 1933, to June 11, 1936, were deposited in the Ad. Frankel & Co. bank account, and it will be presumed that the endorsements were made by Frankel or by some person

in his behalf. No liability rests on respondent if this be true. There is no evidence that appellant did not know of or that he did not consent to the endorsements.

[23] 5. *Instructions to the jury.* Appellant assigns as error the giving of the following instruction: "You are instructed that where a party to an action fails to produce a witness who is under his control, or who fails to produce documents under his control, when it would be natural for him to produce the documents or the witness if the facts known by him had been favorable, his failure to bring the documents or the witness before the court may create an inference that the evidence is unfavorable to that party." The giving of such an instruction has been criticised and in some cases has been held to be error where there has been no failure to produce witnesses or documentary evidence or otherwise no proper occasion for it. The court did not err in giving the instruction in this case. The bookkeeper of the cannery was present at the trial. Appellant expressly declined to call him as a witness, whereupon he was called and testified on behalf of respondent. The evidence given by him, as already stated, to the effect that he received the interest notices, paid the same as directed by appellant and notified the latter who repaid the amounts paid out, tended to disprove appellant's contentions and furnished a reason for the latter's refusal to call him as a witness. The bookkeeper testified that there was a "J. Shapiro" file at the cannery in which receipts for payments made to respondent were placed and that they "probably" were there when he was testifying—"I think they are; they should be." This file was not produced at the trial. Two other persons, employees of the cannery and under appellant's control, who appear from the evidence to have had some knowledge of the matters in litigation, were neither called as witnesses nor brought into court, although respondent's counsel asked that they be produced. One of the employees referred to was the girl who handled the mail at the cannery to whom appellant testified that he gave instructions to hand all notices from insurance companies to the bookkeeper. What other instructions were

given to her and what knowledge she had of appellant's insurance matters does not appear. It was not incumbent on respondent to call her as a witness and thus be bound by the evidence of an employee of its adversary.

The failure of appellant to produce the "J. Shapiro" file, his refusal to call the bookkeeper, and the evidence given by the latter, adverse to appellant's cause, when called by respondent, support the inference that the evidence of the two absent employees and the contents of the file would also have been unfavorable to appellant and provide a foundation for the instruction. Code Civ.Proc., sec. 1963, subd. 5 and sec. 2061, subds. 6 and 7.

The principle of the instruction is approved in 2 Wigmore on Evidence, 3d Ed., p. 162, sec. 285, where the author says: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause.*" (Italics in the text.) Among the authorities cited in support of the quotation are section 1963, subd. 5, and section 2061, subds. 6 and 7, of the California Code of Civil Procedure.

[24-26] We find no error in giving the instruction, but even though it had been improper the objection to it was waived by appellant's request for an instruction which the court gave with the same purport but in different language as follows: "If and when you should find that it was within

the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point." Appellant cannot complain of an instruction given at the request of respondent when he requested a like instruction. *Langazo v. San Joaquin Light and Power Co.*, 32 Cal.App.2d 678, 696, 90 P.2d 825. One may not complain of error which he himself has invited. *Van Der Veer v. Winegard*, 41 Cal.App.2d 518, 521, 107 P.2d 97; *Gjurich v. Fieg*, 164 Cal. 429, 433, 129 P. 464, Ann.Cas.1916B, 111. Appellant having adopted a theory at the trial the judgment will not be reversed because the trial court instructed the jury according to that theory. *Sommer v. Martin*, 55 Cal.App. 603, 610, 204 P. 33. See *Diel v. Baxter*, 58 Cal.App.2d 383, 387, 136 P.2d 789; *Marra v. Aetna Const. Co.*, 15 Cal.2d 375, 379, 101 P.2d 490; *United States Farm Land Co. v. Darter*, 42 Cal.App. 292, 303, 183 P. 696.

[27, 28] The court properly instructed the jury (a) that the burden rested on appellant to prove that his failure to find out about the claimed fraud was not occasioned by the lack of diligence of himself or his authorized agent; (b) that the burden was on him to show by a preponderance of evidence that he or his authorized agent did not have notice or knowledge of or means of discovering the alleged fraud prior to March 1, 1939, that would have put an ordinarily prudent person on notice; (c) that if appellant failed to meet the burden of proof by a preponderance of the evidence, then the statute of limitations commenced to run against his cause of action before March 1, 1939. *Lichtenberg v. Burdell*, 101 Cal.App. 20, 48, 281 P. 518; *Vogel v. Marsh*, 120 Cal.App. 99, 101, 7 P.2d 756; *Lady Washington Consol. Co. v. Wood*, 113 Cal. 482, 486, 45 P. 809; *Consolidated Reservoir & Power Co. v. Scarborough*, 216 Cal. 698, 702, 16 P.2d 268. While the statute of limitations ordinarily is an affirmative defense and the burden rests on the defendant to prove such defense, yet in an action for fraud which is commenced more than three years after it occurred the bur-

den is not on the defendant to show that knowledge of the facts was brought home to the plaintiff but is on the plaintiff to prove that he did not discover the facts constituting the fraud within three years prior to the commencement of the action; and he must further show the time and the circumstances under which they were brought to his knowledge. *Lady Washington Consol. Co. v. Wood*, supra, 113 Cal. at page 487, 45 P. 809. A plaintiff in such a case as this would be defeated if no evidence were given on either side (Code Civ. Proc. § 1981), and if he should fail to meet the burden of proof cast upon him the defendant would not be required to prove facts and circumstances discrediting the plaintiff's allegation or showing its unlikelihood or improbability. Until the burden is met by the plaintiff the defendant may remain silent. The information repeatedly brought to appellant's attention concerning the amounts due on his policy loans carried a direct suggestion of the fraud of which he now complains.

We find no error in the instructions given to the jury relating to the duty of appellant to make inquiry concerning facts which came to his attention, or to the attention of his agent, or in respect to the facts which would have caused a prudent man to make inquiry, or in the instruction defining "discovery," all of which are correct statements of the law. If the circumstances are sufficient to put a prudent man on inquiry he is charged with notice and knowledge of the existing facts. *Prouty v. Devin*, 118 Cal. 258, 262, 50 P. 380.

[29] A reviewing court will not consider one instruction separate and apart from all others. Instructions must be considered in their entirety, each in connection with all the others. The court will not reverse a judgment even though an instruction or isolated statements are subject to criticism because of verbal inaccuracies, or because they do not contain all conditions and limitations that are to be found in all of the instructions, if they harmonize as a whole and state fairly and correctly the law of the case. *Los Angeles etc. District v. Abbot*, 24 Cal.App.2d 728, 740, 76 P.2d 188; *Shields v. Oxnard Harbor District*, 46 Cal.App.2d

477, 489, 116 P.2d 121; *Westover v. City of Los Angeles*, 20 Cal.2d 635, 637, 128 P.2d 350.

[30] If any errors may be found in the instructions they become immaterial by reason of the fact that the findings of the court are adverse to appellant on all issues presented by the pleadings, including those in the first cause of action that were submitted to the jury. Since the views of the court as expressed in its findings and judgment are that appellant is not entitled to recover the amount sued for in the first cause of action and that his action is barred by the statute of limitations, it is reasonably certain that if the judgment on the verdict had been the final judgment in the case the court would not have set it aside on a motion for a new trial. Therefore no error in the instructions could have resulted in a miscarriage of justice. *Haney v. Takakura*, 2 Cal.App.2d 1, 9, 37 P.2d 170, 38 P.2d 160; *Wallace v. King*, 27 Cal.App.2d 174, 181, 80 P.2d 523; *Etienne v. Kendall*, 202 Cal. 251, 257, 259 P. 752.

[31-33] 6. *The findings of fact are sustained by the evidence.* In reference to appellant's claim that some of the findings are not sustained by the evidence certain principles of law are applicable: Where a conflict in the evidence exists the findings of the trial court are conclusive and every substantial conflict must be resolved in favor of the finding. *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 163 P. 2d 756 and cases cited; *Berger v. Steiner*, 72 Cal.App.2d 208, 164 P.2d 559. An appellate court will view the evidence in the light most favorable to the respondent, will indulge all intendments which favor sustaining the findings of fact, and will not disturb a finding if there is substantial evidence in the record to support it. *Estate of Isenberg*, 63 Cal.App.2d 214, 216, 146 P.2d 424. As to the first cause of action the jury, and as to the second cause the court, was the sole judge of the credibility of the witnesses, including appellant (*Code Civ.Proc.* § 1847), and both the jury and the trial judge were free to disbelieve appellant's testimony, even though uncontradicted, if any rational ground existed for so doing. *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d

868, and cases cited; *Gray v. Southern Pacific Co.*, 23 Cal.2d 632, 641, 145 P.2d 561; *Blanc v. Connor*, 167 Cal. 719, 722, 141 P. 217; *Davis v. Judson*, 159 Cal. 121, 128, 113 P. 147.

[34] In weighing appellant's testimony the court and the jury had a right to and no doubt did take into consideration the manner in which he testified and the fact that on direct examination his memory was clear and his answers positive, while on cross-examination concerning the same matters as many as 30 times his answer was "I don't remember," or the equivalent. The jury and the court also had a right to consider his failure to call available witnesses who were under his control as employees at his cannery, and his omission to produce the "J. Shapiro" file which may have contained evidence pertinent to the issues in the action. Appellant testified that he never signed an application for a loan of a blank amount, but two of the applications signed in 1934 which his counsel admitted were signed by him were for blank amounts. The jury and the trial judge were in accord as to their findings and as to the weight given to the evidence produced by the respective parties.

[35] Pursuant to the rules of law above stated and by reason of the weight, or the lack of it, that may have been given to appellant's testimony, and by reason of all the evidence and the circumstances herein related, the court was justified in rejecting appellant's evidence and in finding: (a) that it was not true that his name was forged by Frankel on the endorsements of the checks without his knowledge or consent; (b) that it was not true that Frankel concealed the facts relating to the loans and the alleged forgeries from him; (c) that he knew the amounts of his personal borrowings against each of his policies. Since Frankel was not respondent's agent, except for the limited purposes set forth in the agency agreement, findings (a) and (b) were immaterial in so far as the cause of action against respondent is concerned. There is clear and positive evidence, hereinbefore stated at length, sustaining the several findings that appellant received each of the loan interest notices in due course

of mail; that they were received by his agent, the bookkeeper; that the latter paid the amounts shown to be due; that memoranda of the payments were given to appellant and he repaid each amount; that the interest notices were such as to have put an ordinarily prudent man upon notice of the amounts of the loans and advances then currently outstanding against each policy; and that appellant discovered the acts of Frankel in connection with the loans and advances more than three years before the stipulated time of the commencement of the action.

7. *The purported judgment on the verdict was void and the only judgment was that rendered by the court.* Immediately after the rendition of the verdict of the jury on the first cause of action on October 10, 1944, the clerk, assuming it to be his duty so to do (Code Civ.Proc. § 664), entered a judgment in conformity with the verdict. The second cause of action having been submitted to the court without additional evidence, findings of fact and conclusions of law thereon were filed on January 15, 1945, and judgment by the court was filed on the same day and entered on January 16, 1945. Appellant assigns as error the entry of two judgments, asserting that there can be but one judgment in an action no matter how many counts the complaint contains. The judgment rendered by the court recites the rendition of the verdict of the jury and the entry of judgment thereon, incorporates the same in the judgment of the court "as if specifically set forth herein," and decrees that "plaintiff take nothing by his complaint in this action," obviously covering both causes of action.

[36-40] The general rule is that there can be but one judgment in an action (see *Nicholson v. Henderson*, 25 Cal.2d 375, 378, 153 P.2d 945; *Steiner v. Davis*, 10 Cal.App. 2d 519, 521, 52 P.2d 530; *Bank of America Nat. Trust and Savings Ass'n v. Superior Court*, 20 Cal.2d 697, 701, 128 P.2d 357), and there is but one judgment in the instant case. Where special issues which form only a portion of the controversy between the parties to the action are submitted to a jury and the remaining issues are tried by the court and findings of fact made there-

on, no judgment can be entered in the case at the time the jury renders its verdict. The case has not been tried and the trial has not been concluded until the court has rendered its decision disposing of all issues submitted to it, and there is no decision until the court has passed upon the facts and drawn its conclusions thereon. *Reclamation Dist. No. 556 v. Thisby*, 131 Cal. 572, 574, 63 P. 918; *Rosslow v. Janssen*, 136 Cal.App. 467, 470, 29 P.2d 287; *Bell v. Marsh*, 80 Cal. 411, 414, 22 P. 170. Where, in an action for injunction and damages, the question of damages is submitted to a jury its verdict does not affect the equitable issues which are to be determined by the court upon findings of fact made by it. The clerk is without authority to enter a judgment on the verdict where issues of purely equitable cognizance remain which the court alone can determine and which it had not determined at the time the verdict was rendered. *Farrell v. City of Ontario*, 39 Cal.App. 351, 359, 178 P. 740; *Churchill v. Louie*, 135 Cal. 608, 612, 67 P. 1052. Section 664 of the Code of Civil Procedure is directory and it is not necessary to the validity of a judgment that it should be entered within 24 hours after the verdict is rendered. *Churchill v. Louie*, supra. The trial of this action had not been concluded when the verdict of the jury was rendered, and the judgment entered thereon having been premature was void and of no effect. *Farrell v. City of Ontario*, supra; *Vallejo etc. Co. v. Reed Orchard Co.*, 169 Cal. 545, 558, 147 P. 238. A motion for a new trial following the entry of judgment by the clerk on the verdict would likewise have been premature. *Farrell v. City of Ontario*, supra, 39 Cal.App. at page 360, 178 P. 740.

There is but one judgment in the case, to wit, the judgment of the court which followed the findings of fact determining all issues both legal and equitable adversely to appellant, which for the reasons herein stated is affirmed. The purported appeal from the void judgment entered on the verdict of the jury is dismissed.

MOORE, P. J. and McCOMB, J., concur.

Hearing denied; SHENK, EDMONDS, and SCHAUER, JJ., not participating.

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TOMEY v. DYSON et al.

Civ. 7265.

District Court of Appeal, Third District,
California.

Sept. 24, 1946.

1. Automobiles ⇨244(6)

In action for injuries to pedestrian struck by automobile backing from sidewalk curb, evidence supported finding of driver's negligence in failing to see plaintiff standing in open unobstructed space behind automobile about six feet from curb. Vehicle Code, § 543.

2. Appeal and error ⇨1011(1)

The appellate court may not interfere with trial court's definite finding on conflicting evidence that motorist was guilty of negligence, proximately causing injuries to pedestrian, in backing automobile against her from sidewalk curb without seeing her standing in open space behind automobile. Vehicle Code, § 543.

3. Automobiles ⇨222

While a pedestrian, whose hearing is seriously impaired, should exercise greater care than one with perfect hearing in attempting to cross street, pedestrian's defective hearing will not preclude him from recovering damages for injuries sustained because of motorist's negligence, if pedestrian exercises due caution under all surrounding circumstances.

4. Appeal and error ⇨1011(1)

Trial court's finding on conflicting evidence may not be interfered with on appeal.

5. Automobiles ⇨217(3)

While pedestrian should exercise greater care in crossing street elsewhere than on marked crosswalk, mere crossing of street in middle of block does not constitute contributory negligence precluding recovery of damages for injuries sustained as result of being struck by automobile, in absence of contrary statute or ordinance, if pedestrian uses due care commensurate with conditions.

6. Automobiles ⇨160(4)

The statute requiring pedestrian, crossing roadway at point other than within marked crosswalk, to yield right of way to all vehicles on roadway, was inapplicable to pedestrian struck by automobile backing from sidewalk curb while she was waiting in open space behind automobile to cross street in middle of block, as both pedestrian and motorist had equal right to use highway. Vehicle Code, §§ 543, 562.

7. Automobiles ⇨160(4), 217(3)

A motorist and pedestrian, attempting to cross street elsewhere than within marked crosswalk, should both exercise care consistent with circumstances surrounding situation which confronts them. Vehicle Code, § 562.

8. Automobiles ⇨222

The fact that pedestrian, whose hearing is defective, must exercise greater care in attempting to cross street in middle of block, does not necessarily mean that such pedestrian is guilty of contributory negligence, barring recovery for injuries sustained when struck by automobile, in making such attempt. Vehicle Code, § 562.

9. Negligence ⇨122(1)

In action for personal injuries, burden is on defendants to prove plaintiff's alleged contributory negligence.

10. Appeal and error ⇨931(1)

On appeal from judgment in case tried without jury, every intendment is in favor of trial judge's finding and judgment.

11. Appeal and error ⇨1050(1)

In personal injury suit, admission of evidence that plaintiff's son paid \$10 for workmen's compensation insurance to protect persons employed to care for plaintiff during her convalescent period was harmless to defendant in view of omission of such item from paragraph of trial judge's findings, enumerating items of special damages allowed, and smallness of amount, though record failed to disclose that insurance policy covered nurse's services.

12. Damages ⇨43

In personal injury suit, amount paid for services of trained nurse and mainte-

nance of plaintiff in convalescent home while recovering from injuries after her discharge from hospital was properly allowed as element of damages.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Jane A. Tomey against Robert Dyson and others for injuries sustained as the result of being struck by a backing automobile driven by named defendant. Judgment for plaintiff, and defendants appeal.

Affirmed.

Van Dyke & Harris, of Sacramento, for appellants.

Francis O. Hoover and Edward M. Lacy, both of Modesto, for respondent.

THOMPSON, Justice.

The defendants appealed from a judgment of \$6,784.90 rendered against them in a suit for damages for personal injuries received as the result of negligently backing an automobile from the sidewalk curb in Modesto, where it was parked, upon and over plaintiff who was attempting to walk across the street in the middle of a block. The cause was tried by the judge sitting without a jury. The court found that plaintiff's injuries were caused by the negligence of the driver of defendant's car, and that plaintiff was not guilty of contributory negligence.

The appellants contend that the findings and judgment are not supported by the evidence; that the defendants were free from negligence; that plaintiff was guilty of contributory negligence as the sole cause of the accident, and that the court erroneously admitted in evidence certain incompetent proof of damages.

Gordon A. Wight Company is a copartnership engaged in the business of operating an automobile repair and tow car business in Modesto. Robert Dyson, who was employed by the copartnership as a mechanic, was driving defendant's tow car at the time of the accident. The plaintiff is an elderly lady, seventy-six years of age, and quite deaf. She was, however, well,

strong, spry and alert for her age. She was in good health and walked briskly. She resided in Modesto near the scene of the accident, which was in the business portion of the city, and was familiar with traffic conditions in that vicinity. She was shopping and had two or three small packages in her arm at the time of the accident, one of which contained a small enameled vessel.

The accident occurred on 11th Street, about 150 feet southeasterly of its intersection with H Street. Mrs. Tomey was attempting to cross 11th Street from the southerly curb. A store building occupied by Strong's Auto Parts extended along the property line on 11th Street, easterly from H Street, some distance beyond the place where the accident occurred. The sidewalk was 16 feet wide from that building to the curb. The front entrance to the building was on H Street, but there is a side entrance on 11th Street about 130 feet from the corner of H Street. A 15 foot open driveway leads from 11th Street across the sidewalk to that entrance, evidently used for the delivery of merchandise. There is another similar side entrance to the building, over another 15 foot driveway situated about 35 feet westerly from the first mentioned driveway. Adjacent to the sidewalk, on the southerly side of 11th Street, parking spaces for automobiles are distinctly outlined in white stripes on the concrete surface of the street. No parking spaces are reserved opposite the 15 foot driveways. Between the two driveways there are two parking spaces about eight feet in width which are outlined parallel with and adjacent to the curb. All other parking spaces on that side of the street are outlined with white stripes at an angle of 45 degrees with the curb. They are 6.65 feet in width. Easterly from the first mentioned driveway, and adjacent thereto, there is an additional open space of about 12 feet to the rear end of a 16 foot machine parked in the nearest diagonal space, where the defendant's machine was alleged to have stood. Assuming that it did occupy that first diagonal parking space, there would still be about 27 feet of open space, with a clear view of the street, to the rear

end of their machine, where no automobiles were parked.

On the afternoon of January 18, 1944, Robert Dyson drove defendant's tow car, which was 16 feet in length, to Strong's accessory shop to secure some automobile equipment for repairing machines for his employer. He parked on 11th Street at the curb next to the easterly side of the first mentioned driveway. There is a conflict of evidence as to whether he parked in the diagonal parking space or parallel with the curb. The evidence indicates that his car was not parked within the outlined space, but was much more nearly parallel with the curb or he could not have struck the plaintiff in the place where her body lay upon the pavement after he backed the machine out from its parked position. After parking his tow car, Mr. Dyson went into the store and was gone fifteen or twenty minutes. It was not raining and it was broad daylight.

After Dyson entered the store, the plaintiff, Mrs. Tomey, walked along the sidewalk 100 feet or more on the southerly side of 11th Street from the corner of H Street looking for a safe place to cross the street. After passing the open space of the second driveway she stopped on the sidewalk near the parked tow car and "stood there for a few minutes" watching the traffic and examining defendant's machine. She saw defendant's machine at her right, and noticed that it was a tow car. She had not seen Dyson leave the machine or go into the building. The record indicates that she exercised much caution. The tow car was not then occupied by any person. She said that after examining the tow car she was "entirely satisfied it was entirely unoccupied." She testified that the car was parked "right along straight with the curb"; not at a right angle therewith. She then stepped off the sidewalk "quite a distance from the rear end" of the tow car, and walked into the street five or six feet from the curb where she stood about fifty-five seconds only, watching the traffic on the street. At the place where she stood there was an open space of about 27 feet where no cars were parked. Her view of the street was not obstructed. The first car

on her left, as she faced the street, was parked parallel with the curb beyond the driveway. It did not obscure her view. While she stood in that position for less than one minute, looking to her left for approaching vehicles on the street, Mr. Dyson came back from the store along the sidewalk, past the open space where she stood. Mrs. Tomey did not see him. Entering his car, Mr. Dyson turned on the motor, reversed the gearing and backed the car against or upon plaintiff, knocking her down and breaking her left femur—the thigh bone—and otherwise seriously injuring her. When Dyson heard the plaintiff scream, he stopped the car and went back to her aid. He started to assist her in getting upon her feet, but, at the request of a bystander, he left her there on the pavement and went to summon an ambulance, which arrived in about fifteen minutes. The body of Mrs. Tomey lay upon the pavement five or six feet from the curb and partly upon the easterly portion of the driveway. Numerous particles of enamel broken from the vessel she carried in her arm were found in that same place. There appears to be no doubt she was not standing behind the outlined parking space within which Dyson testified that he parked his car. If she had been there, she would have stood 12 feet or more from the curb. There is no dispute regarding the place where her body lay upon the pavement. Several witnesses definitely fix the location of that spot.

[1,2] We are convinced there is ample evidence to support the finding that the driver of the tow car was guilty of negligence. He should have seen the plaintiff standing in the open space. There is no evidence that Mrs. Tomey was ever farther in the street than about six feet from the curb. She must have stood some distance from the tow car in the open unobstructed space in clear view of Mr. Dyson as he passed along the sidewalk from the store to his car. If that be true, he should have seen her if he had used reasonable care in observing the street behind his car which he intended to and did back upon that open space. It is true that Mr. Dyson testified that he carefully observed the open space

behind his machine, and that he saw no person standing there. On the trial he positively asserted that no one was then standing on the street in the vicinity of his car. He also stated that, after he turned on the motor and slowly backed the car from the curb, he looked through the small 12 by 18 inch window in the rear of his cab and saw no person standing on the pavement. Those statements of the driver of the machine merely raise a conflict in the evidence regarding his negligence. In view of the fact that the court definitely found that the driver of the machine was guilty of negligence which proximately caused the injuries sustained by plaintiff, we may not interfere with that conclusion under the circumstances of this case. *Payne v. Wright*, 58 Cal.App. 655, 209 P. 218; 3 Cal.Jur., sec. 179, p. 948; 2 Cal.Jur. 10-Yr. Supp., sec. 293, p. 467, and cases cited; Vehicle Code, sec. 543. The section last cited provides that, "No person shall start a vehicle stopped, standing or parked on a highway nor shall any person back a vehicle on a highway unless and until such movement can be made with reasonable safety."

[3,4] Nor, conceding that it is a more serious question to determine, may we hold, upon the facts of this case, that plaintiff was guilty of contributory negligence as a matter of law. *Payne v. Wright*, supra; 2 Cal.Jur. 10-Yr. Supp., sec. 270, p. 429; Vehicle Code, sec. 543. It is true that a pedestrian whose hearing is seriously impaired should exercise greater care than one with perfect hearing ability, in attempting to cross a public thoroughfare. But defective hearing of a pedestrian will not preclude him from recovering damages for personal injuries sustained on account of the negligence of the driver of an automobile, provided the pedestrian exercises due caution in crossing a street, under all the surrounding circumstances of the case, including the realization that he is deprived of warning of an approaching machine by the noise of the motor or the voice of an individual. The driver did not blow the horn nor speak to her. He did not see her. We must assume that the court took into consideration Mrs. Tomcey's defect of hear-

ing in determining that she was not guilty of contributory negligence. The judge listened to a rigid examination of the plaintiff on that subject and was best able to judge of her ability to hear sounds. It does appear that she was often unable to follow a conversation. That might depend on the articulation of the speakers, or upon their distance or the clearness with which they spoke. It was demonstrated that she could hear sounds. She was by no means totally deaf. We think that was one of the elements of the question of her due care, the determination of which may not be interfered with on appeal, under the circumstances of this case. The plaintiff stood on the sidewalk near the tow car several minutes, carefully examining it and the surrounding conditions to make sure it was unoccupied before she stepped off the walk into the clear, open unobstructed space adjacent to the machine. She had a right to assume that when and if the driver returned he would observe the provisions of section 543 of the Vehicle Code before he backed his car from its parked position, by first ascertaining that he might do so with reasonable safety to her. She stood about 12 feet behind the tow car, five or six feet from the curb, near the line of the driveway, only fifty-five seconds, looking to her left for approaching vehicles, when she was struck.

[5] It is also true that a pedestrian should exercise greater care in crossing a street at a place other than upon the marked crosswalks. 2 Cal.Jur. 10-Yr. Supp., sec. 257, p. 402. But, in the absence of a statute or ordinance to the contrary, the mere crossing of a street in the middle of a block does not constitute contributory negligence which will preclude an injured pedestrian from recovering damages, if he uses due care commensurate with the circumstances and conditions. *Payne v. Wright*, supra. With respect to a pedestrian's right to use a public highway, it is said in *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, at page 95, 239 P. 709, at page 713, 41 A.L.R. 1027, that, "It is settled law that pedestrians have a right to travel anywhere upon a public highway, and it is, therefore, not negligence in them to do so.

This is the common-law rule, and our Legislature has not changed or modified it."

[6,7] The appellants invoke the application of section 562 of the Vehicle Code in support of their contention that Mrs Tomey was guilty of contributory negligence in failing to yield the right of way. That section provides that,

"(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"(b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

We think the preceding section is not applicable to the circumstances of this case. This cause does not involve the question of whether the pedestrian or the vehicle had a superior right to the use of the highway. Both had an equal right to the use of the highway. Both the driver of a machine and a pedestrian should exercise due care consistent with the circumstances surrounding the situation which confronts them. The yielding of a right of way, referred to in the section above cited, contemplates that the pedestrian, with knowledge of the fact that the driver of an automobile is actually using or desires to use the highway at about the same time and place, shall defer to the superior right of the machine. In the present case neither party knew of the contemplated use of the highway by the other party. Moreover, in spite of that declaration of the superior right of the vehicle, the second paragraph of that section nevertheless imposes upon the driver of a machine under such circumstances the duty to exercise due care for the safety of pedestrians upon the highway, which the court found upon satisfactory proof that he did not do. We conclude that the foregoing section does not apply to the facts of this case, but section 543 of the same code does, as we have previously stated.

The case of *Payne v. Wright*, supra, in which a hearing by the Supreme Court was

unanimously refused, is remarkably similar to the facts of the present case. Judgment for the plaintiff was affirmed. The plaintiff, who was crippled and walked with a crutch, was about to cross the street in the middle of a block, in company with her young grandson. There were two automobiles parked close to the curb, with a space between them wide enough for another car. After looking about her for approaching vehicles, she stepped from the sidewalk into the space between the two parked cars. Her grandson walked beyond the parked machines to see whether there were approaching vehicles in the street. While she stood there "for a moment," the defendant, without warning signal and without looking in the direction of the plaintiff, rapidly backed his machine into the space between the parked cars, where she stood, and struck and injured her. The grandson shouted a warning to her, but she had no opportunity to escape. The appellate court said there was ample evidence of defendant's negligence, and that, "A mere recital of the above [evidence] is a sufficient answer to appellant's contention that * * * plaintiff was guilty of contributory negligence as a matter of law."

[8] In the present case the appellants insist that because plaintiff was deaf she must therefore exercise greater care in attempting to cross the street in the middle of the block. That assertion seems reasonable. But it does not necessarily mean that she was therefore guilty of contributory negligence. In the *Payne* case the plaintiff was also disabled. She was crippled and had to walk with a crutch. The same rule which may require a deaf person to exercise greater care would also compel a person so crippled that she had to walk with a crutch, to use greater caution, yet the court held that Mrs. Payne was not guilty of contributory negligence on that account, or for any other reason.

[9,10] The burden is on the defendants to prove alleged contributory negligence on the part of the plaintiff. The finding of the trial judge that plaintiff is free from contributory negligence will not be disturbed on appeal when there is substantial evidence or reasonable inference to be drawn therefrom in support of that conclusion.

A reviewing court may not hold that plaintiff is guilty of contributory negligence as a matter of law unless there is no evidence or reasonable inference to support a contrary finding in that regard. On appeal every intendment is in favor of the finding and judgment. Even when reasonable minds may differ regarding the effect of the evidence in support of the conclusion of a trial judge, his finding should be upheld. All the facts and circumstances of the case should be weighed in a manner most favorable to the plaintiff. *Page v. Cudahy Packing Co.*, 31 Cal.App.2d 282, 288, 87 P.2d 913; *Lang v. Barry*, 71 Cal. App.2d 121, 161 P.2d 949; *Foerster v. Direito*, 75 Cal.App.2d 323, 170 P.2d 986.

Finally the appellants contend that the court erred in admitting evidence of damages of payments, on account of plaintiff's injuries sustained, of \$10 for workmen's compensation insurance for the protection of persons employed during her convalescent period, and the further sum of \$181 paid for a nurse and care for plaintiff for a period of fifty-four days, while she was recovering after she had left the hospital.

Regarding the item of \$10 paid by the son of the plaintiff for workmen's compensation insurance, it may be conceded that the record fails to disclose the fact that the insurance policy covered the services of the nurse. If it did not, that item would be improperly allowed as an element of damages. But there is no evidence that that item was included in the judgment. The evidence of that expenditure was admitted only conditionally. That condition was not supplied by further proof. The court said in that regard: "Suppose we let it in. It won't hurt anything. Unless they [plaintiff's attorneys] can show me a necessity, unless it is required, I wouldn't charge them [the defendants] with it."

Paragraph IV of the findings specifically enumerates the items of special damages

which were allowed. The item of \$10 for insurance is not included therein. We must assume it was excluded from the judgment. The amount is small. It may be said to fall within the maxim of *de minimis non curat lex*. The ruling of the court in admitting the evidence is harmless.

[12] Regarding the other challenged item of \$181 which was paid for the services of a nurse and maintenance of the plaintiff in a convalescent home for fifty-four days while she was recovering from her injuries, we are of the opinion it was properly allowed as necessary expenses incident to the reasonable care of plaintiff. When the plaintiff was discharged from the hospital, where she remained for three and a half months, her physician, Dr. De Lappe, recommended that she be placed in a convalescent home for recuperation. She remained under his care for six weeks after her discharge from the hospital. She was unable to dispense with her crutches during that entire period, after which she used a cane to move about the house. Pursuant to the doctor's advice plaintiff's son placed her in the home of William Rushing, who employed a trained nurse, where she remained under the care of the nurse and the supervision of the doctor for fifty-four days. For that service and care Rushing was paid \$181. That bill apparently included some cost of maintenance. Compensation of a trained nurse for the necessary care of an injured person in a private home during her recovery from a broken thigh as the result of negligent injury, is a proper element of damages, even after her discharge from a hospital. *New Amsterdam Casualty Co. v. Industrial Accident Commission*, 137 Cal.App. 719, 31 P.2d 245. That item was a proper charge for necessary and proper treatment of the patient.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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THOMPSON et ux. v. WALSH et al.

Civ. 15296.

District Court of Appeal, Second District,
Division 3, California.

Sept. 23, 1946.

1. Vendor and purchaser ⇨16(1)

Writing by which owners listed realty with a broker for sale unfurnished at certain price or for rent furnished, at a specified rental, and subsequent writing listing the realty for sale furnished for certain price, were mere authorizations for broker to find a buyer or renter for the realty and furnishings, and not offers addressed to prospective purchasers or to the public generally.

2. Vendor and purchaser ⇨17

A receipt signed by vendors' real estate broker, acknowledging a deposit of \$5,000 by prospective purchasers on account of purchase price of \$65,000 for residence and furnishings, and which was signed by prospective purchasers, was a continuing offer by prospective purchasers to purchase the realty and personalty, and it was subject to acceptance by prospective vendors at any time before it should be revoked.

3. Vendor and purchaser ⇨17

Prospective vendors' instructions to escrow holder that the prospective purchasers' terms, conditions and instructions with reference to sale of residence and furnishings, were concurred in, approved and accepted, constituted an acceptance of prospective purchasers' offer to purchase.

4. Vendor and purchaser ⇨17

Prospective vendors who had knowledge of prospective purchasers' offer to purchase residence and furnishings could have accepted the offer by the execution of any writing expressing their consent to sell on terms offered by prospective purchasers and by delivery of such writing to prospective purchasers or their agents.

5. Specific performance ⇨29(1)

A continuing offer by prospective purchasers to purchase residence and furnishings, with a description of the furnishings, and prospective purchasers' and prospective vendors' instructions to escrow holder concerning the sale constituted a single agreement of the parties, and therefore suit for specific performance by prospective purchasers would lie though instructions did not contain a description of the furnishings, since offer could be looked to for the description.

6. Frauds, statute of ⇨118(2, 5)

If all writings adduced to establish contract for sale of realty, when viewed together, show unmistakably that they constitute several parts of one transaction, there is such a reference as satisfies rule that memorandum must express essential elements of contract with reasonable certainty, and parol evidence is admissible to show circumstances under which transaction occurs and to connect several papers constituting the contract between the parties.

7. Vendor and purchaser ⇨89, 107

Where terms of sale of realty have been agreed on, additional demands of one party or the other through the escrow holder may not be seized upon as an excuse for withdrawing from the transaction without a good faith effort to ascertain whether they are attempts to impose new and unacceptable conditions or are merely tentative proposals.

8. Vendor and purchaser ⇨89

Where entire evidence in respect to purchasers' suit for specific performance of contract for sale of residence and furnishings showed that additional letters by prospective purchasers to escrow holder with reference to sale were merely proposals, prospective vendors were not entitled to refuse to perform the contract on ground that prospective purchasers' demands were at variance with the terms of the contract between the parties.

9. Vendor and purchaser ⇨89

Statement in letter by prospective purchasers to escrow holder that prospective

vendors' liability under policy of title insurance should be \$55,000 was not an additional demand entitling vendors to refuse to perform the contract where contract provided that amount of title company's liability in its assurance of title would be handed to escrow holder later and approved by the parties and amount specified did not appear to be unreasonable.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit for specific performance of a contract for the sale of residential property together with certain furniture and furnishings by E. J. Thompson and Ada R. Thompson, his wife, against Raoul Walsh and Lorraine Walsh, his wife, and others, wherein the Security-First National Bank of Los Angeles filed a cross-complaint. From a judgment of specific performance, Raoul Walsh, Lorraine Walsh, and others appeal.

Affirmed.

Freston & Files, of Los Angeles, for appellants.

Roane Thorpe, of Los Angeles, for respondent Security-First National Bank of Los Angeles.

Warren E. Libby, of Los Angeles, for respondents E. J. Thompson and Ada R. Thompson.

SHINN, Justice.

Defendants appeal from a judgment of specific performance, directing them to transfer to plaintiffs a residential property, together with certain furniture and furnishings thereof, upon payment of the sum of \$65,000. Appellants in their defense alleged that no sufficient agreement of sale had been entered into, and this defense raises the sole question for decision upon the appeal. The action was tried upon a stipulation as to the controlling facts.

The writings to be examined in deciding the question of the sufficiency of the agreement, and which the trial court held to be sufficient, are the following:

(a) A writing dated April 16, 1943, by which defendants listed their property with a broker for sale unfurnished at a price of \$59,500, or for rent furnished at \$750 per month.

(b) A writing dated August 4, 1943, listing the property for sale furnished for \$65,000, and enumerating certain items of furniture and furnishings reserved by the owners.

(c) (Referred to as Exhibit C.) A receipt dated August 10, 1943, signed by the broker, acknowledging a deposit of \$5,000 by plaintiffs on account of the purchase for \$65,000 cash, and stating, "The above price is to include all furniture, furnishings, floor coverings and window draperies now on and in the premises excepting all prints in bar room and upstairs sitting room, also screen with prints in upstairs sitting room, dresser in front bedroom, large round table con. in living room, secretary in living room and all silverware and 8 piece coffee set on said table & 4 silhouettes on living room walls." The writing further read, "Subject to the approval of the Buyer of a report from a licensed termite control company showing the property to be free & clear of termites & dry rot. The seller agrees to leave the telephones as installed now on the premises and the buyer agrees to sign a letter showing his responsibility for the bills accruing." The receipt stated also, "* * * the property is sold subject to the approval of the owner." Underneath the signature of the agent appeared the following: "I agree to purchase the above described property on the terms and conditions herein stated," which plaintiffs signed. Below their signatures appeared, "We hereby agree to the above sale and terms thereof and agree to pay to Lawrence Block Co., Inc., a commission of ———% of the total sales price." Defendants were not requested to and did not sign this instrument.

(d) (Referred to as Exhibit D.) A single instrument, upon which first appeared the buyer's escrow instructions and beneath those the instructions of the seller. The buyer's instructions bore date of August 12, 1943, were signed by plaintiffs August 13,

1943, stated that \$65,000 would be deposited for a deed, and read: "Hold for the Buyer a Bill of Sale, with inventory attached, subject to said Buyer's approval. No chattel search is required. Inasmuch as the consideration provided for herein includes the chattels mentioned in the above Bill of Sale, the amount of Title Company's liability in its assurance of title and the amount of U. S. Revenue stamps to be affixed and cancelled on the deed, will be handed you later and approved by both parties hereto. Affix \$ see above U.S.R. stamps on deed, to be paid by SELLER." The instructions in other respects were in the usual form and do not bear upon the matter of the sufficiency of the agreement. The seller's instructions were dated and signed August 9, 1943, and read in part: "The foregoing terms, conditions and/or instructions are hereby concurred in, approved and accepted. I will hand you all instruments and money necessary for me to comply therewith," etc. They further stated: "Pay your Loan Department for reconveyance of Trust Deed on the property described herein. The demand is to be subject to the seller's approval." The instructions in other respects were formal and need not be noticed.

(c) A letter to the bank dated August 13, signed by plaintiffs, reading as follows: "Escrow No. 136-14740 R August 13, 1943. To Security-First National Bank of Los Angeles My previous instructions in the above numbered escrow are hereby modified-supplemented in the following particulars only: The original instructions herein are amended as follows: Procure Chattel search covering personal property in the premises conveyed in this escrow, for a period of five years. The report is to be subject to the Buyer's approval. Hold, subject to the Buyer's approval, a Termite report. The seller herein pays the charges for said search and report. The parties hereto will hand you two letters, in duplicate, both signed by both Buyers and sellers, regarding telephone and personal property not conveyed to the Buyers. At close of this escrow deliver one copy of each of said letters to each the Buyer and seller herein. Your Bank is not to be concerned with

the contents of said letters, and the signatures thereon represent full approval thereof by both Buyer and Seller. The assurance of title covering the property herein is to be written with Title Company Liability of \$55,000.00. Affix and cancel \$60.50 U. S. Revenue Stamps on the deed and charge same to the seller in accordance with the original instructions. [Signed] E. J. Thompson Ada R. Thompson." (f) A letter to the bank, signed by plaintiffs, dated August 13, instructing that title should be vested in plaintiffs as joint tenants; (g) a letter addressed to defendants, dated August 12, requesting permission to continue in defendant's name the telephone service and listing and agreeing to pay all charges; and (h) a letter, dated August 12, addressed to defendants, agreeing to deliver to defendants within 30 days after close of escrow an 8 piece coffee set and 4 silhouettes, within four months from the date of the letter a round table, secretary and dresser and, upon demand of defendants, all other items of furniture and furnishings excepted from the sale. None of these four letters was signed by defendants.

On September 1 defendants by letter to plaintiffs stated that they revoked their offer to sell and convey the property, "for the reason that you have not accepted said offer unconditionally but have, since we made said offer, imposed upon us, as the sellers of said furnished residence, new, additional and different conditions than were contained in our said offer and which are not acceptable to us."

Plaintiffs had theretofore deposited \$65,000 in escrow to be used in accordance with their instructions, but defendants did not deposit a deed or bill of sale.

Appellants place their main reliance upon the absence from the escrow instructions, Exhibit D, of any description of the personal property, contending that such description is one of the essentials of a valid agreement under the statute of frauds. The trial court found that by the terms and provisions of the above-mentioned writings, Exhibits A, B, C, and D, defendants agreed to sell and plaintiffs agreed to purchase the real property and the furniture and fur-

nishings, with the exceptions set forth in Exhibit C, for a price of \$65,000.

[1-6] It is the contention of appellants that Exhibit D constituted the entire contract; that it did not, expressly or by implication, refer to or incorporate any other writing and that the other writings may not be resorted to for the purpose of supplying the missing description of the personal property. In discussing this contention, we shall disregard Exhibits A and B. These were mere authorizations for the agent to find a buyer or renter for the property and were not offers addressed to plaintiffs or to the public generally. *Holway v. Malloy*, 70 Cal.App.2d 317, 160 P. 2d 893. Exhibit C, however, was an offer by plaintiffs to purchase the property. When it was signed by plaintiffs it described the personal property as it was described in the listings given the agent, including a specification of the items to be excepted from the sale. The order in which the several writings were signed was the following: the agent notified defendants that plaintiffs had made an offer of \$65,000 and defendants thereupon caused to be prepared the escrow instructions, Exhibit D, and they signed the seller's instructions on August 9, but retained them in their possession. On August 10 plaintiffs made their deposit of \$5,000 and signed their offer, Exhibit C. The instructions, D, were then in the hands of the private secretary of Mr. Walsh, and she delivered them to defendants' attorney. On August 11 there was a meeting of the agent, defendants' secretary and attorney, with plaintiffs and their attorney. Upon that occasion, as a result of negotiations, the list of excepted articles of personal property specified in Exhibit C was amended by the addition of the following: "8 piece coffee set on said table & 4 silhouettes on living room walls" and these additions were initialed by plaintiffs. Upon the following day defendants' attorney prepared the two letters, G and H, which were dated August 12. On the morning of August 13 defendants' attorney delivered the instructions, D, to the bank as escrow holder, and upon the afternoon of that day plaintiffs signed their instructions, D. Aside from the letters E, F, G, and H, which we shall

mention later, the writings then consisted of plaintiffs' offer, Exhibit C, which contained a sufficient description of the personal property, plaintiffs' portion of the instructions, D, which did not contain a description of the property, but called for bill of sale with inventory attached, to be approved by the parties, and defendants' portion of the instructions, D, by which they agreed to furnish all instruments needed to comply with plaintiffs' instructions. Exhibit C was a continuing offer by plaintiffs to purchase the real property and the personal property, and it was subject to acceptance by defendants at any time before it should be revoked. Plaintiffs' instructions, D, were merely an affirmation of their offer, with certain modifications of their demands and without a description of the personal property. Defendants' instructions, D, constituted an acceptance of plaintiff's offer to purchase as modified by plaintiffs. Although defendants' instructions were signed and dated August 9, they were deposited with the escrow holder August 13 after plaintiffs' offer, Exhibit C, as amended, had been communicated to defendants. It is quite obvious, we think, that the offer, C, and the escrow instructions, D, constituted a single agreement of the parties. Defendants, having knowledge of plaintiffs' offer, could have accepted it by the execution of any writing expressing their consent to sell on the terms offered by plaintiffs and the delivery of such writing to plaintiffs or their agent. The escrow holder was the agent of plaintiffs as well as of defendants for the consummation of the sale and was authorized to receive from defendants an acceptance of plaintiffs' offer. It was not necessary that plaintiffs' instructions, D, also, should contain a description of the personal property, nor was it necessary that defendants' acceptance contain such description. Plaintiffs' offer was as much a part of the agreement as were the escrow instructions, and could be looked to for a description of the property which was to be the subject of the bill of sale and the inventory. In *Searles v. Gonzalez*, 191 Cal. 426, at page 432, 216 P. 1003, at page 1005, 28 A.L.R. 78, the court quoted from *Strouse v. Elting*, 110 Ala. 132, 20 So. 123, as follows: "It has

been held that if all the writings adduced to establish the contract, when viewed together in the light of the conditions and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter and constitute several parts of one connected transaction, so that there can be no other reasonable conclusion, from the evidence thus afforded, than that they were written with reference to those concurrent or preceding, there is such a reference of one to the other as satisfies the rule, although there is no reference in express terms; and parol evidence is admissible to show the circumstances under which the transaction occurred, and to connect the several papers constituting the contract between the parties." And our Supreme Court said (191 Cal. at page 431, 216 P. at page 1004, 28 A.L.R. 78): "While the memorandum must express the essential elements of the contract with reasonable certainty, these may be gathered either from the terms of the memorandum itself or from some other paper or papers therein referred to. If one of a series of papers which appear to have some relation to the same matter is signed by the party to be charged, this is enough, as all the papers are to be considered together as forming one contract or memorandum." See also *Van Cauteren v. Forger*, 45 Cal.App.2d 388, 114 P.2d 6; *Sterling v. Title Ins. & Trust Co.*, 53 Cal. App.2d 736, 739, 740, 128 P.2d 31; *Gibson v. De La Salle Institute*, 66 Cal.App.2d 609, 152 P.2d 774; *Easton v. Ash*, 18 Cal.2d 530, 536, 116 P.2d 433. Defendants' acceptance of plaintiffs' offer obligated them to furnish a bill of sale as well as a deed. Plaintiffs' instruction to the escrow holder calling for a bill of sale was but a part of the mechanics of closing the transaction, and the court properly looked beyond that instruction to plaintiffs' original offer for a description of the personal property and upon doing so found the agreement to be complete in that respect. An inventory was prepared, approved by plaintiffs and placed in the escrow, and no question appears to have been raised as to its correctness.

[7] Appellants specify several particulars in which it is contended plaintiffs' demands were at variance with the terms up-

on which defendants were willing to sell. They refer to the requirement in Exhibit C of a report showing the property free of termites and dry rot and to the letter (e) calling for a termite report "subject to the buyer's approval" and a title search covering the personal property. The contention is that the filing of the letter (e) with the escrow holder amounted to a refusal by plaintiffs to consummate the purchase on the terms stated in the escrow instructions (D). In considering this contention it is necessary to distinguish between instructions which go to the terms and conditions of the proposed purchase and sale and those which do not. Insofar as the instructions constitute offers and the acceptance of offers affecting the basic terms and conditions of a sale, they become a part of the contract of the parties. But they may only serve the purpose of directing the escrow holder, as agent of the parties, in matters of detail which are frequently involved and which do not go to the essentials of the contract. Custom enters into the adjustment of matters of detail, and proposals and counter proposals may be made and compromises may be effected. Demands may be made as a basis of negotiations and with the intention of withdrawing them if they are not agreed to. Where the terms of a sale have been agreed upon, additional demands by one party or the other through the escrow may not be seized upon as an excuse for withdrawing from the transaction without a good faith effort to ascertain whether they are attempts to impose new and unacceptable conditions or are merely tentative proposals. Appellants point out that one letter of August 13 required a title search of the chattels and a termite report, which were to be paid for by the sellers, and to be subject to the buyers' approval, and that this instruction also called for letters signed by both buyers and sellers regarding the telephone service and the delivery to defendants of personal property not conveyed to the buyers. They say: "We think it obvious that the making of the additional demands constitutes one act on the part of the plaintiffs with their execution of Exhibit D." And further: "None of these additional impositions were accepted by the defendant sellers and, on

the contrary, they cancelled the escrow on the ground that such additional impositions were not accepted." We do not find in the stipulation of facts, the findings, or the testimony, support for the contention that, "The making of the additional demands constitutes one act on the part of the plaintiffs with their execution of Exhibit D." The stipulation was that the several writings were deposited with the bank "on or about the 13th day of August, 1943," and we find nothing more definite than that in the record. However, we deem it immaterial when the letters were delivered to the escrow holder.

It will be recalled that Exhibit C provided: "The seller agrees to leave the telephones as installed now on the premises and the buyer agrees to sign a letter showing his responsibility for the bills accruing." If this was intended as one of the terms of the purchase, it was withdrawn by one of the letters deposited with the bank, addressed to the defendants, and which stated: "This will confirm our oral agreement, which is as follows: That as purchasers of your furnished residence described at 624 North Doheny Road, Beverly Hills, California, we desire that you permit us to continue in your name the telephone service and listing at present being furnished to you," with an offer to pay the bills, and a request reading: "If the above correctly states our understanding kindly so indicate by your acceptance at the bottom hereof." Exhibit C also called for a termite report showing the property free and clear of termites and dry rot. But the letter (e) modified this demand by calling only for a termite report subject to the buyers' approval. We do not doubt that if plaintiffs had adhered to their original demand, for a report showing the property to be free of termites and dry rot, a refusal by defendants to furnish a report or the furnishing of a report which showed the existence of termites or dry rot in the house would have furnished a good reason for the withdrawal of plaintiffs' offer. But we think it is quite significant that plaintiffs modified their demands so as to call for a report, but not necessarily one which showed the absence of termites, and withdrew their demand for a report showing the

absence of dry rot. While we are on the subject, it may be mentioned that plaintiffs did not insist that defendants furnish the report. Some one, presumably plaintiffs, procured a report at a cost of \$5 and plaintiffs assumed the bill.

The letter dated August 12 with reference to the delivery to defendants at specified times of the items of personal property not included in the sale was prepared on August 12 by the defendants' attorney. It related, as well, to the additional items agreed to at the conference of August 11 and, without explanatory evidence, might well have been considered by the court as a statement or confirmation of an oral agreement arrived at in this conference. It is to be remembered that in their original instructions plaintiffs had waived a title search on chattels as one of the conditions of purchase, but, by their letter to the bank, requested one which would meet with their approval, although it was not stipulated that it must show clear title.

[8] We cannot construe these additional letters as statements of conditions upon which plaintiffs' willingness to purchase depended. The letter which referred to the chattel search and the termite report, and the one which gave instructions as to the vesting of title, were addressed to the escrow holder and each read: "My previous instructions in the above numbered escrow are hereby modified—Supplemented in the following particulars only [stating particulars]." Defendants expressed their refusal to go further with the deal in a letter to plaintiffs in which they referred to plaintiffs' letters (e) and (f) as imposing "new, additional and different conditions than were contained in our said offer." We do not construe plaintiffs' requests with respect to the chattel search and the termite report as adding new or additional conditions to plaintiffs' instructions in Exhibit D. Upon the contrary, plaintiffs' demand with respect to the telephone, as contained in Exhibit C, was withdrawn. Their demand in Exhibit C for a report showing the property free of termites was eliminated from their instructions, D, and was modified by their letter (e), which withdrew altogether their demand for a report as to

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Division 2, California.

Sept. 23, 1946.

the existence of dry rot. It is quite significant that these demands stated in Exhibit C were not carried into plaintiffs' instructions, Exhibit D, which should have been done had plaintiffs intended to insist upon them as conditions upon which they would purchase. The court found that Exhibit D was a complete and binding escrow agreement and that it was not altered or rescinded by amendments or other documents proposed by plaintiffs and not signed by defendants. We are of the opinion that the instructions, D, supplemented by the description of the personal property in Exhibit C, constituted a complete agreement. In so far as Exhibit C constituted an offer of purchase, the several demands stated therein and which were not accepted in writing by defendants were withdrawn and modified by plaintiffs' instructions in Exhibit D.

[9] If the letters addressed to the escrow holder were delivered after the execution and delivery of the original instructions, they could not be given effect to alter the terms of the executed agreement (Williams v. Rush, 134 Cal.App. 554, 559, 25 P. 2d 888), and defendants would have been justified in disregarding them. But if it be assumed that the additional instructions were deposited at the same time as the original ones, which the record does not show to be the fact, they would nevertheless appear from the entire evidence to have been mere proposals, and not statements of conditions which had to be met before plaintiffs would complete their purchase. And we might add that the statement in one of the letters that the liability under the policy of title insurance should be \$55,000 was not a new or additional demand. It was the duty of defendants to agree upon a reasonable amount of liability, and the figure of \$55,000 does not seem unreasonable. The matter of paying off the encumbrance in an amount to be approved by defendants was no part of the agreement of sale.

Plaintiffs established their right to specific performance of the agreement. The judgment is affirmed.

DESMOND, P. J., and WOOD, J., concur.

1. Trusts ⇨44(1)

In suit to quiet title to bank account standing in name of deceased insurance broker and executive secretary of association of irrigation districts representing commissions on surety bonds and insurance written for member districts by decedent, evidence conclusively established that decedent had carried on insurance business for the benefit of the association and that he was merely trustee of bank account for the benefit of association.

2. Contracts ⇨138(1)

An action which is not to enforce an illegal contract but to establish title to property acquired under it may be maintained.

3. Quieting title ⇨10(1)

A party suing to quiet title to personalty must recover upon the strength of his title and in doing so he cannot rely on underlying and inherent illegality.

4. Quieting title ⇨1

Suit to quiet title to personalty was subject to the same rules as those prevailing in similar suits respecting realty.

5. Quieting title ⇨10(1)

When it has been determined that plaintiff in quiet title suit has no interest in the property in controversy, the case is ended, and it is unnecessary to examine the title of defendant.

6. Banks and banking ⇨133

Bank was bound to pay to association of irrigation districts as depositor money derived from insurance business conducted for association by its executive secretary and deposited for association in name of secretary, regardless of illegality of such conduct of insurance business from which the money was derived. Insurance Code, §§ 755, 1642.

7. Evidence ⇨271(17)

Declarations of a deceased person in support of his own interests are generally inadmissible. Code Civ.Proc. § 1850.

8. Evidence ⇨271(19)

Statements in letter written by executive secretary, since deceased, of association of irrigation districts to assistant insurance commissioner that he was operating a general insurance business and no part of premiums or commissions was paid back to member districts or into funds of association were self-serving declarations and were not admissible in suit by his executors to quiet title to funds derived from such business, either as part of transaction sought to be proved or as explanatory of letter written to attorney general 25 days earlier stating that commissions would be applied toward payment of salary as executive secretary or other expenses of association. Code Civ.Proc. § 1850; Insurance Code, §§ 755, 1642.

9. Judgment ⇨747(5)

Simple judgment in defendant's favor in quiet title action operates as an estoppel against plaintiff and protects defendant against any claim of plaintiff as fully as would an affirmative decree in defendant's favor.

10. Appeal and error ⇨1073(1)

Portion of judgment in quiet title action requiring plaintiff to deliver specified personal property to defendant, though affirmative relief was not prayed for, could be regarded as surplusage and its inclusion in judgment was not prejudicial, particularly where plaintiff during trial had abandoned all claim to such personalty.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Suit by W. Rene Wagner, executor of the will of Walter Douglas Wagner, also known as Walter D. Wagner, also known as W. D. Wagner, deceased, against Margie Worrell and others to quiet title to office furniture, equipment and insurance records and a bank account. Judgment for defendants, and plaintiff appeals.

Judgment affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Athearn, Chandler & Farmer, Hoffman & Angell and Earl C. Berger, all of San Francisco, for respondents.

GOODELL, Justice.

This is an appeal from a judgment in favor of the defendants in a suit brought by the estate of Walter D. Wagner, to quiet title to certain office furniture, equipment and insurance records and to \$4,092.38 in bank, title to all of which is claimed by respondent association. The contest is now confined to the bank account, for the appellant's claim to the other property has been abandoned.

The association, composed of about 111 irrigation districts in this state, was organized in the early 1920's for the purpose of co-operation between the districts, and to promote their interests, legislative and otherwise. The decedent was its secretary from its early days (when he operated from his home in Merced at a nominal salary) until his death in 1944. About 1929 its office was moved to San Francisco.

In 1927 it was determined that the various purposes of the association would be better served by increasing its income so that a full-time executive secretary could be adequately compensated, and that this could be accomplished without increasing the dues, by handling the insurance and bonds of the member districts through the association. Such plan actually *reduced* the members' dues. Accordingly, the decedent was requested to obtain, in his name, a license as an insurance agent. In 1928 meetings were held between the decedent and other representatives of the association and the attorney general and representatives of the insurance commissioner, at which the proposed plan was discussed, and on September 3, 1928, the following letter was written by decedent to the attorney general:

"In accordance with our conversation of last Saturday, I am writing you in regard to the plan of the Irrigation Districts to secure all their surety bonds through one source. We already know that such a plan will result in lower rates of insurance and other advantages to the districts.

"The following are the facts and the plan proposed: * * *

"The Association elected and employs W. D. Wagner as secretary of the association and pays him a certain salary, and also pays other expenses.

"The law provides that certain officers of an irrigation district shall furnish surety bonds and the district pays the premium on the same.

"The said W. D. Wagner has been regularly appointed as an agent of certain insurance companies and as such agent will receive certain commissions on insurance business.

"It is proposed that the Irrigation Districts shall place or secure the bonds of their officers and certain other bonds or insurance through the said W. D. Wagner, the districts paying the same premium for their bonds as they would were they secured through any other agent.

"The said W. D. Wagner will apply the commissions thus received by him as agent of the insurance company toward the salary agreed to be paid him by the association, or toward any other expenses of the association.

"This will result in its being possible, but not necessary, for the association to ask the districts for less dues or other contributions than formerly, for the support of the association. * * *

"The question is: Is this or could this be construed as being an illegal rebate to the district, or in any way impairing the obligation of any bond? * * *

"The fact that the district places its insurance through W. D. Wagner, who is an agent of an insurance company, and who happens also to be the secretary of the Irrigation Districts Association, and Wagner chooses to use the commissions received as agent to pay the salary of his secretary, or to pay any other expenses of the association, thereby making it possible for the association to conduct its business with less voluntary contributions from the district, can in no way be considered as a rebate to the district on its insurance. * * *"

The attorney general replied that he saw nothing illegal about the plan. It was put

into effect and operated about as follows: A district would communicate with decedent at the association's office and he would have the insurance policy or bond written. Bills for premiums were made out in the name W. D. Wagner, Broker, but on the letterheads of the association. Checks or warrants of the districts for premiums, payable in most instances to the association but occasionally to the decedent, were deposited in a commercial account in the Wells Fargo Bank in the name "W. D. Wagner, Insurance Account". Against this account decedent drew checks in payment of the premiums, after deducting commissions. Out of the commissions thus earned (and the receipts from dues) there were paid the decedent's salary, the salary of his assistant, Mrs. Worrell, the office rent, telephone service, stationery and supplies, travelling expenses, automobile expenses, in short all outlays connected with the running of the association *in all its activities*.

This procedure continued for 11 years and more—at least from 1933 to decedent's death in March, 1944. In 1943 decedent's son (the executor-appellant) was employed by the association as his father's assistant *and his salary, also, was paid by the association*. One of his duties was to drive his father on association business, including insurance, in an automobile owned by the association.

All correspondence relating to insurance was written on the association's letterheads for decedent had none of his own. Decedent's name did not appear on the office door as an insurance agent or broker. *The fees for decedent's licenses were paid out of association funds.*

From appellant's own testimony it appears that at no time did his father draw for living expenses or other needs anything in excess of his monthly salary, which was \$350 a month at the beginning but \$500 latterly (and expenses).

Whatever insurance or bonding business was handled by decedent other than for the association was negligible—mostly for members of his family. He had no general outside business. His arrangement with the association called for his full-time services as its secretary.

Shortly after the insurance business was started the association employed an accountant to devise a book-keeping system for the association *in all its activities*. He set up three controlling accounts, (1) the general fund, (2) the district welfare fund, and (3) the insurance fund. It was in and out of this insurance fund that all commissions passed. This accounting system has prevailed ever since 1928 or 1929.

In 1933 the association's commercial account was transferred from another bank to the Wells Fargo Bank, where it has ever since been carried. When this was done a written authorization was required by the bank, and the following letter dated March 24, 1933, on the letterhead of the association was written:

"Wells Fargo Bank & Union Trust Co.
San Francisco, Calif.
Gentlemen:

The following resolution was adopted by the executive committee of the Irrigation Districts Association of California on the 18th day of March 1933:

Resolution

Resolved: That W. D. Wagner, Secretary, be and he hereby is authorized and directed to endorse checks made payable to the Irrigation Districts Association of California and to deposit the same in accounts designated, Irrigation Districts Association of California and/or W. D. Wagner, Insurance Account, and to withdraw the same on checks signed Irrigation Districts Association of California by W. D. Wagner, Secretary, or W. D. Wagner, Insurance Account.

Very truly yours,

W. D. Wagner

Secretary

Irrigation Districts Association of California

A. B. Tarpey President

Irrigation Districts Association of California."

The initials "WDW:R" in the corner would indicate that the decedent himself prepared the letter.

At the time of decedent's death there was a balance of \$10,596.41 in this account. By agreement of the litigants \$6,504.03 was

withdrawn to pay outstanding liabilities of the business, leaving the balance, \$4,092.38, now in litigation.

After the insurance business had been running for several years it was decided that a working fund was required. Accordingly, on October 31, 1931 \$5,000 then on hand was placed in a special interest-bearing savings account in the Hibernia Bank, \$1,000 of which was allocated to the general fund and \$4,000 to the insurance fund on the books of the association. This special deposit was in the name of "W. D. Wagner, Special Account". At the San Jose convention in 1943 (the last meeting attended by decedent) it was suggested that to obviate any question in the event of decedent's death this fund should be put into the name of the association, and this was done.

Appellant testified to a conversation during the San Jose convention wherein he admitted that this \$4,000 belonged to the association. In its cross-complaint the association pleads that this \$4,000 "is the account mentioned and described in paragraph II" of the plaintiff's second count. This was denied for want of information or belief, but the court found in accordance with the association's allegation.

The association held two meetings or conventions each year. At one of these the decedent would submit and personally read a full report of all phases of the association's activities for the past year including the insurance business. He would at the same time submit a full accounting of all the association's activities during the year *including the insurance business*, supported by vouchers which accounting would be checked by an auditing committee of the association. These reports were distributed among the members.

There is no evidence that the decedent ever claimed that the insurance business was his own. The witnesses Kidd, Durbrown, Wisler and Worrell all testified to this effect. Kidd testified that at the meeting of the executive committee in September, 1943, appellant acknowledged to him that the insurance business belonged to the association. Wisler testified that decedent told him the commissions belonged to the

association; that the money was the association's but was carried in his name because the license was in his name—that he was acting for the association.

The record shows that the expenses of the association always exceeded the net insurance commissions. Decedent's salary alone was \$500 a month and the net commissions never came to that much. In 1942 the net insurance commissions were \$3,639 and in 1943, \$3,686.

The only conflict in the whole case arises from testimony given by the appellant that at the San Jose convention in 1943, L. D. Thompson, an officer of the association, told him "We have always felt that [the insurance] was your father's own private business". Thompson flatly denied this, stating that he had made no statement respecting the ownership of the insurance account.

So strongly did all this evidence impress the trial judge that at the close of the evidence he remarked: "As far as the facts are concerned, the Court is prepared to state the preponderance of the evidence indicates the money was intended to be and always was the fund of the association and not the private fund of Mr. Wagner. That matter is settled. I don't want any argument on that. * * *"

[1] The position first taken by the appellant is that the court should have concluded that the fund belonged to the decedent because he was conducting the insurance business as his own and such conclusion would make the arrangement between decedent and the association "lawful, operative, definite, reasonable, and capable of being carried into effect." *Robbins v. Pacific Eastern Corporation*, 8 Cal.2d 241, 272, 65 P.2d 42, 58. But the trial court could not possibly have found on this record that the insurance business was the decedent's own, for the evidence is practically all one way that for sixteen years decedent consistently carried on the business for the use and benefit of the association. It is needless to repeat the facts already narrated. Five incidents are sufficient: 1st, The opening of the bank account by the association with its authoriza-

tion respecting the handling of the account (prepared by decedent and signed by him as secretary), which would have been wholly inexplicable had it been the decedent's own money; 2nd, The fact that decedent never drew out a cent in excess of his stated salary; 3rd, The carrying of the insurance fund as one of the three controlling accounts, as an integral part of the accounting system of the association; 4th, The transfer back of the \$4,000 working fund; and 5th, the annual accounting by decedent as secretary of the association to the general membership thereof, of the insurance business. All these things were so inconsistent with the idea that the insurance business belonged to decedent that the trial court could not have conceivably concluded otherwise than it did, namely, that the decedent was trustee of the bank account "for the benefit of the Irrigation Districts Association of California, and not otherwise".

Whether the plan, and the way it operated, was within the law or in circumvention of it, is another question.

[2] The appellant contends that the arrangement between decedent and the association violated the Insurance Code. This illegality was pleaded in appellant's answer to respondents' amended cross-complaint but the court found against appellant on that point. The sections relied on are 755 which provides that, "The paying or allowing of any commission or other valuable consideration on insurance business in this State to other than an admitted insurer or a licensed insurance agent, broker or solicitor is an unlawful rebate", and 1642 which provides that, "A person shall not act as an insurance agent, broker, or solicitor until a license is obtained from the commissioner, authorizing such person so to act." The respondents tacitly concede that the arrangement was illegal by invoking the rule found at 6 Cal.Jur. 160 that, "When an action is not to enforce an illegal contract, but is to establish title to property acquired under it, the action may be maintained * * *" and by reliance on the case of *Wayman Investment Company v. Wessinger & Wagner et al.*, 13 Cal. App. 108, 109, 108 P. 1022.

[3] Without deciding whether this case comes within that rule, it is sufficient to say that the appellant, who is the moving party herein, "must recover upon the strength of his own title" (22 Cal.Jur. 167) and in doing so, it goes without saying, he cannot rely on underlying and inherent illegality. Appellant was one of the leaders in launching the plan and *the* leader in operating it. In appellant's brief this is said: "If we assume that the insurance business was operated for the Association, the decedent may have been equally guilty in conducting an illegal transaction." This is a concession that decedent was *in pari delicto*. 6 Cal.Jur. 156. The court has found, on abundant evidence, that the insurance business was so operated.

[4,5] This suit to quiet title to personal property is of course subject to the same rules as those prevailing in similar suits respecting real property, and the rule is settled by a long line of cases that when it has been determined that the plaintiff in a quiet title suit has no interest in the property in controversy "the case is ended. * * * The want of title in plaintiff renders it unnecessary to examine the title of defendant. * * *" Denman v. Smith, 14 Cal.2d 752, 758, 97 P.2d 451, 454. To paraphrase the language in *Rockey v. Vieux*, 179 Cal. 681, 683, 178 P. 712, 713, "having shown no interest [in the fund] the plaintiffs are not aggrieved by a judgment declaring someone else to be the owner." The failure of the plaintiff to establish his own title eliminates him as a claimant to the fund in question.

[6] The \$4,092.38 in the Wells Fargo Bank stands in the name "W. D. Wagner, Insurance Account" but the trial court found that the decedent was trustee of this account for the benefit of the association. In the closing brief counsel say: "The funds on deposit are in the possession of the Bank, having been placed there by the decedent in an account in his own name." The answer to this is that the record clearly shows that *the account was opened by the association when the written authorization of March 24, 1933, signed by the decedent himself, as secretary of the association, was lodged with the bank.* Fur-

ther, they say " * * * the Association cannot recover against the Bank because payment by the Bank to the Association would be an illegal act." The depository bank (which has filed a disclaimer) is not concerned with the transaction or arrangement which produced the fund. It has not pleaded illegality and could not do so, for it was not a party to it. Its duty is to pay the money to its depositor (4 Cal.Jur. 246; see also *Kyne v. Kyne*, 16 Cal.2d 436, 440, 106 P.2d 620), and there can be no question that the association was and is such depositor.

Furthermore, this is not an action to *enforce a contract*. It is a suit brought to determine the ownership of a fund of money the origin of which was a course of conduct lasting for 16 years, but long since terminated by the death of the appellant's testator. There is nothing executory about it. Whatever the arrangement was, whether legal or illegal, it has been wholly executed and closed. The case is therefore unlike the cases cited by appellant (*Fewel & Dawes, Inc., et al. v. Pratt*, 17 Cal.2d 85, 109 P.2d 650; *Carrier & Braddock et al. v. S. W. Straus & Co.*, 213 Cal. 508, 2 P.2d 811; *Wise v. Radis*, 74 Cal.App. 765, 242 P. 90; *Firpo v. Murphy*, 72 Cal.App. 249, 236 P. 968; *Del Rey Realty Co. v. Fourl*, 44 Cal.App.2d 399, 112 P.2d 649) which were actions to enforce illegal contracts in one way or another.

The appellant contends that decedent's letter of September 28, 1928 should have been admitted. The court reserved a ruling which was never made. In this discussion, however, we shall treat the question as if the court had made a formal ruling rejecting it.

On September 3, 1928, the decedent, acting in conjunction with his executive committee, wrote the attorney general that "The said W. D. Wagner will apply the commissions thus received by him as agent of the insurance company toward the salary agreed to be paid him by the association, or toward any other expenses of the association."

Three weeks later, on the 28th, the decedent wrote the assistant commissioner of insurance "I am carrying on a general in-

surance business" and "*No part of the premium, or of the commission* received by me is paid back to the district, nor is any part of it paid in to the funds of the association." (Emphasis his.)

There is nothing in the record to show whether the executive committee knew anything about this letter of the 28th, and appellant frankly concedes that whether the association had such knowledge will never be known.

[7] The statements in the letter of the 28th are self-serving for they claim the commissions as the decedent's own. They are, moreover, entirely inconsistent with the representations made by him in his letter three weeks earlier to the attorney general, *of which his executive committee admittedly had full knowledge*. It is frankly admitted by counsel for appellant that "as a general rule the declarations of a deceased person in support of his own interests are not admissible" but they claim that the letter was admissible, (1st), "as a declaration forming part of the transaction sought to be proved", (sec. 1850, Code. Civ.Proc.) and (2nd), because "it explains declarations claimed by the defendants to be against the decedent's interest"; in other words as an off-set to the self-disserving statements contained in the earlier letter.

Speaking of testimony admissible under § 1850, 10 Cal.Jur. 1111 says: "The propriety of such testimony, and, indeed, the theory upon which it is taken out of the general rule against hearsay, proceeds upon the supposition that declarant * * * has spontaneously made some statement which tends to explain the nature, quality, motive or intent of the transaction. * * *"

[8] The proffered letter does not meet this test. The period of 25 days elapsing between the two letters does not argue for spontaneity, nor does the self-serving character of the letter. The second letter was no more a "verbal act" forming "a part of a transaction" than was the first. Each of them simply purported to inform a state official how certain funds were handled. It served "merely as an ordinary hearsay assertion of what has [had] been already done" (VI Wigmore on Evidence, 3d Ed.,

§ 1776; see, also, *In re Estate of Gleason*, 164 Cal. 756, 763, 130 P. 872) for it showed that decedent was already "carrying on a general insurance business". Indeed decedent's letter to the attorney general showed that he had theretofore "been regularly appointed as an agent of certain insurance companies." As early as May 11, 1928, decedent was requested by the association "to so qualify as to be able to handle this insurance", and the minutes of the executive committee, signed by decedent, read into the record, showed "that *since August 1, 1928*, the secretary had taken in commissions on insurance in the sum of \$1,312.19". (Emphasis added.) While it is true the court found "that the insurance business commenced about September, 1928" the undisputed evidence indicates that neither letter was written in the middle of any transaction, as was the case in the declarations made in each of the cases cited by appellant.

What has been said under the first point answers the second, for the proffered letter did not pretend to *explain* the declarations contained in the earlier letter; *it simply contradicted them*. We are satisfied that the letter of September 28 was not entitled to be admitted.

[9, 10] The judgment in paragraph (2) declares "(a) That the plaintiff W. Rene Wagner forthwith turn over and deliver to the defendant * * * Association * * * all records, books, chattels, and other personal property described in the complaint and amended cross-complaint." There is no allegation or prayer in the amended cross-complaint upon which such order could have been based. Such was substantially the case in *Warden v. Stoll*, 210 Cal. 374, 291 P. 835, 837 where, in a quiet title suit, the decree went beyond the prayer of the answer and attempted to award affirmative relief. In that case it was held that the plaintiff was "not injured by that portion of the decree awarding the respondents affirmative relief" the court saying (210 Cal. at page 377, 291 P. at page 837) "A simple judgment in a quiet title action in favor of the defendant, that is a judgment that plaintiff take nothing by his said action and that the defendant recover his costs, operates as an estoppel upon the

plaintiff and determines title as between the parties and protects the defendant against any claim of the plaintiff as fully as would an affirmative decree in his favor. *Larkin v. Superior Court*, 171 Cal. 719, 154 P. 841, Ann.Cas.1917D, 670; *Wilson v. Madison*, 55 Cal. 5, 8; *Miller v. Luco*, 80 Cal. 257, 261, 22 P. 195; *Booth v. Stow*, 38 Cal.App. 191, 175 P. 705. The insertion, therefore, in the decree in this action of a provision awarding the respondents affirmative relief against the appellant, while erroneous, does not prejudice the appellant in any of her substantial rights and may be regarded as surplusage." The same may be said here.

Moreover it clearly appears from the record that the appellant during the trial abandoned all claim to the movable personal property.

The judgment is affirmed.

NOURSE, P. J., concurs.



76 Cal.App.2d 247

**McIVOR et al. v. MERCER-FRASER
CO. et al.**
Civ. 7204.

District Court of Appeal, Third District,
California.

Sept. 25, 1946.

1. Adjoining landowners ⇨6 Nuisance ⇨48

In action for damages to plaintiff's land because of excavation of dirt and gravel on defendants' adjoining land, evidence that excavation caused excessive dust and dirt to be cast or blown on plaintiffs' land, to their great discomfort and damage, was not inadmissible as showing special damage not pleaded, as such damage was natural and necessary consequence of acts complained of.

2. Appeal and error ⇨1039(13)

Where trial court's inference and conclusion that special damage, not pleaded by

plaintiffs, was natural and necessary consequence of acts complained of and hence not required to be specially pleaded, were reasonable in light of evidence, admission of testimony as to such damage may not be disturbed on appeal from judgment for plaintiffs.

3. Adjoining landowners ⇨6 Nuisance ⇨49(2)

In action for damages caused by excavation on defendants' land adjoining plaintiffs' land, evidence that defendants offered to purchase plaintiffs' land for cost or market price thereof and thus "make them whole" after completing excavation was properly excluded, as admission thereof would have allowed defendants to take advantage of their own wrong. Civ.Code, § 3517.

4. Adjoining landowners ⇨6

In action for damages to plaintiff's land because of excavation on defendants' adjoining land, instruction that excavator must provide adequate degree of slope for protection of adjacent property was proper as supported by evidence that slope of walls on excavation was improper, within issues, in accord with plaintiffs' theory of case, and correctly stating law.

5. Adjoining landowners ⇨6

In action for damages caused by excavation on defendants' land up to plaintiffs' adjoining land, defendants' requested instructions as to excavator's failure to give prescribed statutory notice of intention to excavate were properly refused as against contention that such notice was not required because plaintiffs had actual knowledge of excavation. Civ.Code, § 832.

6. Adjoining landowners ⇨6

The giving of advance notice to landowner of proposed excavation on adjoining land is a substantial, not merely formal, statutory requirement. Civ.Code, § 832.

7. Adjoining landowners ⇨6 Nuisance ⇨54

In action for damages caused by excavation on defendants' land adjoining plaintiffs' land, instruction that jury must find for defendants, if excavation was made in prudent manner and there was no sliding away of plaintiffs' lands, was properly

refused as inappropriate, in view of evidence that defendants willfully created and maintained a dangerous condition on their premises.

8. Adjoining landowners Ⓒ6
Nuisance Ⓒ4

Persons whose use and enjoyment of their land is substantially impaired by creation and maintenance of dangerous condition on adjoining land by excavation thereon need not show actual physical damage to their property in order to recover damages from owners of such adjoining land.

9. Adjoining landowners Ⓒ6
Nuisance Ⓒ4

Deprivation of landowners' right to enjoy their property to full extent because of willful creation and maintenance of dangerous condition on adjoining land by excavation thereon constituted partial eviction, and fact that it was only partial did not deprive them of right of action against owners of adjoining land for damages.

10. Municipal corporations Ⓒ621

Quarrying for earth and sand on land in interim multiple family district was "nonconforming use", within city zoning ordinance prohibiting such use of premises without official permit, as against contention that ordinance applied only to excavations for erection of buildings.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonconforming Use".

11. Nuisance Ⓒ75

Violation of city zoning ordinance, prohibiting nonconforming use of land without official permit, by excavating for earth and sand on land within interim multiple family district, constituted actionable wrong against each member of community, for whose particular welfare ordinance was enacted, and created public nuisance, remediable at suit of persons specially injured thereby, such as owners of adjoining land.

12. Adjoining landowners Ⓒ6
Nuisance Ⓒ54

In action for damages caused by excavation on defendants' land adjoining plaintiffs' land, instruction to jury, including deposit of dust and dirt on plaintiffs'

land because of excavation as item of damage, was proper.

13. Appeal and error Ⓒ1068(4)

Any error in instruction to jury, including deposit of dust and dirt on plaintiffs' land because of excavation on defendants' adjoining land as element of damage therefor, was harmless to defendants, where there was ample evidence sustaining amount of damages awarded plaintiff by jury without recourse to such particular item.

14. Adjoining landowners Ⓒ6
Nuisance Ⓒ50(6)

Under pleadings and proof in action for damages caused by excavation on defendants' land adjoining plaintiffs' land, plaintiffs were entitled to exemplary damages in addition to substantial compensatory damages shown.

15. Nuisance Ⓒ4

Mere apprehension of injury from dangerous condition may constitute a "nuisance", where it interferes with comfortable enjoyment of property.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

16. Nuisance Ⓒ41

A party injured by maintenance of nuisance need not seek abatement thereof, but may sue for damages.

17. Adjoining landowners Ⓒ6
Nuisance Ⓒ49(5)

Evidence was sufficient to support jury's verdict and judgment thereon for plaintiffs in action for damages caused by excavation of dirt and gravel on defendants' land adjoining plaintiffs' land.

Appeal from Superior Court, Humboldt County; Samuel S. Finley, Judge.

Action by M. L. McIvor and another against the Mercer-Fraser Company, a partnership, and another for damages caused by defendants' excavation of dirt and gravel on their land adjoining plaintiffs' land, violation of a city zoning ordinance, creation of a nuisance thereby, and violation of a city ordinance requiring re-

taining walls. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Nelson & Ricks and Howard P. Noyes, all of Eureka, and Gerald B. Wallace, of Sacramento, for appellants.

Irwin T. Quinn, of Eureka, for respondents.

PEEK, Justice.

Plaintiffs and defendants are adjoining landowners in the city of Eureka. Appellants' property up to the time of the commencement of the within action was being used for the excavation of dirt and gravel while plaintiffs' property was and is improved with a small house where said parties reside, and a garage containing a bedroom and bath.

Shortly after defendants began excavating their property, plaintiffs protested to them and also to the City Council of Eureka that the manner in which the work was being done endangered their property. Defendants ignored plaintiffs' protest as well as the written notice given by the city attorney of the city of Eureka pursuant to instructions of the city council, and continued with their excavation work, whereupon plaintiffs filed this proceeding.

By their amended complaint plaintiffs allege four causes of action: The first is for damages based on the alleged fact that appellants willfully excavated up to respondents' lands without regard to proper sloping and without providing for adequate lateral support to plaintiffs' property; that the excavation was not made for the improvement or benefit of defendants' premises; that it was not a proper or usual excavation under section 832 of the Civil Code; that it has caused sloughing off of a portion of respondents' land, and deprived them of the use of a five foot strip on and along their lot; that said excavation creates a hazardous condition for anyone using the garage which is located near the edge of said pit; that the city authorities through the city attorney notified appellants that they could not excavate further without erecting a proper retaining wall, but that appellants willfully refused to desist or put in any support in accordance therewith.

Plaintiffs' second cause is based on the alleged willful violation by appellants of a city zoning ordinance (Ordinance No. 2230-A of the City of Eureka) prohibiting the use of property for purposes other than those specified therein, except upon permission of the city authorities, declaring it to be a public nuisance to so use the same without a special permit authorizing such use, and designating the district herein involved as an "Interim Multiple Family District"; that appellants did not seek or secure such a permit; that because of such unauthorized use of their land they have created an unsightly and dangerous hole next to plaintiffs' lot, and have left a high perpendicular and dangerous bank there, thereby rendering plaintiffs' premises undesirable and unsuitable as a place of residence; that said acts have caused plaintiffs' premises to become valueless or greatly depreciated in value, and have caused a sloughing off of a portion of their property into the excavation, the corner of the garage to be struck and damaged by defendants' steam shovel in removing said dirt, and the ground near the excavation to settle, resulting in injury to the hedge and trees growing along the boundary; that plaintiffs further have been deprived of the use of a strip of land about five feet wide along said excavation, and that the ground next to said excavation cannot be worked or disturbed because of the great danger of causing a slide.

Plaintiffs' third cause is predicated upon the alleged nuisance created by the violation of said city ordinance.

The last cause of action charges a violation of the Building Code of the City of Eureka, being Ordinance No. 2215, which requires retaining walls to be used when excavations of twelve feet or more are made.

Each count concludes with a prayer for damages in the sum of \$3000, for plaintiffs' costs of suit, and for equitable relief.

The case proceeded to trial before a jury which found for plaintiffs and assessed their damages in the sum of \$1000, and it is from the judgment entered in accordance therewith that defendants have appealed to this court.

[1,2] Appellants first complain of the action of the trial court in admitting and refusing to strike certain evidence that the making and maintenance of the excavation caused excessive dust and dirt to be cast or blown upon the property of respondents, to their great discomfort and damage. Appellants characterize this evidence as a showing of special damage which could not be made unless pleaded. However, the court specifically denied respondents' request to amend their pleading in this respect, being apparently of the opinion that the damage due to dust and dirt was a natural and necessary consequence of the acts complained of and therefore did not need to be specially pleaded. With this conclusion we agree. 39 Am.Jur., p. 405, § 142. And see, *Green v. General Petroleum Corp.*, 205 Cal. 328, 337, 270 P. 952, 60 A.L.R. 475. Since the trial court was in a better position than are we to determine the preliminary question of fact, having viewed the premises and received the testimony on condition that it would be stricken if improperly admitted, and since the inference which the court drew and the conclusion which it reached are reasonable in the light of all the surrounding circumstances, its action may not be disturbed by this court on appeal.

[3] Appellants, without citation of authority, advance the novel proposition that the trial court erred in excluding evidence that after the excavation had been made and the respondents had protested, appellants offered to purchase respondents' property at its cost or the market price thereof, and thus "make them whole." Had the trial court permitted appellants to make such a showing it would have allowed them to take advantage of their own wrong, contrary to settled principles. Civ.Code, sec. 3517. If appellants' theory were sound, one who coveted his neighbor's property could force a sale of the same by the simple expedient of injuring such property or impairing the enjoyment thereof and cause the owner to sell or forego all right to damages by tendering to the owner the cost of said property to him or the market value thereof. This of course cannot be the law.

172 P.2d—48½

[4] Appellants also assign error with respect to certain instructions given and refused. They complain of the giving of an instruction requiring the excavator to provide an adequate degree of slope for the protection of the adjacent property, on the ground that one of their witnesses testified that the slope of the walls on this excavation was proper; but they fail to take into account the fact that other witnesses testified to the contrary. Since there is evidence to support the instruction and it is within the issues and in accord with respondents' theory of the case, and since it likewise correctly states the law (*Conboy v. Dickinson*, 92 Cal. 600, 605, 28 P. 809; *Wharam v. Investment Underwriters*, 58 Cal.App.2d 346, 350, 136 P.2d 363; *Harper Co. v. DeWitt, etc., Co.*, 115 Cal.App. 15, 19, 20, 300 P. 839), the giving of such instruction was neither erroneous nor reversible error.

[5,6] Appellants next assail the ruling of the trial court in refusing to give defendants' requested instructions numbered 10 and 13, dealing with the failure of an excavator to give the prescribed notice of his intention to excavate and particularly of his intention to excavate beyond the depth of 12 feet. It is appellants' theory that notice was not required because the respondents had actual knowledge of the making of the excavation. The trial court did not err in refusing to charge the jury as requested. The giving of advance notice to a property owner of the creation of a proposed excavation on adjoining property in a substantial and not merely formal requirement of the statute. Civ.Code, sec. 832; *Wharam v. Investment Underwriters*, supra, 58 Cal.App.2d at pages 349, 350, 136 P.2d 363. Information as to the depth and extent of the excavation may be necessary to afford the landowner an opportunity to protect his premises. The text authority cited by appellants on this point does not announce a different rule. See 2 C.J.S., *Adjoining Landowners*, § 13, p. 13. In addition to certain language quoted by appellants, said authority declares:

"Knowledge which renders notice unnecessary must be such as a lawful notice

would impute, and mere knowledge that the work is going on is not in itself sufficient in the absence of the knowledge of proximity of the excavation and its intended extent and depth. * * *

"A landowner's notice of an intention to excavate should give the adjoining owner full knowledge of the intended excavations in time and at a time to enable the adjoining owner to take the necessary measures to protect his property, and where the excavation is actually deeper or is conducted in a different and more dangerous manner than stated in the notice, the notice is insufficient." 2 C.J.S., *Adjoining Landowners*, § 13, p. 14.

[7-9] Appellants likewise urge that they should have had the benefit of their proposed instruction number 11, which charged in effect that if the excavation was made in a prudent manner, and there was no sliding away of respondents' lands, the jury must find for defendants. This instruction would not have been appropriate under the situation presented in this case. The record discloses evidence that appellants were guilty of willfully creating and maintaining a dangerous and deleterious condition on their premises, thereby substantially impairing the use and enjoyment of respondents' adjoining premises. It was not necessary for respondents to show actual physical damage to their property. *Dauberman v. Grant*, 198 Cal. 586, 590, 246 P. 319, 48 A.L.R. 1244; *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 172, 106 P. 581, 26 L.R.A.,N.S., 183, 21 Ann.Cas. 1247. The deprivation by defendants of plaintiffs' right to enjoy their property to the full constituted a partial eviction. *Green v. General Petroleum Corp.*, supra, 205 Cal. at page 337, 270 P. 952, 60 A.L.R. 475. The fact that it was only partial does not deprive respondents of their right of action. As the court stated in *Judson v. Los Angeles Suburban Gas Co.*, supra, 157 Cal. at page 172, 106 P. at page 583, 26 L.R.A.,N.S., 183, 21 Ann.Cas. 1247: "'It is surely no justification to a wrongdoer that he takes away only one twenty-eighth of his neighbor's property, comfort, or life.'"

[10,11] Neither was the trial court in error in refusing to give appellants' pro-

posed instruction number 15 stating that the city zoning ordinance does not apply to excavating unless such excavating is done for the purpose of erecting a building. The ordinance prohibits any non-conforming use of the premises without a permit, and quarrying for earth and sand under the circumstances herein may properly be said to be a nonconforming use. It is industrial activity as distinguished from residential. The ordinance does not purport to deprive appellants of the use of their premises, but merely to regulate that use "for the benefit of the working and living conditions of its people and for planned relationship to the existing environments of the city". The violation of the provisions of said ordinance constituted an actionable wrong against each member of the community for whose particular welfare the ordinance was enacted (*Sapiro v. Frisbie*, 93 Cal.App. 299, 309, 310, 270 P. 280), and created a public nuisance remediable at the suit of persons specially injured thereby, such as respondents have shown themselves to be (*Gould & Kane, Inc., v. Valterza*, 37 Cal.App.2d 678, 681, 100 P.2d 335).

[12] Appellants again advert to the question of damages from dust and dirt deposited on respondents' premises by reason of the excavation, complaining of the fact that the court approved and gave an instruction including this as an item of damage. What we have heretofore said on this subject likewise disposes of this objection.

[13,14] In any event, any error in the rulings connected with this matter would have been harmless, as there was ample evidence to sustain the amount of the award without recourse to this particular item of damage. Furthermore, in addition to the substantial damages shown, respondents were entitled to exemplary damages under the case made by the pleadings and proof. *Barnes v. Berendes*, 139 Cal. 32, 38, 69 P. 491, 72 P. 406; 20 Cal.Jur., pp. 331, 332, § 55; 39 Am.Jur., p. 399, § 137.

[15-17] Finally, appellants contend that the evidence was insufficient to support the verdict and judgment, and that such verdict was the result of passion and prejudice. Their argument on this branch of the case

emphasizes the rights of a landowner in the use of his property but fails to recognize the correlative duties he owes to other owners in the district (*Sapiro v. Frisbie*, supra, 93 Cal.App. at pages 305-309, 270 P. 280), and more particularly to an adjoining landowner (*Pacific Gas & Elec. Co. v. Scott*, 10 Cal.2d 581, 585, 75 P.2d 1054). Likewise it fails to take into consideration the fact that mere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property (46 Corpus Juris, p. 680, § 50), and that the injured party need not seek an abatement of the nuisance but may sue for damages (*Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 119, 120, 92 P. 70, 125 Am.St.Rep. 47). In view of the circumstances disclosed by the record herein, such contention appears to be without foundation.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J.,
concur.



76 Cal.App.2d 198

**CHIESUR v. SUPERIOR COURT, IN AND
FOR LOS ANGELES COUNTY.**

Civ. 15538.

District Court of Appeal, Second District,
Division 3, California.

Sept. 23, 1946.

1. Receivers ⇨183

A proposed complaint, alleging that defendant was in possession and control of apartment house as receiver for 16 months before injuries to plaintiff from defective door, and that defendant negligently permitted door to become and remain out of repair stated cause of action against defendant as receiver, not as individual, for negligence, so as to entitle plaintiff to leave to sue defendant as receiver for damages.

2. Receivers ⇨168

One in possession and control of apartment house as receiver owed duty in such

capacity, not as individual, to exercise control and management of portions of premises for tenants' common use, and any negligent omission by him to make repairs thereto was breach of duty owed tenant by him as receiver, not as individual.

3. Receivers ⇨71

An apartment house receiver held such property as representative of court and under its control, but for benefit of owners thereof, their creditors, and others in whose favor claims might exist or arise against estate in receivership, and receiver's possession, with respect to any duties owed by him to tenants of apartment house, must be deemed to have been owners' possession.

4. Landlord and tenant ⇨1642

Responsibility for failure to make repairs to building rests on one in possession thereof and in position to make repairs.

5. Mandamus ⇨172

Whether apartment house receiver was negligent in failing to make repairs thereto is for determination by court trying action against receiver for injuries to tenant as result of such alleged negligence and cannot be determined by District Court of Appeal in mandamus proceeding to compel superior court to grant injured tenant leave to institute such action against receiver.

6. Receivers ⇨168

A receiver is liable only in his official capacity to persons not interested in receivership estate for negligence in performance of his authorized duties, and recovery of damages by such persons for negligence is a charge on such estate.

7. Receivers ⇨168

A receiver is not liable in his individual capacity as tort-feasor for any act within scope of his duties as receiver under express court order not in excess of jurisdiction.

8. Jury ⇨14(2)

Receivers ⇨186

A tenant, injured as alleged result of apartment house receiver's negligence in permitting door therein to become and remain out of repair and in defective condition, had right to jury trial of question whether she was injured through receiver's

er's negligence in his official capacity and to recognition of any judgment, recovered against him as receiver, as a charge against receivership estate.

Proceeding by Ida Chiesur for a writ of mandamus requiring the Superior Court in and for the County of Los Angeles to grant petitioner leave to institute an action against R. E. Allen, as receiver, for personal injuries claimed to have been caused by his negligence in maintenance and management of an apartment house.

Writ granted.

Gavin Morse Craig, of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Douglas De Coster, Deputy County Counsel, both of Los Angeles, for respondent.

SHINN, Justice.

By this proceeding in mandamus, petitioner seeks a writ requiring the Superior Court of Los Angeles County to grant her leave to institute an action against R. E. Allen, as receiver, for the recovery of damages resulting from personal injuries claimed to have been suffered by petitioner by reason of the negligence of the receiver in the maintenance and management of an apartment house which at the time of the injury was, and still is, under the receivership. It is alleged that the petitioner presented to the superior court an application for permission to sue the receiver, accompanied by a proposed complaint naming as defendants R. E. Allen individually and also in his capacity as receiver, a copy of which is attached to her petition herein. In the complaint and in her petition plaintiff alleges that on November 22, 1944, R. E. Allen was duly appointed receiver of the apartment house in an action for partition; that he was authorized to take full charge and complete possession and control of the property, including the furniture, equipment, machinery and fixtures used in the management, operation and maintenance thereof, and to manage, control, operate and maintain the same; that he took possession and has since continued

to remain in possession and to manage and control the said property as such receiver; that he was in possession long prior to the 24th day of March, 1946, and for a long time prior thereto had maintained clothes lines on the roof for the use of the tenants and had negligently and carelessly permitted a door opening onto the roof to become and remain out of repair and in a defective condition, and that he had both actual and constructive notice of the condition of said door; that on the 24th day of March, 1946, and prior thereto, plaintiff was a tenant of one of the apartments; that on said day, while proceeding to the roof to use said clothes line, she attempted to open said door, whereupon the door, as a direct result of the negligence of defendant, fell off its hinges and caused plaintiff to be thrown down, as a result of which she sustained injuries, to her damage in the sum of more than \$10,000. The petition alleges that upon notice to said R. E. Allen she applied for leave to sue the said Allen as receiver and that upon the hearing of her application it was by the court denied. The matter was argued and submitted upon respondent's demurrer to the petition.

[1,2] We are of the opinion that the application should have been granted. The denial of the motion was, in effect, a ruling that petitioner's cause of action was against Mr. Allen individually and not as receiver. The law is to the contrary. The proposed complaint stated a cause of action for negligence against the receiver. No facts were alleged which would have rendered Mr. Allen liable to petitioner as an individual. He was accused of a breach of duty in his capacity of receiver. It was alleged that he had been in possession and control of the property for some 16 months prior to the date of petitioner's injuries and it was his duty to exercise control and management of those portions of the premises which were for the common use of the tenants. He was in possession not as an individual but in his capacity of receiver, and whatever duties he owed to the tenants by reason of his relation to the property, he owed in that capacity. If he had made the repairs which it is alleged he should have made, he would have done so as re-

ceiver, and any negligent omission to make repairs would not have been a breach of any duty he owed the tenants as an individual, since he had no such duty.

[3-5] Mr. Allen, as receiver, held the property as the representative of, and under the control of the court, but for the benefit of the owners, their creditors and others in whose favor claims might exist or arise against the estate in receivership. The possession of the receiver, with respect to any duties owed to the tenants of the apartment house, must be deemed to have been possession of the owners. Responsibility for the failure to make repairs rests upon the one who is in possession and in a position to make repairs. *Benussi v. Hannah*, 53 Cal.App. 243, 199 P. 1063. Upon the facts alleged, the question whether Mr. Allen was negligent in failing to make repairs is for the determination of the court in which plaintiff's case will be tried.

[6] Although we have found no California case which has applied the rule, it is well settled in other jurisdictions that a receiver is liable to those who are not interested in the estate, in his official capacity only, for negligence in the performance of his authorized duties, and that the recovery is a charge upon the estate in receivership. The leading case on the subject is *McNulta v. Lochridge*, 141 U.S. 327, 12 S.Ct. 11, 13, 35 L.Ed. 796, in which a recovery for wrongful death was upheld. It was said: "Actions against the receiver are in law actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands." Mr. Clark in his work on *Receivers*, 2 Ed., section 392, subdivision (f), quotes from the opinion and states: "Bold as this decision is, it is the well-established law of America." See, also, *High on Receivers*, 4th Ed., p. 304, sec. 255; 1 *Tardy Smith on Receivers*, p. 245; *Thompson on Corporations*, 1931 Supplement to 3d Edition, p. 1091, sec. 6362; *Fletcher, Cyclopaedia Corporations*, Permanent Edition, Vol. 16, Ch. 64, pp. 423, 426, sec. 7864; 45 *Am.Jur.* p. 279, § 349; 23 *R.C.L.* 83.

Many of the reported cases arose out of the operation of railroads, but the reasons for the rule of liability apply equally to any other type of business or property operated under the authority and direction of the court. See *Gardner v. Martin*, 123 Miss. 218, 85 So. 182, 10 A.L.R. 1055 and Note; *Kellems v. Schiele*, 297 Ill.App. 388, 17 N.E.2d 604; *Knickerbocher v. Benes*, 195 Ill. 434, 63 N.E. 174; *Bartlett v. Cicero Light, Heat & Power Co.*, 177 Ill. 68, 52 N.E. 339, 42 L.R.A. 715, 69 Am.St.Rep. 206; *Betts v. Bisher*, 9 Cir., 213 F. 581; *Morgan v. Steingut et al.*, 157 Misc. 215, 282 N.Y.S. 378; *Klein v. New York Title & Mortg. Co.*, 155 Misc. 513, 279 N.Y.S. 931; *Reinhardt v. Lehman*, 248 App.Div. 764, 288 N.Y.S. 770; *Robinson v. New York & S. I. Elec. Co.*, 99 App.Div. 509, 91 N.Y.S. 153; *Leal v. Westchester Trust Co.*, 279 N.Y. 25, 17 N.E.2d 673.

[7] The learned trial judge was of the opinion that the rules which we have stated were repudiated in *Havemeyer v. Superior Court*, 84 Cal. 327, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192, and, in a memorandum opinion, expressed the view that, "When a receiver does a negligent act in the course of management of the receivership property, he steps out of character as receiver and beyond the order of court and in doing so is acting personally" and "that any judgment for damages for negligent acts of the receiver may not in good conscience be paid or satisfied out of receivership estate or funds." We find nothing in the *Havemeyer* case, nor in any other case, which intimates that a receiver is personally liable, to strangers, for torts committed in the performance of his receivership duties. There is ample support for the statement in 22 Cal.Jur. 515, "A receiver is not liable in his individual capacity as a tort-feasor for any act within the scope of his duties as receiver and done under an express order of court which is not in excess of jurisdiction, the liability incurred being chargeable upon the property." It was so held in *Tapscott v. Lyon*, 103 Cal. 297, 37 P. 225, where a receiver was sued in trespass for wrongfully taking possession of property, the court, in holding that it was error to exclude evidence as to the authority which he had been given by the

order of appointment, stating, 103 Cal. at page 311, 37 P. at page 229: "It was important and proper for defendant to show that he was directed to pursue these very goods, as showing that in taking them he was acting under the direction of the court. * * * Though plaintiff's title be admitted, still the defendant cannot be held in this proceeding as a tortfeasor for any act within the scope of his duties as receiver and done under the express order of the court." The cases which we have cited and others found in Annotation in 7 A.L.R. 414 either hold expressly, or they recognize, that if a receiver is liable in his official capacity he is not liable as an individual.

[8] Petitioner proceeded properly in applying for permission to sue the receiver. *Casey v. Doherty*, 116 Cal.App. 42, 2 P.2d 495; *De Forrest v. Coffey*, 154 Cal. 444, 98 P. 27. Her motion should have been granted. She has a right to have her case tried before a jury to prove, if she can, that she was injured through the negligence of Mr. Allen as receiver, and to have any judgment which she may recover against him as receiver recognized as a charge against the receivership estate.

A writ of mandate will issue directing respondent court to grant the application for leave to sue.

DESMOND, P. J., and WOOD, J., concur.



76 Cal.App.2d 274

PEOPLE v. NOORLANDER.
Cr. 4036.

District Court of Appeal, Second District,
Division 1, California.

Sept. 30, 1946.

Hearing Denied Oct. 28, 1946.

I. Stipulations ¶14(7)

Under terms of stipulation, defendant could not complain that trial court was without jurisdiction to proceed with trial

upon such stipulation on the ground that defendant was not confronted with witnesses against him.

2. Larceny ¶65

Evidence authorized conviction of grand theft of an automobile.

3. Criminal law ¶625

Failure to have defendant's sanity determined after question had been raised and a doctor appointed to make a sanity report to the court was not error.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Walter O. Noorlander was convicted of grand theft of an automobile and he appeals

Affirmed.

Robert W. Kenny, Atty. Gen., and John F. Hassler, Jr., Deputy Atty. Gen., for plaintiff and respondent.

Walter O. Noorlander, in pro. per.

DORAN, Justice.

Defendant was adjudged guilty of grand theft with a prior conviction of a felony and appeals from the judgment.

The information alleged the theft of an automobile.

The trial was before the court without a jury. By stipulation, the people's case was submitted upon the transcript of the proceedings at the preliminary hearing. Defendant and defendant's mother testified for the defense at the trial.

It is contended on appeal that,

"I. The trial Court was without jurisdiction to proceed with the trial upon stipulation of counsel that the evidence at the preliminary examination be considered as evidence at the trial without confronting defendant with the witnesses against him.

"II. The Court erred in failing to consider that defendant did not avoid arrest and waited for the police for two days.

"III. The evidence is insufficient to sustain the judgment.

"IV. The trial Court erred failing to have appellant's sanity determined after

the question had been raised and a doctor appointed to make a sanity report to the Court.

"V. The prior felony conviction alleged in the information and found to be true by the Court cannot operate to increase appellant's minimum term of imprisonment."

The record of the trial reveals, in part, the following:

"The Court: The People against Walter O. Noorlander.

"Mr. Warner: In regard to this matter, we can now submit the transcript to the Court to read, and then put on the defendant and call another witness. I believe the officer's testimony will be substantially the same. I have gone over the transcript several times, and I don't believe it will add anything to put them on the stand.

"The Court: Mr. Noorlander, do you waive your right to a trial by jury?

"The Defendant: Yes, sir.

"The Court: You want to be tried by the Court sitting without a jury?

"The Defendant: Yes.

"The Court: Do you join in that, Mr. Warner?

"Mr. Warner: I do.

"The Court: And the People?

"Mr. Bowler: The People join.

"The Court: I understand that the matter is now submitted upon the transcript of the preliminary hearing with the stipulation that if the witnesses whose testimony is there recorded in that transcript were here, sworn and testified, their testimony would be substantially the same as recorded in the transcript and I may consider that those witnesses were here and were sworn and did so testify, and when I have read the transcript and heard whatever additional testimony may be offered, I may then proceed to determine the question of the guilt or innocence of the defendant.

"Mr. Warner: So stipulated.

"Mr. Bowler: So stipulated.

"The Court: I have received a copy of the transcript. (Transcript of the preliminary examination in this matter, had in Division 4 before Hon. Louis W. Kaufman on January 4, 1946, is in words and figures as follows:)"

There is no merit to appellant's contentions.

The transcript of proceedings at the preliminary hearing in the Municipal Court, following the trial of Court and cause, is, in part, as follows:

"Los Angeles, California, January 4, 1946.

"Upon the above date, at the hour of 10:00 o'clock a. m., this case was called for preliminary examination before Hon. Louis W. Kaufman, Judge of the Municipal Court of the City of Los Angeles, State of California. The defendant appeared in person, together with his counsel, James J. Sresovich, Esq., Deputy Public Defender, the People being represented by Kenneth J. Thomas, Esq., Deputy District Attorney of Los Angeles County, when the following proceedings were had, to-wit:—"

[1] It is at once evident from the foregoing excerpts from the record that no rights of the defendant were violated, as urged in appellant's first contention.

Appellant's second contention is trivial.

As to the third contention, a review of the transcript reveals the evidence to have been sufficient.

[3] Contentions four and five are obviously without merit and require no comment.

There being no errors, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

29 Cal.2d 13

**MIDWAY SCHOOL DIST. OF KERN
COUNTY et al. v. GRIFFEATH.**

L. A. 19719.

Supreme Court of California, in Bank.
Sept. 18, 1946.

could go deer hunting. Education Code,
§§ 13521, 13522, 13527, 13529, 13551, 13552.

SPENCE, J., GIBSON, C. J., and EDMONDS, J., dissenting.

1. Schools and school districts ⇨141(5)

Where a teacher discharged by school board demands a hearing, the duty of determining the issues as to the truth of the charges and their sufficiency to support a dismissal is placed on the superior court by the Education Code, and the superior court's judgment, appropriate to the evidence and findings, terminates the matter. Education Code, §§ 13521, 13522, 13527, 13529, 13551, 13552.

2. Schools and school districts ⇨141(5)

On appeal by a school district from the judgment of a superior court that school board had no right to discharge a teacher, the review was not to discover whether facts sustain the board's action of dismissal, but whether the evidence on the court hearing supported the court's findings and judgment. Education Code, §§ 13521, 13522, 13527, 13529, 13551, 13552.

3. Schools and school districts ⇨141(5)

Evidence sustained superior court's judgment that school district had no right to discharge teacher for "dishonesty" because he gave ill health as the reason for his absence from school while he went deer hunting, where teacher had many years of faithful service and act in question was his first violation of school regulations. Education Code, §§ 13521, 13522, 13527, 13529, 13551, 13552.

See Words and Phrases, Permanent Edition, for all other definitions of "Dishonesty".

4. Schools and school districts ⇨141(5)

In action by school district to determine district's right to dismiss permanent teacher, superior court's conclusion that cause for dismissal did not exist was not fatally inconsistent with court's findings that teacher's physical condition did not prevent his performance of his duties as a teacher but that he used his physical condition as an excuse to be absent so that he

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by the Midway School District of Kern County and others against Glenn A. Griffeath, to determine the district's right to dismiss the defendant who was a permanent teacher employed by the district. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

Prior opinion 166 P.2d 331.

Siemon, Maas & Catalano, Alfred Siemon, Walter L. Maas, Jr., and Oscar F. Catalano, all of Bakersfield, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

SHENK, Justice.

On November 1, 1944, the plaintiffs, as members of the governing board of Midway School District of Kern County, served on the defendant, a permanent teacher employed by the district, a written statement of charges as constituting causes for his dismissal, and notice of intention to dismiss him on December 2, 1944. On November 29th the defendant demanded a hearing on the charges and the plaintiffs filed a complaint in the superior court pursuant to section 13529 of the Education Code (Stats.1943, p. 570). The defendant answered, a trial was had, and judgment in his favor was entered from which the plaintiffs have appealed. The evidence produced at the trial shows the following facts:

The defendant had been employed by the Midway School District for more than 20 years. He taught mathematics, physical education and shop. He furnished without pay much extra time in teaching at night, and in school affairs and exhibitions. There was no question of his competency and fitness for the position he held nor of his cooperation and helpfulness in school

curricula and other activities. He suffered chronically from hives due to a food allergy, but had missed no more than 10 days of school in the 20 years. During the five years preceding the events hereinafter related he had had no vacation due to his attendance at summer school and work in industry. During the latter activity he had received an injury resulting in a condition which gave him pain. His physical condition was known to the school principal and others, and on at least one occasion necessitated temporary relief from teaching before a mixed class. In each of two or three prior years he had attempted to obtain a few days leave of absence, but was unsuccessful for the reason that he was considered not wholly incapacitated from performing his duties. In May, 1944, he consulted a physician for possible alleviation of his condition, but took no treatment at that time. On Saturday, September 23, 1944, he called at the hospital for an appointment, but the doctor was away and he could not obtain a definite appointment until Monday, October 2d. On Monday, September 25th, at the invitation of the father of one of the pupils, he decided to go on a deer hunting trip in Nevada on a promise from his prospective companion to have him back on Monday, October 2d. After the close of school on Wednesday, September 27th, he placed the following note on the principal's desk:

"On account of coming illness I find it necessary to be absent from school the rest of this week. My lesson plans are on my desk. Will try to be back Monday but will probably be absent again on Wednesday until the next Monday as I will probably enter the hospital under Dr. Johnson for observation."

He left the same evening for Nevada with his companion. On the following Saturday a snow storm arose which prevented their leaving the deer camp until Wednesday. It was impossible to communicate the fact of his enforced absence to the principal. He arrived home Thursday evening and returned to his classes on Friday morning, October 6th.

The governing board deducted \$96 from the defendant's salary for the six days'

absence without leave and requested his resignation. Upon his refusal to resign the board adopted a resolution charging him with (1) unprofessional conduct; (2) dishonesty; and (3) persistent violation of the school law and regulations. The hearing in the trial court was had on those charges.

The court found the foregoing facts and concluded that they did not constitute sufficient cause for dismissal.

The judgment in effect was an adjudication that the plaintiffs may not dismiss the defendant. The plaintiffs contend that the trial court had no power to make such an adjudication; that the court's power was circumscribed by the rules relating to certiorari and mandamus, and that judicial investigation was limited to whether the board properly exercised its jurisdiction. It is claimed that if facts existed which, as here asserted to have been found, were sufficient support for the board's determination to dismiss, the trial court had no power to disturb it. The plaintiffs specially refer to the fact, also found by the court, that the indisposition of the defendant was not sufficient to prevent continued performance of his duties and that he used his indisposition as an excuse to absent himself for the purpose of going deer hunting for at least two school days. A school regulation provided that teachers should not be absent without leave except on account of illness incapacitating them from performance of their duties. The substance of the court's finding is that the defendant's conduct was a violation of that regulation.

The position of the plaintiffs assumes the existence of statutory provisions which are lacking in the present law. Long prior to the adoption of the present Education Code, and pursuant to the 1921 amendment of section 1609 of the Political Code, included in the former Teachers' Tenure Act, the law afforded a retrial in the superior court after a hearing before the board of education on charges similar to those here involved. In *Saxton v. Board of Education*, 206 Cal. 758, 768, 276 P. 998, it was stated that such a trial was not an appeal from the board's determination, and that the then existing statutory provisions

deprived the board of the power to pass finally upon the dismissal of an accused teacher.

The case of *Board of Education of City of Los Angeles v. Ballou*, 21 Cal.App.2d 52, 55, 68 P.2d 389, 391, noted the significant changes brought about by the 1935 amendment of the School Code, Stats.1929, ch. 23, Stats.1935, pp. 1886, 1887, whereby "Administrative school officials were deprived of the power to dismiss permanent teachers for cause and it was made necessary for the governing board, in order to bring about a dismissal, to file a complaint in the superior court 'asking that the court inquire into such charges and determine whether or not such charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of such employee, under the provisions of this code, and for judgment pursuant to its findings.' The Legislature has placed upon the judges the duty of determining whether a teacher should be dismissed when charges such as incompetency are filed." See, also, *Fresno City High School Dist. v. De Caristo*, 33 Cal.App.2d 666, 92 P.2d 668. In *Board of Education of San Francisco Unified School Dist. v. Mulcahy*, 50 Cal.App.2d 418, 421, 123 P.2d 114, it was said that the interposition, between the initial charge and the final order, of a judicial determination as to the existence of proper grounds for dismissal is supported by both reason and authority, citing *Wheatley v. Superior Court*, 207 Cal. 722, 279 P. 989.

The changes enacted by the School Code have been carried into the Education Code adopted in 1943. Stats.1943, ch. 71. Section 13521 provides that no permanent employee shall be dismissed except for one or more of the enumerated causes which include those here involved. Upon the filing of written charges the governing board of the school district may give notice to the permanent employee of its intention to dismiss him at the expiration of 30 days from the service of the notice unless a hearing is demanded. § 13522. If the employee does not demand a hearing within the 30 day period he may be dismissed upon the expiration of that time. § 13527. However, the employee may demand a hearing, in which event the board has the option

either to rescind its action or to file a complaint in the superior court setting forth the charges and asking that the court inquire into the charges and determine whether they are true, whether they constitute sufficient grounds for the dismissal of the employee under the provisions of the code, and that judgment be entered pursuant to the findings. § 13529. Section 13551 provides that after the trial the court shall enter judgment, which "shall determine whether or not the governing board may dismiss the employee." Section 13552 reads: "If the judgment determines that the employee may be dismissed, the governing board may dismiss him upon entry of the judgment. Otherwise the employee may not be dismissed as the result of the charges or of any charges which could have been made or heard at the hearing."

[1] The foregoing cited cases and provisions of the Education Code afford a complete answer to the contention of the plaintiffs that the trial court did not have the power to determine whether the defendant may be dismissed by the board. Where an accused teacher demands a hearing, the duty of determining the issues as to the truth of the charges and their sufficiency to support a dismissal is placed by the statute on the superior court, whose judgment, appropriate to the evidence and the findings, terminates the matter. In such cases the board has the administrative function of initiating the charges, of filing the complaint on request, and of compliance with the judgment of the court—with the qualification that a judgment determining that the board may dismiss the defendant is not to be deemed a matter of direction or compulsion.

[2] On an appeal from the judgment the review is not to discover whether facts exist which sustain the action of the board, but whether the evidence on the court hearing supports the findings and judgment of the court.

[3] The plaintiffs contend that the conclusion that cause for dismissal does not exist is inconsistent with the findings and therefore, that the findings do not support the judgment. They point to the finding that the defendant's condition did not pre-

vent the performance of his duties and that he used it as an excuse to go deer hunting, and to the evidence that he admitted before the board that he was not sorry he had gone and that under similar circumstances he might feel impelled to do the same thing again. They contend that these facts support the charges of unprofessional conduct, dishonesty and persistent violation of regulations, and are inconsistent with the conclusion of the trial court that the facts do not constitute sufficient cause of dismissal. However, the court in effect also determined that the one instance of violation under the circumstances, together with the frank answers indicating the defendant's state of mind, did not constitute unprofessional conduct or dishonesty such as would unfit him for the performance of his duties as a teacher. An approved definition of dishonesty connotes a disposition to deceive. *Hogg v. Real Estate Com'r*, 54 Cal. App.2d 712, 717, 129 P.2d 709. That the defendant was guilty of a measure of deception may not be doubted and his conduct was reprehensible when measured by the high standards of his profession. But whether the Legislature intended that all deception, however slight, should result in dismissal is doubtful. A judicial question is thus presented. The trial court having the responsibility in the premises, chose to relieve the defendant from the rigorous result of his misconduct and we are disposed not to disturb its judgment in this respect.

[4] The court concluded that one instance of disobedience of the school regulations did not necessarily show persistence. Persistence, in the sense intended, is referable to past conduct. The Legislature undoubtedly intended that opportunity for correction be available and refrained from providing for dismissal for a single violation of regulations, or until repeated violations could be considered persistent. In *Fresno City High School Dist. v. De Caristo*, supra, 33 Cal.App.2d 666, at page 675, 92 P.2d 668, it was said that two absences without leave may not be considered a persistent course of conduct. See *Fresno City High School Dist. v. Dillon*, 34 Cal.App.2d 636, 94 P.2d 86; cf. *Evard v. Board of Education*, 64 Cal.App.2d 745, 149 P.2d 413, where the teacher absented herself without leave for a

period of seven months. A teacher who is "continually insubordinate * * * may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn." *Johnson v. Taft School Dist.*, 19 Cal.App.2d 405, 408, 65 P.2d 912, 913. The emphasis is on "persistent" and "continually." The trial court expressly found that the defendant was not motivated by an attitude of insubordination. We conclude that the findings and conclusions are not fatally inconsistent, that they are supported by the evidence and in turn support the judgment.

Both the governing board of the school district and the trial court have followed the procedure prescribed by the Education Code and the judgment is pursuant to the authority vested in the trial court by the provisions of that code.

The judgment is affirmed.

CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

SPENCE, Justice (dissenting).

I dissent.

Under the undisputed facts in the present case, I am of the opinion that the judgment of the trial court must be reversed. These undisputed facts required findings by the trial court that certain of the charges made against respondent were true, and further required the conclusion by the trial court that such charges constituted sufficient grounds for dismissal under the provisions of the Education Code. Ed.Code, § 13529. Upon such findings and conclusions, the judgment of the trial court should have been that "the governing board may dismiss the employee." Ed.Code, § 13551.

The trial court, however, apparently misconceiving the relative functions of the school board and of the court under the pertinent sections, not only made findings and conclusions some of which are inconsistent among themselves and some of which are wholly contrary to the undisputed facts, but further made certain findings which could have no relevancy except upon the erroneous theory that the trial court had the power not only to determine the matters above mentioned but also had

the power and duty to determine the penalty, if any, which should be imposed.

The majority opinion sustains the judgment upon arriving at the conclusions that "the findings and conclusions are not fatally inconsistent" and that "they are supported by the evidence." In arriving at these conclusions, the majority opinion stresses the facts which might be considered by the board in ultimately fixing the penalty, if any, to be imposed by the board following a court determination that the board "may dismiss the employee" but which facts should not have been considered by the trial court and should not be considered by this court in determining whether the charges were true and whether they constituted sufficient grounds for dismissal under the code. While the procedure set forth in the Education Code contemplates the exercise by the trial court of broad powers in determining questions of fact and of law, the function of the trial court ends with such determination. In other words, the trial court has the function of determining whether the board *may* dismiss the employee, but it has not the function of determining whether the board *should* dismiss the employee. The latter function of fixing the penalty, if any, is an administrative function which remains with the board. This is made manifest by the provisions of section 13552 of the Education Code, which provides that "If the judgment determines that the employee may be dismissed, the governing board may dismiss him upon entry of the judgment." The true function of the court is apparently recognized in that portion of the majority opinion where it is said that "a judgment determining that the board may dismiss the defendant is not to be deemed a matter of direction or compulsion," but the majority opinion also quotes with apparent approval the language used in *Board of Education of City of Los Angeles v. Ballou*, 21 Cal.App.2d 52 at page 55, 68 P.2d 389, at page 391, where it was said: "The Legislature has placed upon the judges the duty of determining whether a teacher *should* be dismissed when charges such as incompetency are filed." (Emphasis added.) This language was dictum in the *Ballou* case and should be disapproved rather than quoted with approval,

as the word "should" was obviously used in place of the word "may." That case arose upon demurrer and the question under discussion was not before the court. Neither was the question involved in *Board of Education of San Francisco Unified School Dist. v. Mulcahy*, 50 Cal.App.2d 418, at page 421, 123 P.2d 114, in which the language of the *Ballou* case was quoted. There the court affirmed a judgment "that the board might dismiss the defendant as an employee of the school district." 50 Cal.App.2d at page 420, 123 P.2d at page 116.

As above indicated, the pertinent facts with respect to certain charges were undisputed. Among other charges, respondent was charged with dishonesty and unprofessional conduct. Stripped of all irrelevant matters which were introduced in evidence, it appears from the undisputed evidence that because of respondent's desire to go deer hunting, he absented himself from his duties for that purpose for several days without permission, upon the admittedly false pretext, embodied in his letter to the principal, that his absence was necessitated solely by illness; that upon his return, he adopted and maintained a defiant and insubordinate attitude in his meetings with the principal and with the board, and made no apology for his unauthorized absence or for the false statements contained in his letter, but on the contrary stated "I am not sorry"; "I would do it again under the same conditions"; and "If you fire me that is all right."

In its findings, the trial court found that respondent had written the letter to the principal containing the false statements and had thereafter voluntarily absented himself from his duties for at least part of the time "without legal reason or excuse," and that such voluntary absence "was without the permission or assent of the said principal or school board and was not because of illness or indisposition but was for the purpose of going on said hunting trip." But as to the specific allegations relating to the defiant and insubordinate attitude of respondent after his return, which allegations were contained in the complaint and were further incorporated

into the complaint by reference to the resolution of the board, which was attached, the trial court made no specific findings but found generally that all other allegations were "untrue, except in the respects in which said allegations are elsewhere in these findings found to be true." These last-mentioned general findings were contrary to the undisputed evidence and cannot be sustained. Likewise contrary to the undisputed evidence is the general finding "that it is not true that said defendant was motivated at any time by an attitude of insubordination."

The above-mentioned undisputed evidence left for the determination of the trial court no real issue of fact with respect to the truth of the specific charges to which such testimony related. The question presented to the trial court was rather one of law than one of fact, and concerned the question of whether such admitted conduct constituted dishonesty and unprofessional conduct within the meaning of section 13521 of the Education Code. That question remains a question of law on this appeal, and the question is not foreclosed by the trial court's inconsistent and unsupported conclusion, contained in the findings of fact, that "it is not true that defendant has been guilty of unprofessional conduct or dishonesty."

While there may be situations in which the question of whether certain acts constitute unprofessional conduct and dishonesty may not be a question of law alone, such is not the case here. Under approved definitions respondent was unquestionably guilty of dishonesty in writing the letter to the principal containing false representations which were intended to deceive. See *Hogg v. Real Estate Com'r*, 54 Cal.App.2d 712, 717, 129 P.2d 709. This is apparently conceded in the majority opinion, where it is stated "That the defendant was guilty of a measure of deception may not be doubted and his conduct was reprehensible when measured by the high standards of his profession." Furthermore, it is difficult to conceive of any more flagrant unprofessional conduct than that evidenced by such dishonesty, coupled with total disregard of the rules, and the defiant and in-

subordinate attitude adopted and maintained by respondent throughout his meetings which followed with the principal and the school board. It therefore appears that the trial court here had no alternative but to declare, as a matter of law, that the undisputed facts constituted dishonesty and unprofessional conduct. To declare otherwise under the circumstances would mean that the school board, entrusted with the important duty of supervising education of the younger generation, would be powerless to dismiss the admittedly offending, defiant and recalcitrant teacher and would be seriously hampered in maintaining discipline and efficiency. In this connection, the following language used in *Johnson v. Taft School Dist.*, 19 Cal.App.2d 405, at page 408, 65 P.2d 912, at page 913, is pertinent: "A board of education is entrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The example of a teacher who is continually insubordinate and who refuses to recognize constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though her other qualifications may be sufficient. 'Book learning' is only a phase of the important lessons a child should learn in a school."

As I read the majority opinion, it fails to distinguish between the functions of the school board and of the court in the plan set forth in the sections of the Education Code. It recognizes that respondent was guilty of what is termed "deception," "misconduct" and "reprehensible" conduct, but it sustains a judgment holding that the school board has no power to dismiss respondent. It states that the trial court in effect determined that the conduct of respondent "did not constitute unprofessional conduct or dishonesty *such as would unfit him for the performance of his duties as*

a teacher. * * * The trial court having the responsibility in the premises, chose to relieve the defendant from the rigorous result of his misconduct and we are disposed not to disturb its judgment in this respect." (Emphasis added.) It was the function of the trial court to determine only whether respondent was guilty of unprofessional conduct and dishonesty, and to leave to the school board the determination of whether respondent should be dismissed because of such unprofessional conduct and dishonesty. As indicated above, the trial court had no alternative but to determine that he was thus guilty under the undisputed facts. But it was no part of the function of the trial court to determine whether such unprofessional conduct and dishonesty were "such as would unfit him for the performance of his duties as a teacher" or "to relieve the defendant from the rigorous result of his misconduct." That function clearly rested with the school board, in its discretion, following an appropriate judgment of the trial court.

Respondent does not yet appear to appreciate the seriousness of his offenses, as he claims on this appeal that at most his "conduct amounts to no more than one absence without leave." It may be assumed, for the purpose of this discussion, that if the undisputed evidence showed nothing more than one short absence without leave, the trial court would have properly entered judgment in his favor. But the very fact that respondent fails to appreciate the seriousness of his deliberate falsehoods uttered to deceive his principal or the seriousness of his defiant and insubordinate attitude, adopted and maintained toward his principal and the school board following the uttering of said deliberate falsehoods and following the taking of his absence without leave, tends to show justification for the action of the school board in passing a resolution containing an expression of its intention to dismiss respondent. Whether respondent's attitude has changed and whether the final action of the board should be one imposing the penalty of dismissal are matters which are committed to the school board for determination following the judgment of

the trial court determining that such conduct constituted unprofessional conduct and dishonesty. Ed.Code, §§ 13521, 13552. It is not the function of the trial court nor of this court to determine the circumstances under which unprofessional conduct or dishonesty should be condoned or to compel the school board to retain an offending teacher regardless of his continued defiant and insubordinate attitude toward those who are charged with the duty of dealing with such derelictions and of maintaining the high standards of our educational system.

For the reasons stated, I am of the opinion that the judgment of the trial court should be reversed.

GIBSON, C. J., and EDMONDS, J., concurred.



29 Cal.2d 7

ROCK CREEK WATER DIST. v. CALAVERAS COUNTY.

Sac. 5712.

Supreme Court of California.

Sept. 17, 1946.

1. Statutes ⇨184
Taxation ⇨217

The objective sought to be achieved by a statute, as well as the evil to be prevented, is of prime consideration in its interpretation and that is true of the constitutional provision that land and improvement located outside county, city and county, or municipal corporation, and taxable at time of acquisition by county, city and county, or municipal corporation, shall not be exempt from taxation. Const. art. 13, § 1.

2. Taxation ⇨217

The purpose of the constitutional provision that land and improvements located outside county, city and county, or municipal corporation, and taxable at time of acquisition by county, city and county, or municipal corporation, shall not be exempt from taxation, is to protect, from loss of

taxable property, those counties in which municipalities acquire property for the operation of various municipal projects. Const. art. 13, § 1.

3. Taxation ☞217

Under the constitutional provision that lands and improvements located outside municipal corporation and taxable at time of acquisition by municipal corporation shall not be exempt from taxation, the term "municipal corporation" must be given a broad meaning unrestrained by the strict technical sense of the term. Const. art. 13, § 1.

4. Taxation ☞217

A water district organized under Water District Act was a "municipal corporation" whose property situated in another county was not exempt from taxation, within the constitutional provision excepting from tax exemption such lands of a municipal corporation and improvements thereon located outside of such corporation as were subject to taxation when acquired by the corporation. Gen.Laws Act 9125; Water Code, § 20500 et seq.; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Corporation".

Appeal from Superior Court, Calaveras County; A. L. Pierovich, Judge Assigned.

Action by Rock Creek Water District against County of Calaveras to recover taxes paid under protest. Judgment for plaintiff, and defendant appeals.

Judgment reversed.

Prior opinion 164 P.2d 947.

Virgil M. Airola, Dist. Atty., of San Andreas, for appellant.

C. R. Montgomery, of Sacramento, for respondent.

CARTER, Justice.

Plaintiff, Rock Creek Water District, recovered judgment against defendant Calaveras County for taxes paid under protest.

Plaintiff is a public agency organized in April, 1941, under the California Water District Act, Stats.1913, p. 815, 3 Deering's

Gen. Laws, Act 9125, and embraces territory lying wholly within Stanislaus County, the some 1,800 acres being owned by four persons. Plaintiff owns property situated in defendant taxing county consisting of a dam, reservoir, water rights and easements for ditches, canals and pipe lines. Defendant levied a property tax on that property which plaintiff paid under protest.

Plaintiff claims its property is exempt from taxation under section 1 of article XIII of the Constitution of California. After providing that all property is subject to taxation the Constitution declares that: "further provided, that property * * * [1] such as may belong to * * * this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, [2] except such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation." The clauses are numbered for convenience in reference. Cal.Const. art. XIII, § 1. Plaintiff urges that it falls within clause 1 and its property is thus exempt whereas defendant asserts that plaintiff falls within clause 2 and hence the property is excluded from the exemption.

Plaintiff district's chief function, like irrigation districts, is to supply water for irrigation to landowners within its boundaries. It operates substantially the same as an irrigation district under the California Irrigation District law. Water Code, § 20500 et seq.

It is quite apparent that in order for plaintiff to benefit by clause 1 the property owned by it in defendant county must either belong to the state or plaintiff must be classified as a municipal corporation. It is not claimed by either defendant or plaintiff that the latter is a county or city and county, and it is conceded that the property in question was acquired from a public utility supplying water to the persons who formed plaintiff district and was subject to

taxation at the time of its acquisition. If the property held by plaintiff belongs to the state it is clearly exempt and the second clause does not exclude it from the exemption. Likewise if it is within the scope of the term "municipal corporation" as used in the first clause conferring the tax exemption, it is also embraced in that term as used in the second clause and hence its property which lies outside its territorial limits is subject to taxation.

[1-3] It is fundamental that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation. *People v. Moroney*, 24 Cal.2d 638, 150 P.2d 888; *Gage v. Jordan*, 23 Cal.2d 794, 147 P.2d 387; *California Drive-In Restaurant Ass'n v. Clark*, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028; *In re Ryan's Estate*, 21 Cal. 2d 498, 133 P.2d 626; *Metropolitan Water Dist. v. County of Riverside*, 21 Cal.2d 640, 134 P.2d 249; *City and County of San Francisco v. San Mateo County*, 17 Cal.2d 814, 112 P.2d 595, 597. And that is true of the constitutional provision here involved. *City and County of San Francisco v. San Mateo County* *supra*. The purpose of clause 2 is "to protect from the loss of taxable properties those countries in which municipalities acquire property for the operation of various municipal projects. * * * Prior to the amendment, the property of municipalities lying outside their corporate boundaries was exempt from taxation and that resulted in many instances in the county in which such property was situated losing large sources of revenue, a loss which it could ill afford. The aim of the amendment was to eliminate that condition." *City and County of San Francisco v. San Mateo County*, *supra*, 17 Cal.2d 818, 112 P.2d 595. (See, also, *Metropolitan Water Dist. v. County of Riverside*, *supra*; *City and County of San Francisco v. County of Alameda*, 5 Cal.2d 243, 54 P.2d 462; *City of Pasadena v. County of Los Angeles*, 182 Cal. 171, 187 P. 418. And in line with that policy the term municipal corporation must be given a broad meaning unrestrained by the strict technical sense of the term. *Metropolitan Water Dist. v. County of Riverside*, *supra*, 21 Cal.

2d 644, 134 P.2d 249, disapproving the contrary view in *Turlock Irr. Dist. v. White*, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, and *Laguna Beach County Water Dist. v. County of Orange*, 30 Cal.App.2d 740, 87 P.2d 46.

[4] The evil to be remedied is as clearly present whether the agency be an irrigation district or water district such as is here involved or a city—a municipal corporation in the strict sense. The agency acquires for the benefit of its inhabitants or the property within its boundaries property which lies outside its territory. That property receives the protection of the tax supported governmental agencies of the county in which it lies. There is no reason why the persons within the agency who receive the benefits of its activities should receive aid by way of tax exemption of its property at the expense of the taxpayers in the outside area. In the argument to the voters when clause 2 was added by the 1914 amendment to section 1 of article XIII of the Constitution, reference was made by *illustration* to two cities, Los Angeles and San Francisco, but the principle for which the example was given was stressed as follows: "It is to remedy such a condition that this amendment was proposed. Uncertainty on the matter should be removed by a legal assurance that, while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its shares of maintaining the local government." *Turlock Irr. Dist. v. White*, *supra*, 186 Cal. at page 185, 198 p. at page 1061, 217 A.L.R. 72. The matter is forcefully put by Justice Sloane in his dissenting opinion in *Turlock Irr. Dist. v. White*, *supra*, 186 Cal. at page 193, 198 P. at page 1063, 17 A.L.R. 72:

"It is doubtless true, as set forth in the argument presented to the voters on the submission of this amendment [clause 2], that the inducing cause of the amendment was the acquisition of large real estate interests in the counties of Tuolumne, Mono, and Inyo for reservoir purposes by the distant cities of Los Angeles and San Francisco. These corporations happen to be

governmental municipalities, but that was not the circumstance which appealed to the voters of these counties and others likely to be invaded by public power and water purveyors.

"The real purpose was to prevent abuses threatened and likely to recur from permitting private lands subject to taxation in one jurisdiction to be taken over for public uses by other communities and by depriving the territory in which the lands are situated of the revenue from this taxation, thus throw part of the burden of such public use upon territory not benefited by it. What possible reason or justification could there be for protecting these outside jurisdictions from the incursions of towns and cities in search of water storage and distribution, and leaving them exposed to precisely the same invasion by extensive irrigation districts outside their territory? The gist of the matter clearly appears in the part of the argument for this constitutional amendment which says: 'Uncertainty on this matter should be removed by a legal assurance that, while natural resources within one county may be directly used for the upbuilding of another, lands or other property already upon the invaded county's tax roll shall continue to bear its share of maintaining the county government.'

"The direct object of the amendment was to protect and conserve the revenues of the invaded territory, and with that object in view it can make no difference whether the public use acquired is by a city or county, or some other public corporation exercising municipal functions.

"No violence is done to the rules of construction under the interpretation of the term 'municipal corporations' here contended for. It is common knowledge that in popular usage the term 'municipal corporation' is understood as applying to all departments of state organization exercising public functions, and the same general use of the term is common in judicial decisions and with law text-writers. * * *

"An irrigation district probably comes nearer than any other of the subordinate public corporations of the state to meeting the technical requirements defining a municipal corporation. It has its own directors

and officers, conducts its own elections, can sue and be sued in its corporate name, issues bonds, levies, collects, and disburses its own revenues, acquires and holds property, both real and personal, in its own name, and in the management of its internal affairs is entirely independent of the county and state, aside from the control of general laws."

Turlock Irr. Dist. v. White, *supra*, and Laguna Beach County Water Dist. v. County of Orange, *supra*, take a contrary view but those cases are based upon the assumption that the words "municipal corporation" were used in a strict technical sense. That view has been disapproved. Metropolitan W. Dist. v. County of Riverside, *supra*, 21 Cal.2d at page 644, 134 P.2d 249. Moreover the Turlock case classified an irrigation district as a public corporation for municipal purposes and hence not a municipal corporation, but we stated in the Metropolitan case (21 Cal.2d at page 644, 134 P.2d at page 25): "We conclude, therefore, that the words 'municipal corporation,' as used in the constitutional provision, were intended to include a district of the type of plaintiff, whether for descriptive purposes it be designated a municipal corporation in the technical sense, a quasi-municipal corporation (which plaintiff here concedes itself to be), or a public corporation for municipal purposes." Therefore the Turlock and Laguna Beach cases are overruled. Whether irrigation or water districts such as we have here are municipal corporations in connection with tort liability and other questions is not important. Perceiving the object of clause 2 the use of the term in question must embrace a water district. It is of interest to note that although this court refers to a municipal water district (Stats.1911, p. 1290) as a subdivision of the state it is declared to be a municipal corporation in construing the rights granted by the state to "municipal corporations" for rights of way over state property. State of California v. Marin Mun. Water Dist., 17 Cal.2d 699, 111 P.2d 651. We have seen that an irrigation district and a water district are substantially the same. A municipal water district may include unincorporated as well as incorporated territory and its principal

function is to supply water for domestic service whereas an irrigation or water district is primarily concerned with supplying water for irrigation. That furnishes no rational basis for a distinction.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



29 Cal 2d 34

SPEEGLE v. BOARD OF FIRE UNDERWRITERS OF THE PACIFIC et al.
S. F. 17196.

Supreme Court of California, In Bank.
Sept. 20, 1946.

Rehearing Denied Oct. 17, 1946.

1. Master and servant ⇨8(1)

A contract for permanent employment is only a contract for an indefinite period terminable at the will of either party unless it is based on some consideration other than the services to be rendered.

2. Insurance ⇨79

In action by insurance agent against insurance companies and association of fire insurers, of which the companies were members, for wrongful termination of agent's contracts with the companies as agent or broker, wherein agent failed to allege any consideration for the contracts, it could not be concluded that companies violated their contracts with agent in terminating the contracts.

3. Torts ⇨12

Intentional and unjustifiable interference with contractual relations of others, is actionable, though the contract is terminable at will, since the fact that a contract is at the will of the parties does not make it one at the will of others.

4. Monopolies ⇨18

Insurance companies' activities and activities of association of fire insurers, of

which the companies were members, in having contracts in employing agent and broker canceled would not be justified, if their objective was to stifle competition by enforcing a scheme to restrain trade.

5. Appeal and error ⇨917(1)

On appeal from judgment entered for defendants after the sustaining of defendants' demurrers to plaintiff's complaint without leave to amend, allegations of complaint were regarded as true.

6. Monopolies ⇨28(6)

In action by agent against insurance companies and association of fire insurers, of which the companies were members, for wrongful termination of agent's contracts with companies as agent or broker, complaint properly raised issue of defendants' liability for restraint of trade.

7. Pleading ⇨34(1)

Pleadings must be reasonably interpreted, and they must be read as a whole, and each part must be given the meaning that it derives from the context wherein it appears.

8. Pleading ⇨34(1)

The statutory requirement that allegations must be liberally construed with a view to substantial justice between the parties is not served when technical forfeitures prevent a trial on the merits. Code Civ.Proc. § 452.

9. Pleading ⇨225(2)

Where plaintiff pleaded a general set of facts on which his cause of action was based, trial court, though of the opinion that plaintiff's second amended complaint was not sufficiently detailed, abused its discretion in sustaining demurrers to the petition without leave to amend, since a plaintiff should not be deprived of his right to maintain his action on ground that his pleadings were defective for lack of particulars. Code Civ.Proc. § 472c.

10. Monopolies ⇨18

An association of fire insurers, organized to dominate and control the business and business methods of agents and brokers who might be acting as agents for any of the insurers and by coercion to control and restrict and restrain fair competition

in the insurance business, is an "unlawful trust" within meaning of the Cartwright Act. Business and Professions Code, §§ 16700-16758, 16720, 16726, 16750.

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Trust".

11. Monopolies ⇨18

Insurance is "commerce" within meaning of the Cartwright Act, and therefore the act applies to a combination in restraint of the insurance trade. Business and Professions Code, §§ 16700-16758.

12. Monopolies ⇨10

The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. Business and Professions Code, §§ 16700-16758.

13. Monopolies ⇨12(1)

Under the common law, combinations entered into for the purpose of restraining competition and fixing prices are unlawful.

14. Monopolies ⇨18

Combinations between insurers or insurers and insurance agents for purpose of stifling competition in the insurance market and fixing insurance rates are in violation of common-law rules against restraint of trade.

15. Monopolies ⇨18

Though courts recognize that a certain amount of co-operation between insurers is required by the nature of insurance business, insurance companies are not immune from common-law and statutory rules against restraint of trade. Business and Professions Code, §§ 16700-16758.

16. Monopolies ⇨28(6)

In action by agent against insurance companies and association of fire insurers, of which the companies were members, for wrongful termination of agent's contracts with companies as agent or broker, complaint stated a cause of action under statutory and common-law rules against restraint of trade. Business and Professions Code, §§ 16700-16758.

17. Monopolies ⇨28(1)

One whose business has been injured by the activities of a combination in restraint

of trade is entitled to damages, not only under the Cartwright Act but also under the common law. Business and Professions Code, § 16750.

18. Monopolies ⇨10

The Cartwright Act was not intended to change the common-law policy against combinations in restraint of trade, but was intended merely to make the enforcement of the policy more effective. Business and Professions Code, § 16750.

19. Statutes ⇨64(2)

The Cartwright Act is not unconstitutional on ground that provisions therein exempting certain combinations from the operation of the act are unconstitutional and are inseparable from the rest of the act, where alleged unconstitutional portions were separable from the act. Business and Professions Code, § 16750.

20. Monopolies ⇨10

Where cause of action for damages for alleged injury allegedly caused by violation of the Cartwright Act arose in 1939, the act was required to be construed as it stood at that time and not as it stood when the Legislature in 1941 reenacted the Cartwright Act as amended into the Business and Professions Code. Business and Professions Code, § 16750.

21. Commerce ⇨8(1)

State laws are not invalid under the commerce clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress.

22. Commerce ⇨8(2)

Since there is no conflict between the Cartwright Act of California and the Federal Sherman Act, the Cartwright Act could be invoked in action against insurance companies and association of fire insurers, even though interstate commerce was involved. Business and Professions Code, § 16750.

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Action by Xum H. Speegle, individually and doing business under the firm name

and style of Xum H. Speegle Co. against the Board of Fire Underwriters of the Pacific (an unincorporated association) and others to recover damages for alleged injury to plaintiff's business by defendants in causing and inducing breach and termination of plaintiff's insurance agency contacts. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed.

Prior opinion 158 P.2d 426.

Edward R. Solinsky and Philip C. Boardman, both of San Francisco, and James F. Boccardo, of San Jose, for appellant.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Max Radin, of Berkeley, as Amici Curiae on behalf of appellant.

Joseph T. O'Connor, Long & Levit, and Orrick, Dahlquist, Neff, Brown & Harrington, all of San Francisco, and Bardin & Harrington, of Salinas, for respondents.

TRAYNOR, Justice.

Plaintiff brought this action to recover actual and exemplary damages for alleged injury to his business by defendants. The trial court sustained defendants' demurrers to plaintiff's second amended complaint without leave to amend and entered judgment for defendants. Plaintiff appeals.

The following facts are alleged in the second amended complaint: Plaintiff has been an insurance agent in Salinas since 1927, and since 1937 has also done business there as an insurance broker. He entered into written contracts of agency with the 14 defendant insurance companies and with defendant Pennsylvania Underwriters, hereinafter referred to as one of the defendant insurance companies. Defendant insurance companies are all members of defendant Board of Fire Underwriters of the Pacific, an association of fire insurers, hereinafter referred to as the board. In the early part of 1939, the board, acting in concert with defendant Salinas Association of Local Insurance Agents, hereinafter referred to as the agents' association, accused plaintiff of violating his contracts with the members of the board by placing insurance, as agent or as broker, with nonboard companies. Plaintiff states that he

placed most of his business with board members but that when the interest of his customers required it, he placed insurance with nonboard companies. He denies that this practice constituted a violation of his contracts with board companies. In March, 1939, following an investigation by the board into plaintiff's practices, defendants caused three of the board companies to terminate their agency contracts with him. In July of that year the board threatened to cause the 12 other board companies to terminate their contracts with plaintiff, unless he immediately ceased to represent nonboard companies and relinquished his broker's license. Upon plaintiff's refusal to comply with these conditions, defendants caused the termination of his remaining contracts with board companies.

Plaintiff also alleges that he entered into the insurance agency and brokerage business in Salinas and made his contracts with defendant companies in reliance upon certain usages of the insurance trade; that under such usages an agency contract is permanent and "will not be cancelled except for good and lawful cause," an agent is under no duty to place all insurance with the company or companies for which he is agent and is free to place insurance with other board and nonboard companies, and is also free to engage in the business of an insurance broker and in that capacity to place insurance with other companies according to the wishes or interests of the applicants.

Plaintiff further alleges that it is the purpose of the board through coercion and oppressive methods, and otherwise, to dominate and control "the class of insurance written by its members * * * fix the terms, conditions and rates for such insurance," determine the terms upon which board members may employ agents, dominate and control the business of such agents and of brokers who act as agents for board members, and by such methods to "limit and restrict and restrain fair competition in said insurance business and as between brokers; and * * * unlawfully to create and carry out restraints and restrictions upon the business and business methods of such agents and brokers and upon fair competition in placing insurance to the

best advantage of those who may require or who may desire insurance of the classes written by the * * * members of said Board."

Plaintiff contends that defendants had no right to require him to represent only board companies and relinquish his broker's license; that their conduct amounted to an unjustified interference with his contractual relations and, on the part of defendant insurance companies, to a breach of contract; and that their attempt to dominate or destroy his business was part of a conspiracy to restrain the insurance trade in Salinas. The following questions are thus presented for decision: I. Are defendants liable for breach of contract or interference with plaintiff's contractual relations? II. Has plaintiff properly raised in his pleadings the question of defendants' liability for restraint of trade? III. Has plaintiff stated a cause of action under statutory (Business & Professions Code, §§ 16700 to 16758, known as the Cartwright Act) or common law rules against restraint of trade? IV. Is the Cartwright Act constitutional? V. Does the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, 15 note, preclude the application of state law?

I. Are defendants liable for breach of contract or interference with plaintiff's contractual relations?

[1,2] The complaint does not set forth any of the agency contracts, but pleads them according to their legal effect. As to their duration it merely alleges that in the insurance business such contracts are customarily regarded as being permanent and revocable only for cause. Plaintiff's contention that in terminating the contracts defendant companies committed breaches thereof rests therefore entirely upon that allegation. A contract for permanent employment, however, is only a contract for an indefinite period terminable at the will of either party (Lord v. Goldberg, 81 Cal. 596, 22 P. 1126, 15 Am.St.Rep. 82), unless it is based upon some consideration other than the services to be rendered. Brown v. National Electric Works, 168 Cal. 336, 143 P. 606; Davidson v. Laughlin, 138 Cal. 320, 71 P. 345, 5 L.R.A.,N.S., 579; Millsap v. National Funding Corpora-

tion, 57 Cal.App.2d 772, 135 P.2d 407; Seifert v. Arnold Bros., Inc., 138 Cal.App. 324, 31 P.2d 1059; see Otten v. Spreckels, 183 Cal. 252, 191 P. 11. Since plaintiff has not alleged such consideration, it cannot be concluded that defendant insurance companies violated their contracts with him.

Plaintiff contends, however, that defendants unlawfully interfered with his contracts on the grounds that none of the contracts would have been terminated had the decision rested solely with each insurance company, that the termination of the contracts was brought about by pressure upon the companies brought by the board, assisted by the agents' association, and that each company was influenced by the others acting in concert.

[3] Intentional and unjustifiable interference with contractual relations is actionable in California as in most other jurisdictions. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631; see cases collected in 84 A.L.R. 43. Recognizing that the fact that a contract is "at the will of the parties, respectively does not make it one at the will of others," (Truax v. Raich, 239 U.S. 33, 38, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A. 1916D, 545, Ann.Cas.1917B 283) the great majority of the cases have held that unjustifiable interference with contracts terminable at will is actionable. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260, L.R.A.1918C, 497, Ann.Cas.1918B, 461; United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732, 29 A.L.R. 520; Berry v. Donovan, 188 Mass. 353, 74 N.E. 603, 5 L.R.A.,N.S., 809, 108 Am.St.Rep. 499, 3 Ann.Cas. 738; London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, 69 N.E. 526, 99 Am.St.Rep. 185; see cases cited in 84 A.L.R. 43, 60; see, also, Prosser, Torts, 981; 1 Callmann, Unfair Competition, § 33.1; Carpenter, Interference With Contract Relations, 41 Harv.L.Rev. 728, 742. Interference with such contracts may be justified under certain circumstances. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 36, 112 P.2d 631; McGee v. Collins, 156 La. 291, 100 So. 430, 34 A.L.R. 336; Triangle Film Corporation v. Arcraft Pictures Corporation, 2 Cir., 250 F. 981, 982, 163 C.C.A.

231; see cases collected in 84 A.L.R. 79; Rest. Torts, §§ 766-774; Prosser, Torts, 996, 982; 1 Callman, Unfair Competition, § 33.1; Holmes, Privilege, Intent and Malice, 8 Harv.L.Rev. 1, 9; Carpenter, Interference With Contract Relations, 41 Harv.L.Rev. 728, 745; 30 Am.Jur. 80. Each company is of course interested in the loyalty of its agents, and, like any other principal, may require an agent to represent it exclusively or to represent only such other principals as have interests in common with it. Collective bargaining, which is an important part of modern employment relations, is carried on in recognition of the fact that employers as well as employees may organize for the purpose of furthering their common interests and that such organizations may bring pressure upon their members to include in their contracts certain terms and conditions or to terminate contracts that do not contain such terms and conditions. Bentley v. Mountain, 51 Cal.App.2d 95, 99, 124 P.2d 91; Smith Met. Market v. Lyons, 16 Cal.2d 389, 400, 106 P.2d 414; Bautista v. Jones, 25 Cal.2d 746, 749, 754, 771, 780, 155 P.2d 343; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 603 98 P. 1027, 21 L.R.A., N.S., 550, 16 Ann.Cas 1165; Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 157 N.E. 130, 133; Rest., Torts, §§ 797-812; see Carpenter, Interference With Contract Relations, 41 Harv.L.Rev. 728, 760 and cases there cited. It does not appear that the conditions sought to be imposed upon plaintiff were not also imposed upon the members of the agents' association. Such members would have a common interest in seeing that he was subjected to the same conditions imposed upon them.

[4] Defendants' activities would be for an unlawful purpose, however, and would therefore not be justified, if their objective was to stifle competition by enforcing a scheme to restrain trade. Rest., Torts, § 768(c). The answer to the question whether defendants are liable for interference with plaintiff's contractual relations therefore depends on whether plaintiff has stated a good cause of action against defendants for injury to his business by activities in restraint of trade.

II. Has plaintiff properly raised in his pleadings the question of defendants' liability for restraint of trade?

[5, 6] Since the case is before us on demurrer, the allegations of plaintiff's second amended complaint must be regarded as true. Defendants contend that although the second amended complaint alleges that the board was organized to restrain trade it fails to allege that the purpose of defendants' activities against plaintiff was to restrain trade or that plaintiff's alleged injuries resulted from activities in restraint of trade. Plaintiff alleged that the board was organized to "dominate and control to their economic advantage, the class of insurance written by its members * * * fix the terms, conditions and rates for such insurance * * * likewise dominate and control the business and business methods of said agents and of every independent insurance broker who may be acting as an insurance agent for any member * * * of said Board, and by and through such coercion, oppression, domination and control limit and restrict and restrain fair competition in said insurance business and as between brokers * * * and by such coercion and oppression in respect to and domination and control of the classes of insurance written by its members * * * unlawfully to create and carry out restraints and restrictions upon the business * * * of such agents and brokers and upon fair competition in placing insurance to the best advantage of those who may require * * * insurance of the classes written by said members of said Board." Plaintiff's allegation that the board was organized to stifle competition in the insurance field by dominating the business of insurance agents must be read in conjunction with his allegations as to the conditions that defendants sought to impose upon him and his allegation that acceptance of those conditions would have meant domination of his business by defendants. If these allegations are read in conjunction with each other it cannot be seriously questioned that plaintiff's second amended complaint alleged that it was defendants' purpose not merely to injure plaintiff's business, but to dominate that business along with the

business of other insurance agents and brokers and thus to restrain trade in the field of insurance written by board companies. In the light of the facts alleged it is clear that plaintiff traced the injuries inflicted upon his business to his refusal to accept domination of his business by defendants as part of a general scheme pursued by them to restrain trade in the insurance field by dominating the business of insurance agents.

[7,8] Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears. *Jones v. Kelly*, 208 Cal. 251, 280 P. 942; *Hayter v. Fulmor*, 66 Cal.App.2d 554, 561, 152 P.2d 746. "Allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ.Proc., § 452), which is not served when technical forfeitures prevent a trial on the merits. *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

[9] Even if the trial court was of the opinion that plaintiff's second amended complaint was not sufficiently detailed, it abused its discretion in sustaining defendants' demurrers without leave to amend, for a plaintiff who has pleaded the general set of facts upon which his cause of action

is based should be given an opportunity to amend his complaint, and should not be deprived of his right to maintain his action on the ground that his pleadings were defective for lack of particulars. Code Civ. Proc., § 472c; *Olivera v. Grace*, 19 Cal.2d 570, 579, 122 P.2d 564, 140 A.L.R. 1328; *MacIsaac v. Pozzo*, 26 Cal.2d 809, 815, 161 P.2d 449; *Wennerholm v. Stanford Univ. Sch. of Med.*, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358; *Guilliams v. Hollywood Hospital*, 18 Cal.2d 97, 104, 114 P.2d 1.

It must be concluded, therefore, that plaintiff's second amended complaint properly raised the question of defendants' liability for restraint of trade.

III. Has plaintiff stated a cause of action under statutory or common law rules against restraint of trade?

The Cartwright Act (Business & Professions Code, §§ 16700-16758) forbids combinations in restraint of trade and grants a cause of action to any person injured by such a combination. Under section 16726, trusts, as defined in section 16720, are "unlawful, against public policy and void." Under section 16750 any person whose business is injured by such a trust "may sue therefor * * * to recover twofold the damages sustained by him, and the costs of suit."¹

¹ A trust is defined in section 16720 as a "combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce.

"(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

"(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any combination of any of the following:

"(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

"(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

"(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

"(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected."

[10, 11] It cannot be seriously questioned that a combination like the one alleged to have existed between defendants is an unlawful trust under the foregoing provisions. Defendants contend, however, that insurance is not commerce or at least was not so regarded when the Cartwright Act was enacted, and that therefore the act does not apply to combinations in restraint of the insurance trade. It is true that the decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, in which the United States Supreme Court recently determined that insurance is commerce within the meaning of the Commerce Clause and the Sherman Anti-Trust Act could not change the meaning of the word "commerce" as that word is used in the Cartwright Act. It demonstrates, however, that Congress did not intend "to freeze the proscription of the Sherman Act within the mold of the then current judicial decisions defining the commerce power," but intended on the contrary to go to the utmost extent of its power. The Cartwright Act is couched in similarly comprehensive language; it forbids combinations of the kind described with respect to every type of business. It cannot be assumed, therefore, that the Legislature intended to make an exception for insurance in the absence of any indication in the statute to that effect. Moreover, it is immaterial whether or not insurance is commerce, for the act makes unlawful combinations designed to increase the price of "any commodity" and to fix the price of "any article or any commodity or any article of trade, use, merchandise, commerce or consumption." It is clear that insurance, being "practically a necessity to business activity and enterprise" (*German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 414, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189) has become an indispensable commodity in modern life.

[12-14] The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. Thus, under the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful. *Getz Bros. & Co. v. Federal*

Salt Co., 147 Cal. 115, 118, 81 P. 416, 109 Am.St.Rep. 114; *Meyers v. Merillion*, 118 Cal. 352, 356, 50 P. 662; *Endicott v. Rosenthal*, 216 Cal. 721, 726, 16 P.2d 673; *Herriman v. Menzies*, 155 Cal. 16, 21, 44 P. 660, 46 P. 730, 35 L.R.A. 318, 56 Am.St.Rep. 81, 82; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 393, 18 P. 391, 9 Am.St.Rep. 211; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 P. 36, 25 Am.St.Rep.102; see, 36 Am.Jur. 579. The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand. Combinations between insurers or insurers and insurance agents for the purpose of stifling competition in the insurance market and fixing insurance rates are clearly in violation of the common law rules against restraint of trade. *Ætna Ins. Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624, 45 L.R.A. 355; *McCarter v. Firemen's Ins. Co.*, 74 N.J.Eq. 372, 73 A. 80, 414, 29 L.R.A., N.S., 1194, 135 Am.St.Rep. 708, 18 Ann. Cas. 1048. Insurance is a matter of such public concern that many states regard the protection afforded the community by statutory or common law rules against restraint of trade as insufficient and have accordingly enacted special statutes against combinations that seek to dominate the field of insurance or have given their insurance commissioners special powers over insurance rates. The enactment of such special legislation signifies there is a danger of market domination in the insurance field in which a great number of diversified risks and the accumulation of vast reserves are required of each insurer. "Fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the state is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly." *German Alliance Ins. Co. v. Hale*, 219 U.S. 307,

316, 31 S.Ct. 246, 248, 55 L.Ed. 229. Since there is no such special legislation in California, the Cartwright Act and the common law must be relied upon for the protection of the public against combinations in restraint of the insurance trade.

[15] Courts have recognized that a certain amount of co-operation between insurers is required by the very nature of the insurance business. *Continental Ins. Co. v. Board of Fire Underwriters of the Pacific*, c.c., 67 F. 310; *Brooker & Kinnaird v. Louisville Board of Fire Underwriters*, 188 Ky. 771, 224 S.W. 451, 454, 21 A.L.R. 531; see *Cline v. Insurance Exchange of Houston*, 140 Tex. 175, 166 S.W.2d 677; *Cline v. Insurance Exchange of Houston*, Tex. Civ.App., 154 S.W.2d 491, 495; *Buffalo Ass'n of Fire Underwriters v. Noxsel-Dimick Co.*, 235 App.Div. 92, 256 N.Y.S. 263, affirmed, 260 N.Y. 678, 184 N.E. 142; *Walker v. Fort Worth Ins. Underwriters' Ass'n*, Tex.Civ.App., 79 S.W.2d 661. It does not follow that insurance companies are immune from common law and statutory rules against restraint of trade. The combination complained of in the present case was not merely between insurers but between insurers and association of their agents; combinations between employers and employees present a particularly effective means of stifling competition. The United States Supreme Court has recently declared that "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 808, 65 S.Ct. 1533, 1539, 89 L.Ed. 1939; see, *United States v. Borden Co.*, 308 U.S. 188, 204, 60 S.Ct. 182, 84 L.Ed. 181; 19 So.Cal.L.Rev. 256.

[16] It must be concluded, therefore, that plaintiff has stated a cause of action not only under common law rules but under the Cartwright Act.

[17] If the trial court should determine that plaintiff's business was injured by activities in restraint of trade, the question will arise as to how plaintiff's damages should be computed. One whose business has been injured by the activities

of a combination in restraint of trade is entitled to damages, not only under the Cartwright Act (Business & Professions Code, § 16750), but also under the common law. Civ.Code, § 3281, see, cases cited in 36 Am.Jur. 660, n. 9. Since proof of the damages suffered may be difficult, "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of the injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." *Bigelow v. RKO Radio Pictures, Inc.*, 66 S.Ct. 574, 580. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * That principle is an ancient one * * * and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application." *Id.*

IV. Is the Cartwright Act constitutional?

[18, 19] Defendants contend that the Cartwright Act is unconstitutional. It was so held in *Ward v. Auctioneers Ass'n of Southern Cal.*, 67 Cal.App.2d 183, 153 P.2d 765; and *Blake v. Paramount Pictures, D. C.*, 22 F.Supp. 249, on the authority of *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146. In the latter case the Supreme Court of the United States enjoined the prosecution of several dairy companies under the Colorado Anti-Trust Act, a statute "which is in terms a replica of the Cartwright Act," (*In re Battelle*, 207 Cal. 227, 251, 277 P. 725, 734, 65 A.L.R. 1497) on the ground that the provisions therein exempting from its operation combinations entered into for the purpose of securing reasonable profits to their members, provided such profits could not otherwise be secured, left the whole statute "without a fixed standard of guilt" and thus rendered it unconstitutional. Although the court did not expressly hold those provisions to be inseparable, it must have regarded them as such in the absence of any decision on the subject by the Supreme Court of Colorado, for it indicated that the statute would have been valid without them. Plaintiff contends, however, that

the corresponding provisions of the Cartwright Act (Business & Professions Code, §§ 16723 and 16724) are separable from the rest of the act and that he can recover in the present action irrespective of their invalidity. That contention must be sustained. The policy against combinations in restraint of trade underlying the Cartwright Act was not created by that act but had previously been evolved at common law. The act was not intended to change that policy but merely to make its enforcement more effective. It is clear therefore not only that the provisions exempting certain combinations from the operation of the act do not have the same importance as the provisions prohibiting all other combinations in restraint of trade, but also that the act will remain fully intelligible and will effectively serve the purpose for which it was enacted, even though the former provisions are disregarded. Moreover, there is another consideration that leads us to separate the exceptions from the general prohibition. The Cartwright Act, as enacted in 1907, did not include the provisions that rendered the Colorado act unconstitutional, for those provisions were added in 1909. In the Colorado act, however, they were part of the original enactment. Thus, the fact that the Supreme Court of the United States took the position that the invalid provisions were so essential to that statute that it would not have been enacted without them can have no bearing upon the present case, for in the present case the statute was originally enacted without the allegedly invalid provisions. The very court that decided against separability in *Cline v. Frink Dairy Co.*, supra, would undoubtedly decide in favor of separability in the present case on the authority of *Frost v. Corporation Commission*, 278 U.S. 515, 49 S.Ct. 235, 239, 73 L.Ed. 483. In that case an unconstitutional amendment to a statute of Oklahoma was held separable from the valid provisions sought to be amended, although the court expressly stated that the amendment would have invalidated the original enactment had it been part of that enactment. "When passed, it (the original statute) expressed the will of the Legislature which enacted it. Without an express

repeal, a different Legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent." *Frost v. Corporation Commission*, supra, 278 U.S. at page 526, 49 S.Ct. at page 239, 73 L.Ed. 483. The same position was taken by this court (*Miller v. Union Bank & Trust Co.*, 7 Cal.2d 31, 59 P.2d 1024) and is sustained by the overwhelming weight of authority. See, cases collected in 1 *Sutherland, Statutory Construction*, 3d Ed. § 1937.

[20] Defendants contend, however, that when the Legislature in 1941 reenacted the Cartwright Act, as amended in 1909, into the Business and Professions Code, it intended that the entire statute be regarded as having been enacted at the same time. It need not be determined whether in that event the 1909 provisions would be inseparable from the 1907 provisions, for plaintiff's cause of action arose in 1939 and the act must be construed as it stood at that time. Moreover, far from expressing the intention suggested by defendants, the Legislature made it clear that the 1907 and 1909 provisions should continue to be regarded as separable. Not only does section 2 of the Business and Professions Code specify that the provisions of that code should be construed as restatements and continuations of similar provisions of existing statutes rather than as new enactments, but section 16701 provides that the separability of the provisions of the Cartwright Act should be determined by "whether the provisions of * * * 1907 and the provisions of * * * 1909 are separable among themselves and to each other." The 1909 amendment added four provisions to and deleted two words from the original enactment. In order to make it absolutely clear that if the 1909 amendment were invalid, the entire 1907 enactment should stand, the Legislature added a second paragraph to section 16701 in which it specified that, if the two words that it attempted to delete in 1909 were not effectively deleted, it intended them to be part of the act. Defendants point to the difference

between section 16701(1) and section 16701-(2) and contend that if the Legislature intended to have the entire 1907 enactment stand should the 1909 amendment be invalid, it would have said so expressly as it did in section 16701(2) as to the two deleted words. Section 16701(2), however, was enacted as a precaution to cover two words that do not appear in the text of the amended statute and no similar precaution was needed as to the rest, for, with the exception of those two words, the amended statute includes both the original provisions and those added in 1909. It must be concluded, therefore that the Cartwright Act is constitutional. *Ward v. Auctioneers Ass'n of Southern Cal.*, supra, 67 Cal.App.2d 183, 153 P.2d 765, is therefore disapproved.

V. Does the Sherman Anti-Trust Act preclude the application of state law?

When plaintiff filed his second amended complaint the United States Supreme Court had not yet rendered its decision in *United States v. South-Eastern Underwriters' Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, that the Sherman Anti-Trust Act applies to interstate insurance transactions. Plaintiff has made no allegations as to whether or not any of the parties was engaged in interstate commerce or whether defendants' alleged activities in restraint of trade affected interstate commerce. Upon the trial of the case it may appear that the case involves interstate commerce and the question would then arise whether plaintiff can sue under the state law and in a state court or whether his exclusive remedy is under the Sherman Act and in the federal courts.

[21] Although the South-Eastern case brought "a reorientation of attitudes toward federal power in its relation to the business of insurance conducted across state lines" (*Prudential Ins. Co. v. Benjamin*, 66 S.Ct. 1142, 1147), the United States Supreme Court made it clear that this reorientation did not mean that the states were deprived of jurisdiction to regulate insurance. "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be in-

terstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence or conflicting Congressional action, the state regulatory and tax laws should be declared valid. * * * Finally it is argued * * * that virtually all the states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to the insurers and the insured, and that if the Sherman Act be held applicable to insurance much of this state regulation will be destroyed. * * * The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. Cf. *Parker v. Brown*, 317 U.S. 341, 350, 352, 63 S.Ct. 307, 87 L.Ed. 315. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices." *United States v. South-Eastern Underwriters Association*, supra, 322 U.S. at pages 548, 549, 562, 64 S.Ct. 1162, 1171, 88 L.Ed. 1440. The view that the South-Eastern Underwriters case does not invalidate state laws in the insurance field in absence of conflicting action by Congress was reiterated in *Prudential Insurance Co. v. Benjamin*, supra, and *Robertson v. People of State of California*, 66 S.Ct. 1160. As

stated in the Prudential case: "State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress." 66 S.Ct. 1142, 1150, note 22. In order to "give support to the existing and future state systems for regulating and taxing the business of insurance" (Prudential Ins. Co. v. Benjamin, supra, 66 S.Ct. 1142, 1155) Congress enacted the McCarran Act. 59 Stat. 34, c. 20, 15 U.S.C.A. §§ 1011-1015.²

[22] This act clearly recognizes the interest of the states in the regulation of insurance. "The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, 13 L.Ed. 996, except as otherwise expressly declared." Prudential Ins. Co. v. Benjamin, supra, 66 S.Ct. at page 1156, note 39. In order to allow time for Congress and the state Legislatures to consider legislation with regard to activities in restraint of trade in the field of insurance, the applicability of the Sherman Anti-Trust Act and other pertinent federal statutes is suspended by the act until January 1, 1948. H. Rep. No. 143, 79th Cong. (1st Sess.), p. 3. While this suspension makes it clear that in the meantime state law applies to restrictions upon

competition in the insurance trade, the Sherman Act remains applicable with respect to restraints of competition involving boycott, coercion, or intimidation. The fact that the Sherman Act is applicable to such practices does not mean that the state law concerning restraints of commerce in the insurance trade is invalidated as to activities and agreements involving such practices. The key to an understanding of the provision of the McCarran Act reserving the applicability of the Sherman Act with regard to the practices referred to lies in the statement of the United States Supreme Court in the South-Eastern Underwriters case that no state authorizes combinations of insurance companies to coerce, intimidate or boycott competitors and consumers. By declaring the Sherman Act applicable to such practices the McCarran Act prevents the states during the moratorium from authorizing such practices in conflict with the Sherman Act. Since there is no conflict between the law of this state and the Sherman Act, plaintiff may invoke the state law even if interstate commerce is involved.

The judgment is reversed.

GIBSON, C. J., SHENK, EDMONDS, CARTER, and SCHAUER, JJ., and PETERS, Justice pro tem., concurred.

Rehearing denied; SHENK, J., dissenting.

² Section 1011. "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Section 1012. "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, sections 1-7 of this title, and sections 12-27, 44 of this title, section

412 of Title 18, sections 381-383, 386-390a of Title 28, and sections 52 and 53 of Title 29, and sections 41-46 and 47-58 of this title, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Section 1013. "(a) Until January 1, 1948, sections 1-7 of this title and sections 12-27, 44 of this title, section 412 of Title 18, sections 381-383, 386-390a of Title 28, and sections 52 and 53 of Title 29, and sections 41-46 and 47-58 of this title and sections 13-13b, and 21a of this title, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this chapter shall render sections 1-7 of this title, inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

29 Cal.2d 24

JACOBSON v. WIKHOLM.

L. A. 19504.

Supreme Court of California, in Bank.
Sept. 20, 1946.

1. Partnership ¶253

Though partners, in absence of special agreement, receive no compensation, yet a surviving partner is entitled under the Uniform Partnership Act to reasonable compensation for his services in winding up partnership affairs after the death of a deceased partner. Civ.Code, § 2412(f).

2. Partnership ¶253

Under common-law rule that services rendered by surviving partner after copartner's death in winding up partnership affairs are not compensable, the winding up or settling of the partnership affairs was restricted to selling the firm's property, receiving money due the firm, paying its debts, returning the capital contributed by each partner, and dividing the profits, and did not extend to services rendered in excess of the mere winding up of the partnership affairs, in which case the surviving partner was entitled to compensation.

3. Partnership ¶247

A surviving partner must complete all executory contracts remaining in force after copartner's death.

4. Partnership ¶253

Though fulfilling of contractual obligations of a partnership may be a different matter from that of merely liquidating the assets preparatory to a distribution after the death of one of the partners, the surviving partner in the performance of such obligations, is in fact winding up the partnership affairs and is entitled to reasonable compensation for such services. Civ.Code, § 2412(f).

5. Partnership ¶253

Though fulfilling contractual obligations of a partnership is in a certain sense continuing the partnership business to that limited extent so that it may be advantageously wound up, such services, since adoption of the Uniform Partnership Act, no longer need be distinguished from the mere winding up process to avoid the harsh-

ness of the denial of compensation to the surviving partner under the common law rule. Civ.Code, § 2412(f).

6. Partnership ¶253

Though the relationship of a surviving partner to the administrator of his deceased partner is fiduciary, and as such trustee he must exercise his talents and industry honestly and in the highest good faith, survivor should not be denied compensation where he diligently and efficiently winds up the partnership affairs. Civ.Code, § 2412(f).

7. Partnership ¶258(8)

In suit by administratrix of deceased partner against surviving partner who had completed partnership construction contract after deceased partner's death, to recover amount allegedly due on winding up of the partnership affairs, burden was on surviving partner to establish his compensation claim for completing the construction contract. Civ.Code, § 2412(f).

8. Partnership ¶253

In determining amount due surviving partner for completing partnership construction contract after copartner's death, partnership records with reference to construction contract, account books disclosing survivor's bookkeeping duties in connection with contract, modifications made in contract by surviving partner that resulted in additional profits, and oral agreement of the partners as to salary arrangements on such contracts, were material. Civ.Code, § 2412(f).

9. Partnership ¶253

Surviving partner's right to reasonable compensation for his services in completing partnership construction contract after the death of copartner arose from that section of the Uniform Partnership Act providing that a surviving partner is entitled to reasonable compensation for his services in winding up partnership affairs and not from that section of the act applying where the business is continued without liquidation. Civ.Code, §§ 2412(f), 2435 (3), 2436.

10. Partnership 258(11)

Where surviving partner who completed partnership's construction contract

after death of copartner properly made a claim for compensation for his services in completion of the contract, but deceased partner's administratrix in her accounting demand for one-half of the assets in surviving partner's possession after completion of construction contract improperly denied surviving partner's claim for compensation, assessment of interest as of the date of the administratrix' accounting demand was unauthorized. Civ.Code, § 2412(f).

Appeal from Superior Court, of Los Angeles County; Charles S. Burnell, Judge.

Action by Mandie J. Jacobson, as administratrix of the estate of Alex Jacobson, deceased, against Eser Wikholm to recover the amount allegedly due on the winding up of the affairs of a partnership between the deceased and the defendant. From an adverse judgment, the defendant appeals.

Judgment reversed, and cause remanded for a retrial.

Prior opinion 164 P.2d 781.

Harold D. Kraft, of Los Angeles, for appellant.

John E. McCall, of Los Angeles, for respondent.

SPENCE, Justice.

Alex Jacobson and Eser Wikholm, the defendant, were copartners in a general construction business from 1940 until the death of the former, February 13, 1944. Defendant, as the surviving partner, retained possession of the partnership assets and proceeded with the settlement of its affairs. Prob.Code, § 571. The partnership's only pending contract concerned a construction job for the federal government at Blythe, California, which job involved the erection of an army air base consisting of a squadron hangar, a sub-depot hangar, and an ammunition storage building. The work had been commenced on January 6, 1944, and it was completed after the passing of decedent. Plaintiff, as administratrix of the estate of the deceased partner, brought this action for an account-

ing incident to defendant's winding up the partnership affairs.

The dispute between the parties centered upon the distribution of the profits derived from the Blythe construction job. It is plaintiff's position that finishing the work was necessary in winding up the partnership affairs; that having assumed such responsibility, defendant was obligated to exert every effort to complete his task successfully; and that in the liberal profits so realized, defendant's participation to the extent of his one-half share would constitute ample compensation for services rendered in settlement of the partnership business. The trial court found that all moneys due the partnership had been collected by defendant, but that defendant refused to render plaintiff an adequate accounting or to pay her one-half of the net assets; that defendant did in fact wind up the affairs of the partnership; that all of the work done at Blythe in completing the government contract was necessary in winding up the partnership affairs; and that there remained in defendant's possession for distribution between himself and plaintiff the sum of \$49,286.98. Prevailing in her claim to an equal share thereof, plaintiff was awarded judgment in the sum of \$24,643.49 with interest at 7 per cent from October 31, 1944, the date of plaintiff's delivery to defendant of a balance sheet showing the result of an audit of the books. From said judgment defendant prosecutes this appeal.

Defendant contends: (1) That the judgment unjustly deprived him of compensation for his services in winding up the partnership affairs; (2) that material evidence bearing on his compensation claim was improperly rejected; and (3) that the court's interest assessment was erroneous. Both law and reason support defendant's points of objection and require reversal of the judgment.

[1,2] Though partners, in the absence of special agreement receive no compensation, yet "a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs." Civ.Code, § 2412(f); 7 U.L.A. p. 28, Uni-

form Partnership Act, § 18(f). Prior to 1929 when the Uniform Partnership Act became part of our statutory law (Stats. 1929, ch. 864), the common-law rule—that such services by the survivor were not compensable—prevailed in this state. That rule rested upon the premise that the law enjoined such duty on the survivor as an incident of the contract of partnership, and the death of a copartner was one of the ordinary risks which a partner took. Within the meaning of the rule, the winding up or settling of the partnership affairs was restricted to selling the firm property, receiving money due the firm, paying its debts, returning the capital contributed by each partner, and dividing the profits. 40 Am.Jur., § 313, p. 348; *Maynard v. Richards*, 166 Ill. 466, 46 N.E. 1138, 57 Am.St.Rep. 145; *Lamb v. Wilson*, 3 Nev.Unof. 496, 92 N.W. 167. Where, however, the surviving partner rendered service in excess of the mere winding up of the partnership affairs, he was entitled to compensation for such excess. The most usual application of this principle was made where the surviving partner successfully continued the business of the firm or successfully completed an enterprise in which the firm had been engaged, so that a substantial benefit was received from his efforts. Illustrating this distinction is the early case of *Griggs v. Clark*, 23 Cal. 427, where it was held proper to allow the survivor of a cattle raising partnership reasonable compensation for his time, skill, and industry in taking care of the stock for approximately a year following the death of the copartner, when its sale was measurably more profitable. Thus, the court said at pages 430, 431: “* * * When the partnership has been carried on for some time after a dissolution by death, and such continuance has proved beneficial to the parties, it is but just and proper that the surviving partner should receive a reasonable allowance for his skill and industry in conducting the business, for during that time the business has not received the care and labor of the deceased partner, as an equivalent for such services. While all the parties are living, each is under obligation to devote his time and services to the partnership business, and there is there-

fore good reason for holding that neither should receive a compensation for such services. But when, in consequence of the death of one partner, this equality no longer exists, it is but equitable that the surviving partner should be compensated for such services as he may have rendered in the business after the death of the deceased partner, to be deducted out of the profits realized by the continuance of the business; and the overplus of such profits, after deducting such compensation, to be divided between the partners. (Story on Part. sec. 343 and notes; Coll. on Part. sec. 328; Gow. Part. 354.) We do not wish to be understood, however, as holding that the surviving partner is entitled to compensation merely for services rendered in winding up the affairs of the firm (*Beatty v. Wray*, 19 Pa. 516, 57 Am.Dec. 677), but to confine it to a case like the present, where the partnership business has been continued for a considerable period of time in order that the affairs of the partnership may be advantageously wound up.”

[3-6] In the case of an active partnership, there is ordinarily business to be conducted after the death of a partner in order fairly to discharge the partnership obligations. Thus, it is well settled that a surviving partner must complete all executory contracts of a firm which remain in force after the death of a partner. *Little v. Caldwell*, 101 Cal. 553, 560, 36 P. 107, 40 Am.St.Rep. 89. Although the fulfilling of contractual obligations of the partnership may be a different matter from that of merely liquidating the assets preparatory to a distribution, in the performance of these obligations the surviving partner is in fact “winding up the partnership affairs,” for which services he “is entitled to reasonable compensation” under the prevailing law. Civ.Code, § 2412(f). While fulfilling contractual obligations is in a certain sense continuing the partnership business to that limited extent so that it “may be advantageously wound up,” such services no longer need be so distinguished from the mere “winding up” process to avoid the harshness of the denial of compensation under the common-law rule. *Griggs v. Clark*, supra. It is the fact that the surviving partner has expended time, labor, and skill,

in the administration of the partnership assets incident to the successful termination of the unfinished business that now governs his right to remuneration therefor. Though the relationship of a surviving partner to the administrator of his deceased partner is fiduciary. (*Josephberg v. Cavallero*, 262 App.Div. 1, 27 N.Y.S.2d 361), and as such trustee he must exercise his talents and industry honestly and in the highest good faith (*Grigg v. Hanna*, 283 Mich. 443, 278 N.W. 125), that is no reason for refusing compensation to a survivor where he diligently and efficiently winds up the partnership affairs. Effective example of this principle is found in the case of *Murdock v. Murdock*, 300 Pa. 280, 150 A. 599 where the question of compensation arose under the same provision of the Uniform Partnership Act here involved (Civ.Code, § 2412(f) with respect to a surviving partner's services in completing certain brokerage transactions. It was there said at page 603 of 150 A.: "Nor can we see error in allowing compensation to the liquidator (the surviving partner) from November 1, 1918, to the time of the sale of the property * * * 'a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.' * * * We find no evidence of any bad faith on the part of the defendant, who was compelled, on his brother's death, to adjust a most difficult situation, requiring much time and labor * * *."

There now arises the question of what compensation is proper for the surviving partner in relation to the proportions in which he and the representative of the deceased partner shall share in the profits realized from completing the unfinished business of the partnership as part of the entire process of "winding up" its affairs. This precise point was considered in the case of *Whittaker v. Jordan*, 104 Me. 516, 72 A. 682, 683, under peculiarly pertinent factual considerations. There the surviving partner of a building business completed "certain jobs of repairing and alteration known as the 'Gurnee job' and the 'Doe job.'" On the former job "about one-third of the work had been completed" before the passing of the deceased partner,

while on the latter job "the work had not been actually commenced at the time of the death of" the copartner, though "the services of the firm had been engaged" theretofore. "The entire plant and establishment of the firm and all materials on hand suitable and necessary for the purpose were used by [the surviving partner] to complete the work." Profits resulted and in determining their division, the court said at page 684 of 72 A.: "When his [the survivor's] good faith and fairness are not impeached, the most that the representatives of the deceased partner can justly demand is that he should account to them for their capital, and, in addition, for whatever it has earned. This involves the necessity of inquiring how much of the profits is attributable to the services and skill of the surviving partner and how much to the capital invested in the business. The latter portion of the profits shows what the capital has earned, and should rightfully be divided among the owners of the capital in proportion to their shares of the capital."

Cases concerning the completion of the partnership enterprise in the course of the continuance, rather than the "winding up," of the firm's business present analogous considerations of equity with respect to an accounting to the partnership estate for subsequent profits. So pertinent is the case of *Painter v. Painter*, 4 Cal. Unrep. 636, 36 P. 865, where the surviving partners of a printing concern were left with a half-expired 10-year contract to print the San Francisco Directory. They formed a new copartnership, continued with the business of publishing the directory, used the old firm's equipment in doing the work and made profits from the enterprise. After noting, 4 Cal.Unrep. at page 639, 36 P. at page 866, that "the continuance of the business by the new firm facilitated, to some extent, the winding up of the old business," the court continued 4 Cal. Unrep. at page 647, 36 P. at page 869: "It is true that, as a general rule, an accounting of profits will be ordered against a surviving partner who conducts the business after dissolution, with the use of the firm assets. 'But if, from the nature of the concern, and the state of the accounts, the assets

cannot be realized, except by continuing business, and the surviving partners continue as a new firm, debiting themselves with old assets, they are not accountable for profits.' * * * 'Just allowances to the continuing partners are always made * * *. Hence, if the subsequent profits are partly or wholly due to the skill of the remaining partners, a special inquiry is necessary to ascertain the amount. No general rule can be made.' * * * Upon the same reasoning in the case of a law partnership, the surviving partner was allowed an extra portion of the fees contracted by the firm for the work he performed after his partner's decease. *McNutt v. Hannon*, 183 Cal. 537, 542, 191 P. 1108. The same equitable doctrine has been supported by the courts of other states where the question of accounting has arisen with respect to subsequent profits realized in completing the partnership enterprise. *Cahill v. Haff*, 248 N.Y. 377, 162 N.E. 288, 292; *Bracht v. Connell*, 313 Pa. 397, 170 A. 297, 300.

[7,8] In the light of these principles it becomes apparent that the particular factual situation involved is a governing factor in resolving the controversial issue of accounting between the parties here. The present record shows the following undisputed facts: That the work on the Blythe air base commenced on January 6, 1944; that approximately 20 per cent of the total job was completed by February 13, 1944, the date of the death of defendant's co-partner; that on said last mentioned date the contract for the squadron hangar was cancelled and the outlay schedule covering that portion of the work was thereafter analyzed and detailed by defendant for the purpose of figuring what was owed by the government with respect to said cancellation item; that in the course of completing the balance of the partnership enterprise, comprising a period of some three months, defendant made several trips to the scene of operations, was daily consulted by the general superintendent stationed continuously on the job, and negotiated with the government various modifications affecting construction details of the work; and that plaintiff, with knowledge of defendant's continuance of the Blythe

work, made no objection to his so proceeding in order to bring it to a successful conclusion. In addition, defendant sold assets of the partnership, paid bills, and collected and disbursed moneys due and owing. These services were all of value to the partnership in winding up its affairs, and the burden was on defendant to establish his compensation claim as authorized by law. Civ.Code, § 2412(f). To this end, it appears that defendant made 15 offers of proof, which the trial court rejected as irrelevant and self-serving. Without undertaking to detail each of these excluded items, suffice it to say that they in general referred to these propositions: Partnership records showing estimates of costs and profits in comparison with actual outlays and return on the Blythe job; account books disclosing defendant's bookkeeping duties in connection with the work; modifications made in the original contract by defendant upon negotiation with the government after his partner's death and which resulted in additional profits; the breakdown of the squadron hangar contract and the computations made in consequence of its cancellation; and the oral agreement of the partners as to salary arrangements on government jobs depending on the amount of work each performed. These matters were all material in establishing defendant's right to "reasonable compensation" based upon the time, labor, and skill expended in "winding up the partnership affairs."

[9,10] But, contrary to defendant's theory, there is no factual basis for requiring plaintiff, as legal representative of the deceased partner, to elect to receive, in measure of her accounting right on the Blythe job as completed by defendant, "the value of his [the deceased partner's] interest in the dissolved partnership with interest" or "in lieu of interest the profits attributable to [its] use * * *." Civ.Code, § 2436. Said section expressly applies only when the business is continued "*without liquidation*." Civ.Code, § 2435, subd. (3). That is not the situation here where defendant, as the surviving partner, has simply fulfilled an obligation of the partnership incident to "*winding up the partnership affairs*" but has not continued the busi-

ness beyond that limited extent. Defendant's right to "reasonable compensation" for his services therefore stems wholly from section 2412(f) of the Civil Code. However, in view of the propriety of defendant's claim and plaintiff's denial thereof in her accounting demand of October 31, 1944, for one-half of the net assets in defendant's possession after completion of the Blythe job, there is no foundation for an assessment of interest as of that date against defendant for failing to make such distribution. When the parties went to trial on the accounting issue, the only moneys shown to have been retained by defendant were the profits realized from the Blythe job plus a small reserve from the capital of the partnership earned before the passing of the deceased partner, for the payment of pending bills. While defendant occupies the position of a trustee in his retention of such money (*Ruppe v. Utter*, 76 Cal.App. 19, 25, 243 P. 715), the requirement that he account therefor must await the determination of the parties' respective claims upon an equitable basis as established by evidence germane to the disputed issue.

The judgment is reversed and the cause is remanded for retrial in accordance with the views hereinabove expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



20 Cal.2d 67

PEOPLE v. ZEGRAS et al.

Sac. 5780.

Supreme Court of California, in Bank.
Sept. 24, 1946.

1. Venue ⇐2

The place of trial for all actions not governed by constitutional mandate may be fixed by the Legislature.

2. Venue ⇐7

Under Fire Liability Law providing that expenses incurred in fighting fire shall

be collectible from the one liable for the fire as in case of an obligation under a contract, venue of action under the act against those charged with negligently starting fire was in county where fire started and expense of extinguishing fire was incurred, under statute providing that action on a contractual obligation may be brought in county where contract was entered into. Gen.Laws, Act 2586, § 3; Code Civ.Proc. § 395.

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Action by the People against John Zegras and others to recover expenses incurred by the department of forestry in suppressing a fire alleged to have been negligently set by defendants or by them negligently allowed to be set on their property and permitting the fire to spread to other properties. From an order denying defendants' motion for a change of place of trial, the defendants appeal.

Order affirmed.

Prior opinion 165 P.2d 541.

L. R. Weinmann and A. G. Grant, both of Oakland, N. F. Coombs, of Napa, A. C. McClellan, of Los Angeles, and O. Fenstermacher, of Oakland, for appellants.

Robert W. Kenny, Atty. Gen., and James O. Reavis and Ariel C. Hilton, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The State has sued John Zegras and three other persons under the provisions of "An act defining the civil liability for failure to control fire" (Stats.1931, p. 1644, 1 Deering's Gen. Laws, Act 2586). A question of first impression now presented for decision concerns the venue of such an action.

The charge of the complaint is that \$1,700 was expended by the State Forester and the Division of Forestry in fighting an uncontrolled fire negligently set, or negligently allowed to spread, by the defendants. Judgment is asked for that amount. The fire occurred in Napa County and the action was commenced there. Concededly each of the defendants is a resident of Ala-

meda County, and they have appealed from an order denying a change of venue upon that ground.

The statute in question defines certain acts giving rise to liability and then provides: "The expenses of fighting such fires shall be a charge against any person made liable by this act for damages caused thereby. Such charge shall constitute a debt of the person charged and shall be collectible by the party, or by the federal, state, county, or private agency incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied." § 3.

The action authorized by this section, say the defendants, is quasi contractual and its venue is fixed by the provision of section 395 of the Code of Civil Procedure which specifies that, except in those cases particularly enumerated, "the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action." The state takes the position that this is a suit upon a quasi contractual obligation, or contract implied in law, and comes within the following language of the same code section: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[1, 2] The place of trial for all actions not governed by constitutional mandate may be fixed by the Legislature. *San Jose Ice & Cold Storage Co. v. City of San Jose*, 19 Cal.App.2d 62, 64 P.2d 1099, 65 P.2d 1324; *Perkins v. Winder*, 123 Cal.App. 467, 11 P.2d 394. In enacting the statute upon which the present action is based, it directed that the expenses incurred in fighting fire " * * * shall be collectible * * * in the same manner as in the case of an obli-

gation under a contract, expressed or implied." By this language, the enactment makes applicable to such an action the procedure governing a suit upon a contract, express or implied. It is immaterial, therefore, whether the statutory obligation for the expense of extinguishing a fire is classified as one sounding in tort, or a quasi-contract, or a liability in the nature of a penalty; the Legislature has fixed the amount that may be recovered under specified conditions and made applicable the procedure for suit upon a contract. As the fire started in Napa County and the expense of extinguishing it was incurred there, that is the place where the obligation was entered into and the motion for change of venue was properly denied.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concurred.



29 Cal.2d 79

COLONIAL INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19627.

Supreme Court of California, In Bank.

Sept. 30, 1946.

As Amended on Denial of Rehearing

Oct. 28, 1946.

1. *Workmen's compensation* ⇨ 201, 598, 1074

An employee suffering from progressive occupational disease may, at his option, obtain an award for entire disability against any one or more of successive employers or successive insurance carriers, if disease and disability were contributed to by employment furnished by employer chosen or during period covered by insurance, even though employment was not sole cause of disability.

2. *Workmen's compensation* ⇨ 598

To justify award for entire disability caused by progressive occupational disease against one of successive employers or insurance carriers, the disease must arise out

of employment, but particular employment need not be sole proximate cause of disease, if it substantially and proximately contributed to it.

3. Workmen's compensation ⇨556

The statutory provision that in case of aggravation of disease compensation shall be allowed only for proportion of disability due to the aggravation must be read in light of rule that, when subsequent injury aggravates previously existing condition rendering it disabling liability for full disability without proration is imposed upon employer. Labor Code, § 4663.

4. Workmen's compensation ⇨206

A general and special employer of employee are jointly and severally liable for compensation.

5. Workmen's compensation ⇨201, 1074

Where employee suffering from progressive occupational disease obtains award for entire disability against one of successive insurance carriers or employers, liability may thereafter be apportioned among the successive carriers and employers.

6. Workmen's compensation ⇨1074

Where successive insurance carriers were brought in as parties in proceeding to obtain compensation for silicosis due to exposure to silica dust during period in which employer had had various insurance carriers, award was properly made against insurer for two-year period preceding disability, and issue of apportionment as between successive carriers would not be determined in compensation proceeding, but was to be separately determined.

7. Workmen's compensation ⇨1903

Where findings of fact and conclusions of law were made in compensation case and procedure on rehearing was in proper order, fact that case was referred to as test case by rehearing referee did not mitigate against record showing proper procedure and decision.

Company to review an order of the Industrial Accident Commission awarding compensation for disability for silicosis to Victor E. Pedroza, but making no apportionment among the various insurance carriers.

Award affirmed and case remanded.

Prior opinion 163 P.2d 880.

Herlihy & Herlihy, of Los Angeles, for petitioner.

Wm. E. Colby and Geo. W. Wilson, both of San Francisco, Newlin, Holley, Sandmeyer & Coleman, Ray J. Coleman, and Edwin A. McDonald, Jr., all of Los Angeles, amici curiae on behalf of petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

CARTER, Justice.

Respondent, Industrial Accident Commission, found that the applicant, Victor E. Pedroza, while employed as "crusher" operator on October 29, 1943, by Emsco Refractories Company, a corporation, hereinafter referred to as employer, engaged in manufacturing bricks, sustained an injury arising out of his employment consisting of silicosis due to exposure to silica dust. Pedroza was employed by said employer during various dates from 1928 to the date of the injury; he did not work for any other employer. At the time of the injury, petitioner, Colonial Insurance Company, was the employer's compensation insurance carrier and had been such from January 8, 1935, to February 5, 1935, and April 17, 1941, to and after the date of injury. During the other times between 1928 and 1943, the employer's insurance carriers were, first, Associated Indemnity Corporation, October 26, 1927, to October 26, 1930; second, The Travelers Insurance Company, October 26, 1930, to October 26, 1931; third, The Ocean Accident and Guarantee Corporation, October 26, 1931, to October 26, 1933; fourth, The Travelers Insurance Company, October 26, 1933, to December 22, 1933; fifth, Limited Mutual Corporation Insurance Company, December 22, 1933, to December 28, 1934; (employer uninsured to January 8, 1935); sixth, Colonial Insurance Company (policy excepted industrial disease) above mentioned; (employer

Proceeding under the Workmen's Compensation Law by the Colonial Insurance

uninsured to February 20, 1937); eighth, New Amsterdam Casualty Company, February 20, 1937, to April 7, 1937; ninth, Guarantee Insurance Company, April 7, 1937, to November 15, 1937, (policy excluded industrial disease); tenth, Guarantee Insurance Company, November 15, 1937, to April 17, 1941.

It is conceded by petitioner that the employee is suffering from silicosis and that he was exposed to silica dust, all during his employment by the employer. There is medical evidence that the disease was due to the exposure during the time mentioned. There is no doubt that the evidence is sufficient to establish that Pedroza was exposed to the dust laden atmosphere while petitioner was the insurance carrier of his employer to an extent which contributed to the ultimate disability, and that the conditions of employment during that time were a proximate cause of the disability. Assuming the exposure over the entire period was the cause of the ultimate disability the issue is whether an award for the entire disability may be made against petitioner, the insurance carrier of the employer, for the two years next preceding Pedroza's disability.

[1] We believe the more workable and fairer rule to be in progressive occupational diseases, that the employee may, at his option, obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability. To require an employee disabled with such a disease to fix upon each of the carriers or employers the precise portion of the disability attributable to its contribution to the cause of the malady is not in consonance with the required liberal interpretation and application of the workmen's compensation laws. The successive carriers or employers should properly have the burden of adjusting the share that each should bear and that should be done by them in an independent proceeding between themselves. They are in a better

position to produce evidence on the subject and establish the proper apportionment. All of them may have contributed to the disability and the employee should be permitted to proceed against and have an award against any or all of them for the whole disability if the evidence discloses that he was exposed to silica dust during his period of employment with each of the employers named.

[2,3] It has been held in cases of progressive occupational diseases that the insurance carrier at the time when a compensable disability occurred is liable for the full disability although the exposure and progress of the disease may have accumulated over a period of time when other carriers were obligated. *Sylvia's Case*, 313 Mass. 313, 47 N.E.2d 293; *Borstel's Case*, 307 Mass. 24, 29 N.E.2d 130; *Evans' Case*, 299 Mass. 435, 13 N.E.2d 27; *Donahue's Case*, 292 Mass. 329, 198 N.E. 149; *Donahue's Case*, 290 Mass. 239, 195 N.E. 345; *Yurow v. Jersey Hat Corporation*, 131 N.J.L. 265, 36 A.2d 296; *Natural Products R. Co. v. Court of Common Pleas*, 123 N.J.L. 522, 10 A.2d 148; *Domscheit v. Natural Products Refining Co.*, 14 N.J.Misc. 403, 185 A. 483; *Textileleather Corporation v. Great American Indem. Co.*, 108 N.J.L. 121, 156 A. 840; *King v. St. Louis Steel Casting Co.*, 353 Mo. 400, 182 S.W.2d 560. And that the disability is said to be proximately caused by the later accumulation although it only contributed to it. *Sylvia's Case*, supra; *Evans' Case*, supra; *Borstel's Case*, supra; *Donahue's Case*, supra; *King v. St. Louis Steel Casting Co.*, supra. In dealing with the question of when the statute of limitation commences to run in progressive occupational disease cases this court has said: "An injury, then, may arise out of, and in the course of, the employment, when there is a causal connection between the employment and the injury; but for purposes of compensation the injury dates from the time when the diseased condition culminates in an incapacity for work. It is at that time that the employer's liability becomes fixed; for until then the workman had received no injury in the legal sense, though the seeds productive of the injury had lodged in his frame long before."

Marsh v. Industrial Acc. Comm., 217 Cal. 338, 345, 18 P.2d 933, 936, 86 A.L.R. 563. In those cases from other jurisdictions the carrier at the time the compensable disability arose is alone liable and nothing is said about contribution or apportionment between successive carriers while the effects of the disease are accumulating, but we believe a more just rule is to allow the carriers such an opportunity. The essence of the holdings is nevertheless that it is sufficient if the employment contributes to the ultimate disability. True the disease must arise out of the employment—must be employment connected, but a particular employment is not required to be the sole proximate cause of the disease. As long as it substantially and proximately contributed to it, the employer may be held liable for the full disability. All the time during exposure the employee is contracting, and to varying degrees, has the disease. The workmen's compensation laws provide: "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury." Labor Code, § 4663. But that section must be read in light of the rule that an employer takes the employee as he finds him at the time of employment and when subsequent injury lightens up or aggravates a previously existing condition rendering it disabling, liability for the full disability without proration is imposed upon the employer. Tanenbaum v. Industrial Acc. Comm., 4 Cal.2d 615, 52 P.2d 215, 216; Hendrickson v. Industrial Acc. Comm., 215 Cal. 82, 8 P.2d 833, Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 200 P. 17; Limited M. C. Ins. Co. v. Industrial Acc. Comm., 37 Cal.App.2d 50, 98 P.2d 827; Mullane v. Industrial Acc. Comm., 118 Cal.App. 283, 5 P.2d 483. It is said in Tanenbaum v. Industrial Acc. Comm., supra, 4 Cal.2d at page 617, 52 P.2d at page 216: "The underlying theory is that the employer takes the employee subject to his condition when he enters the employment, and that therefore compensation is not to be denied merely because the workman's physical condition was such as to cause him to suffer a disability from an

injury which ordinarily, given a stronger and healthier constitution, would have caused little or no inconvenience. In such cases *full compensation for the entire disability* suffered is recoverable although the physical condition of the employee *contributed* to and increased the disability caused by the injury or prolonged and interfered with healing and recovery. In other words, there is no authority for prorating the extent of the disability due to the accident itself on the one hand and that due to the aggravation caused by the employee's physical condition on the other." (Emphasis added.) It is true that in those cases the disability was apportioned according to the extent it was caused by the preexisting condition and the industrial injury, but there the prior condition had already resulted in a partial disability which was not attributable to his employment while in progressive occupational disease cases the disease is being contracted and accumulated during various employments. Although no compensable disability has been suffered the disease is employment connected. Moreover, in cases of progressive occupational diseases the disease does not previously exist. It is building up over a period of time and is not theretofore disabling.

[4] It is not unusual that employers may be jointly and severally liable. The burden of the disability is to be borne by industry and a general and special employer of the employee are *severally* liable. This court said: "Since both employers are discharged, as between insurance companies, equity and fair dealing certainly demand that payment be made by the company which received the premium for the coverage. *But that is a matter to be settled between the insurance carriers*, if necessary in an independent suit. The Workmen's Compensation Act imposes upon special and general employers a joint and several obligation (Diamond D. etc. Co. v. Industrial Acc. Comm., 199 Cal. 694, 250 P. 862; Famous Players etc. Corporation v. Industrial Acc. Comm., 195 Cal. 134, 228 P. 5, 34 A.L.R. 765; Department of Water & Power v. Industrial Acc. Comm., 220 Cal. 638, 32 P.2d 354) and the employee may proceed against either or both of them and, having

chosen to seek awards against both, he is entitled to an award against each, jointly and severally, for the full benefit allowed him by the act. *Standard Acc. Ins. Co. v. Industrial Acc. Comm.*, 123 Cal.App. 443, 11 P.2d 401. *Whatever may be the equities between the employers and their insurance carriers*, we think it would be against the policy of the compensation act, and contrary to its spirit and intent, to allow an agreement between joint obligors to *diminish the remedy of the employee*. Despite any agreement between themselves as to which of them shall bear the burden of their liability, the employers are jointly and severally liable to the employee and the award was properly made against both." *American M. Ins. Co. v. Industrial Acc. Comm.*, 8 Cal.2d 585, 588, 67 P.2d 103, 104. Emphasis added. See, also *Hartford A. & I. Co. v. Industrial Acc. Comm.*, 8 Cal.2d 589, 67 P.2d 105.

[5] The question of apportionment between successive employers or carriers has been before our appellate courts. See, *Rubattino v. Industrial Acc. Comm.*, 65 Cal. App.2d 288, 150 P.2d 538; *Argonaut M. Co. v. Industrial Acc. Comm.*, 21 Cal.App.2d 492, 70 P.2d 216; *Associated Indem. Corporation v. Industrial Acc. Comm.*, 124 Cal. App. 378, 12 P.2d 1075; *Moore Shipbuilding Co. v. Industrial Acc. Comm.*, 70 Cal.App. 495, 233 P. 392; *Blanchard v. Industrial Acc. Comm.*, 68 Cal.App. 65, 228 P. 359. The main issue determined in those cases is that apportionment is permitted among successive carriers or employers but they do not give especial consideration as to the nature of the proceeding therefor or whether an award for the full amount may run against any one of the employers or carriers, the employment of which contributed proximately to the disease. Insofar as they may hold to the contrary of the rule heretofore announced, they are disapproved. In *Limited Mutual Compensation Ins. Co. v. Industrial Acc. Comm.*, 37 Cal.App.2d 50, 98 P.2d 827, it is merely said that liability may be apportioned. It may be apportioned as between the successive carriers or employers but as to the employee he may recover from any one of them during whose employment the disease was accumulating although no compensable disability had resulted during that period.

[6] In the instant case the successive carriers were brought in as parties and inasmuch as the award was against one of them it may be said that the issue of apportionment was determined, that is, that it was determined that only one of them was liable. Insofar as the employee is concerned the award must be affirmed, for the carrier against whom the award was made had insured the employer during a period when the disease was accumulating and when the disability occurred. While there is evidence from which it might be said that the employee was working in a part of the plant where he was exposed to more dust during the above mentioned period and hence the disease may be more attributable to that period than others, although devices such as blowers and masks for lessening the hazard were used, yet the only medical evidence is that the employee has the disease and that he contracted it over a period of years. The issue of contribution or apportionment between the successive carriers should be separately determined.

[7] Finally, petitioner argues that the hearing referee stated no grounds for her report favorable to applicant and that the referee to which the petition for rehearing was referred recommended denial because the case should be made a test case and that the case was not decided by the commission on the merits. There is nothing in the record to bear out those assertions. Findings of fact and conclusions of law were made and the procedure on rehearing was in proper order. The commission acted upon all matters. The mere mention by the rehearing referee of the case as a test case does not mitigate against the record showing correct and proper procedure and decision.

The award is affirmed but petitioner shall have the right to have determined the issue of apportionment among the carriers and employer while uninsured, and the case is remanded to the Industrial Accident Commission for the purpose of making such apportionment, and ordering the other carriers and the employer to reimburse petitioner accordingly.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concurred.

76 Cal.App.2d 277

SMITH et al. v. METZGER et al.
Civ. 3436.

District Court of Appeal, Fourth District,
California.
Oct. 1, 1946.

1. Fraud Ⓒ22(1)

Generally a purchaser is entitled to rely on the representations of the seller as to boundaries, as the vendor in dealing with other persons is presumed to know the area and boundaries of his own land, and the purchaser is under no duty to make an independent investigation unless the circumstances are such as to put him upon inquiry.

2. Appeal and error Ⓒ1008(1)

In action to abate a nuisance which was a garage located partially over the dividing line between adjoining property wherein defendants by cross-complaint sought damages for false representations as to location of dividing line when defendants purchased their property from plaintiffs, whether defendants made an independent investigation concerning location of boundary line or was called upon to do so was for trial court.

3. Trial Ⓒ375

That trial judge viewed the premises and made his own observations of the physical facts could be considered in determining the issues.

4. Fraud Ⓒ58(2, 4)

Evidence sustained finding that vendors had misrepresented to purchasers the location of boundary and that purchasers believed the representations and relied solely upon the ostensible appearances of the land and statement of vendors regarding the boundary.

5. Fraud Ⓒ82

\$468 damages awarded purchasers for vendors' misrepresentation respecting location of boundary line was supported by evidence.

Action by E. A. B. Smith and Jule B. Smith against James S. Metzger and Mary Metzger to abate a nuisance wherein defendants cross-complain. From judgment for defendants on the cross-complaint, plaintiffs appeal.

Judgment affirmed.

Head, Wellington & Jacobs, of Santa Ana, for appellants.

L. A. West, of Santa Ana, for respondents.

GRIFFIN, Justice.

Appellants, who are plaintiffs and cross-defendants, instituted this action to abate a nuisance, i. e., a large garage, set on 1" x 12" planks, which was located partially over the dividing line between the properties of plaintiffs and defendants. Respondents, who are defendants and cross-complainants, by their cross-complaint, sought damages for false representations as to the location of the dividing line when they purchased their property from plaintiffs.

Originally, appellants, hereinafter referred to as plaintiffs, owned approximately 1½ acres of land which they subdivided, and out of which they sold lots of various dimensions described by metes and bounds. Included in this subdivided acreage were two contiguous parcels of residential property with a frontage of 111.63 feet, facing north on Eighth Street in Santa Ana. Plaintiffs listed for sale with a real estate broker named Hill (now deceased) the westerly 54 feet of the two contiguous parcels, which had a depth of 130 feet, later increased to 145 feet.

On June 30, 1942, defendant Metzger, a real estate broker, came to plaintiffs' residence with Hill to negotiate for the purchase of the listed property. An agreement of purchase was reached and placed in escrow. The deed described the property with a frontage on Eighth Street of 54.13 feet, and a depth of 170 feet, reserving 25 feet for road purposes.

Plaintiffs testified that about a week after consummation of the sale they notified defendants to remove the garage. It was originally on the Smith acreage but

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

was moved to its present position on the Metzger property by plaintiffs prior to the sale. It now encroaches on the Smith property 24 to 30 inches with an additional eve overhang of approximately 16 inches. Defendants claim that such notice was received about two months after the sale.

Mr. Metzger testified that plaintiff Jule B. Smith told him that the lot listed for sale was approximately 54 feet wide; that during the negotiations they, together with Mr. Hill, went to the southeast corner of the lot and that Mrs. Smith pointed out an imaginary line constituting the easterly boundary line of defendants' property, which line was in fact about 5 or 6 feet east of the actual boundary line as disclosed by the description in the deed; that he (Metzger) did not know where the boundary line was or would be; that he asked her how far to the east of the garage the line would be and that she drew an imaginary line one-half way between the two properties and about $2\frac{1}{2}$ or 3 feet east of the east end of the garage; that the depth of the lot was 145 feet and that there is no controversy as to the point fixed on the south line of it; and that he made no survey of the property.

Jule Smith denied these facts generally and testified that she went with Metzger and Hill to the place indicated and that Metzger showed her "how much depth he wanted", but that she did not "recall that the width of the lot was ever mentioned"; that Metzger stated to her that he had "stepped the lot and that he could measure within a few inches by stepping it". Metzger denied this.

Evidence was taken at the trial by claimed expert real estate appraisers. One testified that the value of the property as of June 30, 1942, was from \$2,800 to \$2,900, if the line was as indicated in the survey made in accordance with the description of the property in the deed, and was \$4,500 if the line was in accordance with the imaginary line pointed out by Mrs. Smith.

At the suggestion of the parties the trial judge, at the conclusion of the case, viewed the premises and stated: "I have gone out to the property and have viewed it and have made measurements myself of

the property, and I have walked completely around it to the South and by the side and measured from the fence to the garage and east from the garage and the width between the driveway and the fence, and viewed it from the fence out to the pergola and pillars and the foundation of the garage and the structures of the garage, and the only thing I am interested in if you have any law you want to cite."

The court found that the garage was wholly within the lines of the premises as pointed out by plaintiffs to be the lines of the property they would convey to defendants if the sale was consummated but that the garage extended approximately $2\frac{1}{2}$ feet over the east line of the property actually conveyed and that it now encroaches upon the premises of plaintiffs; that plaintiffs falsely represented to defendants that the east line of the property they were endeavoring to sell to defendants was $2\frac{1}{2}$ feet east of the east end of the garage located thereon; that defendants did not know the dividing line, as actually conveyed, but that plaintiffs did, and that such false representations were made for the purpose of deceiving defendants; that if defendants had known the truth of such false representations they would not have purchased the property; that in the deed to defendants no reservations, restrictions or exceptions were made; that the east line of the premises, as conveyed, was 5 feet west of the line pointed out by plaintiffs as the true line; that on August 15, 1943, plaintiffs constructed a fence several feet high running north and south along the east line now claimed by them, thereby shutting off the easterly stall of the garage, which space was required for the parking of defendants' automobile, and thereby took 5 feet off of the lot which defendants thought they owned; that plaintiffs cut down and removed a valuable plum tree growing in the 5-foot space in dispute.

The court then found that by reason of the false representations defendants had been damaged in the sum of \$468, and rendered judgment on the cross-complaint accordingly. Since defendants sought damages only and not rescission or other remedies, it further ordered defendants to re-

move that portion of the garage standing on the property of plaintiffs.

Plaintiffs recognize the general rule in respect to conflict of evidence, but now argue that the testimony of defendant James Metzger is inherently improbable because his testimony as to his own actions, experience and the circumstances related, is such as to put him upon inquiry, and he could not, therefore, claim a legal right to rely upon any alleged misrepresentations made by plaintiffs.

[1] They concede the general rule that a purchaser is entitled to rely on the representations of the seller as to boundaries, as the vendor in dealing with other persons is presumed to know the area and boundaries of his own land, and that the purchaser is under no duty to make an independent investigation unless the circumstances are such as to put him upon inquiry, citing 25 Cal.Jur. 550, sec. 72.

[2] Even though Metzger was a real estate agent or broker, the question whether he made an independent investigation of his own or was called upon so to do under the facts of the instant case was a factual question for the trial court to determine. It would appear, in support of the court's finding, that plaintiffs must have known, or should have known, at the time of the sale, whether the garage was then located over the actual boundary line of the property conveyed. If they had this knowledge and then, knowing that fact, falsely represented that the line was several feet east of the garage, surely such a representation would be a material one. A prospective purchaser, observing the garage in the position in which this one was located at that time, would not, without some independent investigation, be led to believe that the boundary line ran through a portion of the garage.

[3-4] The evidence seems clear that a misrepresentation was made as to the location of the boundary line and that defendants believed those representations and relied solely on the ostensible appearances and the statement of the plaintiffs. The trial judge viewed the premises and made his own observations of the physical facts.

This may be taken into consideration in determining the issues of the case. *Robinson v. County of San Diego*, 115 Cal.App. 153, 300 P. 971; *Hatton v. Gregg*, 4 Cal. App. 537, 88 P. 592.

[5] The evidence fully supports the award of damages for such misrepresentation. The judgment, as entered, does not appear to be unjust or lacking in evidentiary support.

Judgment affirmed.

BARNARD, P. J., concurs.



76 Cal.App.2d 306

SEIDENBERG v. GEORGE.

Civ. 15331.

District Court of Appeal, Second District,
Division 2, California.

Oct. 2, 1946.

Hearing Denied Nov. 25, 1943.

1. Appeal and error ⇐955

Weighing the evidence of one witness as against that of another, or analyzing the evidence in view of psychological factors upon which appellant based his argument, was not within the province of appellate court.

2. Appeal and error ⇐1011(1)

Substantial evidence, though contradicted, is sufficient to sustain trial court's findings.

3. Appeal and error ⇐1011(1)

Trial court's determination of the facts from conflicting evidence is conclusive, and all substantial conflicts must be resolved in favor of trial court's findings.

4. Master and servant ⇐40(3)

In action for alleged wrongful discharge from employment, conflicting evidence sustained findings that plaintiff was employed from week to week for no specified period of time, provided that his serv-

ices were satisfactory to employer, that he was employed, not as general manager, but to look after matters involved in Office of Price Administration regulations, and that he was discharged because employer in good faith was dissatisfied with his services.

5. Trial ⇨89

Trial court did not err in striking out answers of witnesses on ground that they were not responsive, were conclusions of the respective witnesses, or were argumentative.

6. Trial ⇨29(1)

Remarks to the effect that time was being wasted, justifiably made by trial court during introduction of evidence, did not preclude plaintiff from having a fair trial.

7. Master and servant ⇨39(2)

Employee suing for damages for allegedly unjustified discharge could not recover compensation for last week of his employment under complaint in which he did not plead an amount due and unpaid under contract of employment for services rendered.

8. Judgment ⇨253(1)

A complaint for damages for breach of contract will not sustain a judgment for an amount claimed to be due under the contract but not pleaded.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Murray M. Seidenberg against Nick George, etc., to recover damages for alleged wrongful discharge from employment. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

Joe Wapner, of Los Angeles, for appellant.

Clyde C. Shoemaker, of Los Angeles, for respondent.

WILSON, Justice.

This is an action for damages for asserted wrongful discharge from employ-

ment. Appellant alleged in his complaint that he had been employed by respondent as the latter's general manager at an agreed salary for one year, payable in weekly installments, together with a bonus based on the gross amount of defendant's business for the year, or \$3,000, whichever sum should be greater. He was discharged after he had been employed for about five months. He alleges that he has been damaged in a sum equal to the difference between the amount he had received while employed and the total salary to which he claims to have been entitled for the year, plus the bonus which would have accrued if he had not been wrongfully discharged. Respondent denied all of the allegations of the complaint and the court found that they were not true, except that appellant had been paid the amount which he admitted having received for the services rendered by him. It was further found that said sum was not paid by reason of the oral contract alleged in the complaint; that appellant was never employed under such contract, but that he was employed from week to week for no specified period of time, provided that his services were satisfactory to respondent; that he was not employed to act as general manager but to assist in respondent's business with such matters as came within the regulations of the Office of Price Administration; that his discharge was for the reason that respondent was dissatisfied in good faith with his services. Judgment was rendered in favor of respondent, from which appellant appeals.

[1] 1. *Sufficiency of the evidence to sustain the findings.* The principal ground for reversal presented by appellant is that the findings of fact are not supported by substantial evidence, and that the evidence is insufficient to sustain any findings except those that accord with the allegations of the complaint. It is not within our province to weigh the evidence of one witness as against that of another, or to analyze the evidence in view of the so-called "psychological factors" upon which appellant bases his argument. The evidence throughout the record is conflicting. Appellant's testimony comported with the allegations

in his complaint. Respondent testified that the employment was not for any specified period of time nor for a salary to be paid upon an annual basis; that appellant was employed at a weekly salary, not as general manager but to look after matters involved in Office of Price Administration regulations; that the understanding was that if his work was satisfactory his compensation would be increased, and if he remained in respondent's employment for a year he would be paid a small bonus; that appellant antagonized both the customers and his fellow employees to such an extent that his discharge was necessary in order to prevent the ruination of respondent's business; that he examined respondent's records, including index files of customers, in order that he might go into business for himself and use the records to the injury of respondent, and that one index file was missing from the office a week before appellant's discharge. The evidence concerning appellant's attitude toward customers and employees was corroborated by several of respondent's employees and by at least one customer. The employees corroborated respondent as to the duties which appellant was engaged to perform.

[2-4] We find nothing inherently improbable in the evidence of respondent and his witnesses. The sole question is whether the evidence is sufficient to sustain the findings. If it is substantial it is sufficient though contradicted. Appellant asks us to perform the function of the trial court, to evaluate conflicting evidence, and to determine the credibility of witnesses, and he insists that we accept his evidence as the truth regardless of its contradiction by others. In so doing we would disregard the familiar and oft repeated rules that in the event of a conflict in the evidence the trial court's determination of the facts is conclusive, and that all substantial conflicts must be resolved in favor of the findings. *Buckhantz v. R. G. Hamilton & Co.*, 71 Cal.App.2d 777, 779, 163 P.2d 756, and cases cited; *Berger v. Steiner*, 72 Cal. App.2d 208, 164 P.2d 559; *In re Estate of*

Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424; *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689.

[5] 2. *Alleged errors in the admission and rejection of evidence and alleged irregularities in the proceedings.* Answers of witnesses were stricken out on the ground that they were not responsive, or were conclusions of the respective witnesses, or argumentative. We find no error in the court's rulings. None of the alleged errors related to evidence of a material nature, and the result of the trial would not have been different if the rulings complained of had not been made.

[6] There is no merit in appellant's claim that remarks of the court made during the introduction of evidence precluded him from having a fair trial. Such remarks as "we are wasting a lot of time," were made by the court in an effort to hasten the trial and an examination of the record demonstrates that they were justified.

[7,8] 3. *Appellant's claim for compensation for the last week of his employment.* Appellant asserts that even though the court may have been correct in its finding as to whether he was employed for one year or at will, nevertheless he is entitled to compensation for his last week's services. When he was discharged respondent gave him a check in payment for the final week and an additional check for an amount which was intended as a donation. Appellant refused to accept the checks because of the endorsements thereon that they were in full payment of his services. In his complaint he does not plead an amount due and unpaid under the contract for services rendered but seeks to recover damages for his alleged unjustified discharge. A complaint for damages for breach of contract will not sustain a judgment for an amount claimed to be due under the contract but not pleaded.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

76 Cal.App.2d 255

**BEVERLY HILLS NAT. BANK & TRUST
CO. v. SERES.**

Civ. 15225.

District Court of Appeal, Second District,
Division 1, California,
Sept. 30, 1946.

1. Appeal and error ⇨927(7)

On appeal from judgment on a direct verdict for plaintiff, evidence was viewed in the light most favorable to defendant.

2. Frauds, statute of ⇨144

Owner who subsequently sold premises was estopped to rely on statute of frauds to support a claim that no valid five-year lease had been entered into with defendant, who paid money to occupant to secure possession of premises and made substantial improvements of a permanent nature after owner agreed to execute a five-year lease.

3. Vendor and purchaser ⇨232(1)

A purchaser of real property has constructive notice of rights of persons in possession and takes title subject thereto.

4. Frauds, statute of ⇨159

Vendor and purchaser ⇨245

In grantee's unlawful detainer action against tenant, evidence whether tenant took possession and made improvements in reliance on grantor's oral lease or a promise to lease, and whether grantee purchased property with notice of tenant's claim to the lease, was for jury.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Unlawful detainer action by the Beverly Hills National Bank and Trust Company, a national banking association, against A. Seres, doing business under the fictitious name of Peacock Custom Shoe Rebuilders. From a judgment for the plaintiff, the defendant appeals.

Reversed and remanded for new trial.

Sidney Fischgrund, of Los Angeles, for appellant.

James A. Houlahan, of Beverly Hills, for respondent.

WHITE, Justice.

Plaintiff, The Beverly Hills National Bank and Trust Company, brought an action of unlawful detainer against the defendant and appellant, A. Seres. Trial was had before a jury, at the conclusion of which the court directed that a verdict be entered for the plaintiff as prayed for in its complaint. From the judgment entered upon such verdict defendant prosecutes this appeal.

In its complaint plaintiff alleged that on or about October 1, 1944, Adolph Fleishman and his wife orally leased the premises here in question (a store room known as 828¼ South Broadway, in the city of Los Angeles) to the defendant on a month-to-month tenancy, for \$400 per month, payable in advance on the first of each month; that defendant took possession on or about October 1, 1944; that plaintiff by mesne conveyances acquired title to such property, and on January 6, 1945, served a notice requiring defendant to deliver up possession of the premises at the expiration of one month; that defendant held over and continued in possession without plaintiff's consent, and failed to pay one week's rent. Plaintiff prayed for restitution, unpaid rent, treble damages for so long as defendant continued in possession, costs, and other relief.

Defendant by his answer denied that the property was leased to him on a month-to-month basis, and alleged that prior to October 1, 1944, A. Fleishman, and wife, the then owners of the premises, agreed to lease the same to defendant for a term of five years at a monthly rental of \$400, and on or about October 1, 1944, represented to defendant that they were negotiating for the sale of the property to plaintiff, "and for that reason the said owners prepared and presented to the defendant a written lease for the term of five years commencing on the 1st day of December, 1944, at a monthly rental of Four Hundred (\$400.00) Dollars, payable in advance on the first day of each and every month," a copy of the written lease being attached to the answer; that the said owners then "represented to the defendant that the plaintiff would execute and deliver said lease * * * provided

it was deposited in escrow together with the rent as therein provided, and that if the plaintiff would not execute and deliver said lease * * * then the owners themselves" would do so; and that said owners did "acknowledge in writing the agreement to lease the said premises to the defendant for the term of five (5) years * * * and thereupon did subscribe to a memorandum thereof in writing in the form of a letter" attached to the answer. Defendant further alleged that he duly tendered the rent due plaintiff, which plaintiff refused to accept.

As a separate defense defendant re-alleged the facts above set forth, and further, that in reliance upon the representations of said owners defendant executed the written lease; that after such agreement to lease was made defendant arranged to pay \$750 to the then occupant of the premises as consideration for said occupant to surrender possession, with the knowledge of and without objection by said owners and "with full knowledge upon their part that the defendant relied upon the agreement of said owners to lease said premises to the defendant for five (5) years * * *"; that defendant took possession about October 24, believing and understanding that he had leased the premises for five years; that relying upon such agreement to lease, defendant made substantial alterations and valuable improvements at considerable expense and with the knowledge of said owners to the extent of about \$5,000; that the form of written lease above referred to was delivered to the plaintiff prior to its purchase of the premises and that plaintiff had knowledge that defendant took possession about October 24, 1944, relying upon the said owners' agreement to lease; that before purchasing the property, plaintiff knew of the written memorandum or letter which had been executed by Fleishman and delivered to defendant; and that at the time of the purchase by plaintiff it had full knowledge that defendant took possession with the full belief and understanding that he had leased the premises for five years and that defendant had made substantial improvements and alterations in reliance upon the aforesaid agreement to lease; and that plaintiff was

thereby estopped from claiming that defendant did not have a valid five-year lease.

As a second affirmative defense defendant further alleged: (1) That he took possession pursuant to the oral agreement for a five year lease; (2) that he made substantial improvements and paid or tendered the rent, and is willing to perform the terms of the lease; that plaintiff acquired title to the property with knowledge and notice that defendant had taken possession, had made substantial improvements, and had complied with all the provisions of the lease hereinabove referred to.

[1] Viewing the evidence in the light most favorable to appellant, it appears that appellant took possession of the premises in controversy on October 24, 1944, for the purpose of operating a shoe repair shop therein. Prior thereto Mr. Adolph Fleishman, then owner of the premises, had a conversation with appellant with respect to leasing the premises for \$400 per month, in which conversation appellant stated, "As long as you promise me I will get a five-year lease, I am willing to pay \$400 to start right away," to which Mr. Fleishman replied, "Don't worry about anything, regardless of what happens to the property, you will get a lease and you can count on it." In a subsequent conversation appellant stated that he would be put to considerable expense for improvements and alterations upon moving into the premises, and Mr. Fleishman said, "Don't worry about anything, go ahead and do as you please, you will get a five-year lease commencing November 1st, 1944, at \$400 per month." Mr. Fleishman further said, "You will get the store November 1st. I made arrangements to give notice to move out at the end of October, and you can move in the 1st of November." On October 11, 1944, Mr. Fleishman brought to appellant a form of typewritten lease for a five-year term. Mr. Fleishman did not execute this lease, but informed appellant that he was negotiating for the sale of the property to the Beverly Hills National Bank, plaintiff and respondent herein and that appellant should make out checks for the first and last months' rent payable to respondent bank, which was done. In the form of lease

presented by Mr. Fleishman respondent bank was named as lessor. Appellant executed the lease as lessee. The lease and the two checks were thereupon deposited by Mr. Fleishman in an escrow at the respondent bank. The conversation at this time, as testified to by appellant, was as follows:

"At that time he brought me the lease to sign, and he himself made out the check, that is, for the first month's rent, and the second month's rent, and he told me that he is going to put this in escrow, and as far as I am concerned whether the Beverly Hills Bank and Trust Company was in the lease or not you move in the place and he will guarantee the lease."

After the execution of the lease form by appellant, he arranged for the payment of \$750 to the occupant of the premises in return for immediate surrender of the premises, and on October 24 appellant took possession and commenced alterations and improvements, including the construction of a new front on the store, the installation of electric power equipment for his machinery, and various other improvements, at a total cost of about \$5200. Shortly after November 1, 1944, while the work was still going on, Mr. Fleishman appeared at the store and warned appellant against spending too much money until he got his lease, but at that date the work was already well under way and contracts therefor had been let.

On December 1, 1944, at the office of appellant's attorney, Mr. Fleishman signed and delivered to appellant a letter which had been prepared by appellant's attorney, reading as follows:

"Mr. Abraham Seres

"828 $\frac{1}{4}$ South Broadway

"Los Angeles 14, California

"Dear Mr. Seres:

"This is to acknowledge that I have agreed to give you a lease on the premises at 828 $\frac{1}{4}$ South Broadway, Los Angeles, California, which you are now occupying, for the term of five years from November 1, 1944, at a rental of \$400.00 per month, payable in advance on the first day of each month, and in accordance with the conditions and provisions contained in the form of lease executed by you and delivered to the

Beverly Hills National Bank and Trust Company, where it has been deposited in the escrow between myself and the said bank which contemplates purchasing said property.

"In the event the bank refuses to execute this lease and purchase the property, I shall execute a lease containing the conditions and provisions set forth in the one so deposited in escrow.

"Very truly yours,

"A. Fleishman."

With respect to his negotiations with Mr. Seres, Mr. Fleishman's testimony was substantially as follows:

That about the middle of October "we talked about making this lease, and he said he wanted the lease, was willing to pay the rent, and I told him we would make a lease"; that he opened negotiations for the sale to plaintiff after the foregoing conversation; that he told appellant "to be careful with his money he spent until he gets the lease or gets some assurance of a lease," but this warning came after appellant had moved in; that he signed the letter above quoted on an occasion when he was trying to arrange with Mr. Seres to accept a shorter term lease which was offered by plaintiff. With respect to the lease forms, he testified, "Well, I told Mr. Seres I prepared the leases which he could deposit with the Beverly Hills National Bank and Trust Company if they accepted it, when his check was with it, the first and last months' rent. * * * He said he would do it and he did it." He further testified that with respect to the negotiations, "He (appellant) said he would have considerable expense there for the five year lease and I agreed on it." On cross-examination he testified that they had four or five conversations. "He wanted a lease, and I agreed to give him one, and that was the whole thing."

On November 28, 1944, plaintiff bank addressed a letter to Mr. Fleishman requesting that he procure the signature of Mr. Seres to a statement to the effect that he held possession of the property as a month-to-month tenant and not under a lease, and that he had no interest in the property other than as such month-to-month tenant. Mr. Fleishman did not take

the letter to Mr. Seres, and so far as the record discloses, plaintiff bank made no further effort to secure any statement from Mr. Seres.

A trust officer of plaintiff bank testified: "I don't know when Mr. Seres took possession of the property. * * * We made two inspections of the property, once prior to our arrangement for the purchase of the property, and Mr. Seres was not in possession then; the tenant that was in possession was the House of Textiles. After we acquired the property our regular inspection revealed that Mr. Seres was in possession." He further testified that some time between the latter part of October and the middle of November, during the period of bringing down the title, he was informed by his escrow officer that Mr. Seres had signed a lease and deposited it in escrow together with checks for the first month's rent (for December, 1944), and the last month's rent (for November, 1949); that his escrow officer mailed the lease and checks back to Mr. Seres "immediately after we were informed that the leases were there," but he did not recall the exact date. From other testimony it would appear that the leases were returned to Mr. Fleishman, rather than to Mr. Seres.

It was also conceded by counsel that plaintiff bank "had knowledge of the fact that defendant Mr. Seres took possession of the property some time in October."

There appears also to have been some conversation between Mr. Fleishman and defendant, at about the time defendant took possession, concerning the necessity of securing the consent of the Citizens National Bank to the making of a lease, as well as the necessity of the bank's securing an order of court in connection therewith, but from other evidence it appears that title to the property stood in the name of Mr. Fleishman alone and no other person had any interest therein.

An employee of defendant testified to a conversation between Fleishman and defendant in which Fleishman said, " * * * go ahead and move in, and I guarantee you a five-year lease * * * I am the owner and I can give you a five-years lease." Plaintiff objected to this testimony "on the

ground of the heresay rule" and moved to strike it "as within the statute of fraud." The trial court ruled that the objection be sustained. The court also rejected, on the ground that the statute of frauds would not permit it, an offer of testimony by defendant's wife to the effect that "Mr. Fleishman spoke to the witness on the telephone and stated to the witness that Mr. Seres could move into the premises whenever and as soon as he desired and he would get a five-year lease"; that in another conversation Mr. Fleishman stated in substance that Mr. Seres could spend any amount of money toward improvements, and that at the time of the execution of the leases which were sent to plaintiff bank Mr. Fleishman stated in substance that Mr. Seres shouldn't worry, that he has a lease for five years.

Plaintiff's counsel moved for a directed verdict upon two grounds:

"One of them is based upon the conditional writing, which is the only memorandum in writing which would take the case out of the statute of frauds, and that shows it was purely a conditional agreement to execute a lease, and the condition never arose whereby the promisor was obligated to execute the lease. In other words, the condition was defeated by the bank purchasing the property.

"Second ground for the motion is that the part performance relied upon was not a part performance under the agreement itself. It was a part performance under another lease, a part performance before the agreement itself came into existence—the alleged agreement came into existence."

[2] There can be no question but that the evidence above recited would warrant application of the doctrine of equitable estoppel so as to foreclose plaintiff's grantor, Fleishman, from relying upon the statute of frauds to support a claim that no valid five-year lease had been entered into. *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; *Vierra v. Pereira*, 12 Cal.2d 629, 86 P.2d 816; *Wilson v. Bailey*, 8 Cal.2d 416, 421, 65 P.2d 770; *Halsey v. Robinson*, 19 Cal.2d 476, 122 P.2d 11. In *Seymour v. Oelrichs*, supra, 156 Cal. at page 794, 106 P. at page 94, 134 Am.St.

Rep. 154, it was held that the doctrine "is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' (2 Pom.Eq.Jur., § 921.) It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am.Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' * * *"

In *Halsey v. Robinson*, supra, the doctrine was applied in favor of defendants who had leveled and improved farm land in reliance upon a promise by the plaintiffs to renew a lease. In *Vierra v. Pereira*, supra, the defendants orally agreed to lease thirteen acres to plaintiffs for a period of three years. Plaintiffs leveled the land, prepared it for irrigation and planted crops, expending over \$688 and 200 hours of labor. The trial court's holding, upon sharply conflicting evidence, that the defendants were estopped to deny the existence of the lease or raise the bar of the statute, was upheld on appeal.

In the present case, the defendant not only paid money to secure early possession of the premises, but made substantial improvements of a permanent nature. Aside from the expenditures necessary in setting up his shoe repair machinery, he spent substantial sums to remodel the front of the

premises, as well as for painting, and for repairing the floor.

[3] It must be held, therefore, that as between Fleishman and the defendant, the latter upon taking possession of and improving the premises held an enforceable five-year lease. It is well settled that the purchaser of real property has constructive notice of the rights of persons in possession and takes title subject thereto. *J. R. Garrett Co. v. States*, 3 Cal.2d 379, 44 P.2d 538, and cases therein cited; 15 Cal.Jur. 735, sec. 146, and cases cited. In *Bessho v. General Petroleum Corporation*, 186 Cal. 133, 137, 199 P. 22, 23, it was said:

"It is conceded at the outset of this discussion that the subsequent purchaser or lessee of premises in good faith and for a valuable consideration and without notice, either actual or constructive, of the rights or claims of persons holding a prior unrecorded lease or deed of the same premises, take the same free of such prior rights or claims. The exception to this rule is this: That if the prior grantee or lessee of the premises under an unrecorded deed or lease has gone into actual possession of the same, such possession may operate to put subsequent purchasers or lessees of the premises upon notice or inquiry as to their prior rights or claims thereunder."

In *Scheerer v. Cuddy*, 85 Cal. 270, 24 P. 713, 714, the property was an office building. The owner leased some of the rooms to a lodge. These rooms were kept locked. The purchaser assumed the lodge-rooms were vacant. The court, in holding that the purchaser was to be charged with notice of the lessee's possession, said: "It was his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant."

We come now to a consideration of the effect of the letter signed by Fleishman on December 1, as well as the effect, if any, of the preparation and execution by defendant of the written five-year lease which was sent to plaintiff bank. It is urged by re-

spondent that the trial court properly excluded evidence tending to contradict the terms of this letter; that the letter, as well as the other evidence, shows that there never was an absolute agreement on the part of Fleishman to give a lease, but that on the contrary defendant took a chance that either the bank would not purchase the property, or if it did, would execute the proffered lease.

True, the second paragraph of the letter is conditional, in that thereby Fleishman promised to execute a lease if the "bank refuses to execute this lease and purchase the property." However, defendant's case did not rest primarily upon this letter, which was not written until several weeks after defendant had taken possession and made improvements. The evidence presented, exclusive of the letter, was ample to warrant the conclusion that he was repeatedly promised a lease and that in reliance upon such promises he changed his position to his detriment, and that therefore it would be inequitable to permit the bar of the statute of frauds to be raised. By the letter Fleishman unqualifiedly admitted that he had promised defendant a lease upon the terms and conditions set forth in the lease form which had been sent to the bank. The conditional promise contained in the second paragraph amounted to no more than a further reassurance that Fleishman would see to it that defendant got his lease, either from the bank or from Fleishman.

It is further argued by respondent: "This document (the letter) was prepared by defendant's attorney and submitted to plaintiff's grantor, Fleishman, for execution after a request had gone out from the plaintiff to find out what were the terms of the tenancy under which the defendant held possession of the premises. It is our opinion that the document tells the story and that if there are any ambiguities there-

in they are chargeable to defendant, and not to plaintiff, who bought the property upon the representation that that was the agreement under which defendant held possession." There is no evidence in the record as to what, if any, representations were made by defendant to plaintiff as to the terms of his tenancy, nor is there any evidence as to what steps, if any, the plaintiff took when defendant failed to sign the form requested by plaintiff acknowledging that he held only a month-to-month tenancy. In his answer, however, defendant alleged that plaintiff knew of the execution of the letter before it purchased the property, and respondent in its brief contends that "in no event should defendant attempt to hold an innocent party who has relied upon a written document prepared by his own attorney." We cannot agree with this contention. On the contrary, far from affording grounds for the purchaser to believe that the property could be acquired free of a leasehold, the letter constituted a warning and notice of defendant's claims which the plaintiff disregarded at its own risk.

[4] It must be held, therefore, that the trial court erred in directing a verdict for the plaintiff and in rejecting proffered testimony of defendant's wife and employee as to conversations with Fleishman. Defendant was entitled to have his cause submitted to a jury on the issues of whether or not there was an oral lease or promise to lease, and whether he took possession and made improvements in reliance upon such lease or promise.

The attempted appeals from the order directing a verdict, from the verdict, and from the order denying the motion for a new trial are dismissed. The judgment is reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concur.

76 Cal.App.2d 373

**WARD v. CHANDLER-SHERMAN
CORPORATION et al.**

Civ. 3434.

District Court of Appeal, Fourth District,
California.

Oct. 7, 1946.

Hearing Denied Dec. 5, 1946.

1. Counties $\Rightarrow$ 20½

Where action to quiet title to two lots against lien of local improvement assessments for which bonds were issued under County Improvement Act was brought and judgment was rendered therein before amendment placed a definite limitation on time of such sales of realty to satisfy the liens of the bonds, amendment could have no bearing on action other than to show the opinion of the Legislature on the state of the law governing such sales prior to the amendment and the necessity for the amendment. St.1911, pp. 759, 760-762, §§ 63, 66-70, 76 as amended; Civ.Code, § 2911; Code of Civ.Proc. § 330.

2. Statutes $\Rightarrow$ 162

Generally, a statute having a special application controls a statute having a general application, without regard to the dates of their passage, and therefore an act general in its character will not annul the provisions of one covering a special subject.

3. Counties $\Rightarrow$ 20½

Section 66 of Improvement Act, providing that assessment for improvements shall be a lien on the property assessed until the assessment be paid, is a special statute and is controlling in action to quiet title to lots against lien of local improvement assessments for which bonds were issued under County Improvement Act, rather than section 2911 of Civil Code, a general statute, providing that a lien is extinguished by lapse of time within which, under provisions of the Code of Civil Procedure, an action can be brought on the principal obligation. St.1911, pp. 759, 760-762, §§ 63, 66-70, 76 as amended; Civ.Code, § 2911; Code of Civ.Proc. § 330.

Action by Harrison R. Ward against the Chandler-Sherman Corporation, a corporation, and H. A. Gardner, as County Treasurer of Orange County, to quiet title to two lots against the lien of three local improvement assessments for which bonds were issued. From a judgment quieting plaintiff's title to the lots subject to prior liens of the bonds, the plaintiff appeals.

Judgment affirmed.

Forgy, Reinhaus & Forgy, of Santa Ana, and Newmark & Hamblin, of Los Angeles, for appellant.

Drumm & Drumm, of Santa Ana, J. M. McCroskey, of Los Angeles, and Joel E. Ogle, Co. Counsel, of Santa Ana, for respondents.

MARKS, Justice.

This is an action to quiet title to two lots in the Dana Point area of Orange County against the lien of three local improvement assessments for which bonds were issued on October 14, 1929, under the County Improvement Act of 1921, Stats.1921, p. 1658, authorizing counties to undertake local improvement proceedings under the Improvement Act of 1911, Stats.1911, p. 730. The judgment quieted plaintiff's title to the lots subject to the prior liens of the bonds which were held to be prior and superior to the title of plaintiff.

The term of the bonds was nine years from and after January 2, 1930, with the last instalment of principal and interest falling due on January 2, 1939. The instalment of principal and interest falling due on January 2, 1933, and all subsequent instalments were not paid. The bonds stated that the amounts unpaid would remain a lien on the real property until paid, which is in accordance with the provisions of sections 63 and 66 of the Improvement Act of 1911.

Plaintiff, for a valuable consideration, acquired title to the property by a deed dated September 12, 1944, recorded September 13, 1944.

On February 23, 1945, Chandler-Sherman Corporation demanded of H. A. Gardner, as county treasurer of the County of Orange, that he sell the properties to satisfy the liens. See, Secs. 67, 68, 69 and 70, Im-

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

provement Act of 1911. He advertised the properties and sold them on October 4, 1945.

[1] This action to quiet plaintiff's title to the lots was filed on April 3, 1945. The judgment was rendered on August 13, 1945, and entered on August 17, 1945, so that the amendment to section 2911 of the Civil Code, Stats.1945, Chap. 361, which places a definite limitation on the time in which such sales can be made, was not in effect and can have no bearing on this action other than raising the inference that it may show the opinion of the legislators on the state of the law governing such sales prior to the amendment and the necessity for the amendment. See, also, Sec. 330, Code Civil Procedure.

As originally passed, the Improvement Act of 1911 gave the bondholder the sole remedy, in case of default, of having the treasurer sell the property in foreclosure of the lien. Secs. 67 et seq. A "separate, distinct and cumulative remedy", was created by amendment to section 76 of the Improvement Act of 1911, Stats.1921, p. 297, whereby the bondholder might bring an action to foreclose the bond. The section was again amended, Stats.1927, p. 1411, by providing that the foreclosure action could only be filled after six months and not more than four years from the date of the last delinquency. The act was again amended, Stats. 1929, p. 1305, by adding section 76a which reenacted the prior section 76, as amended, with changes not material here.

Plaintiff argues that an action to foreclose the bonds in question here was barred by the provisions of 76a of the Improvement Act of 1911, as well as by subdivision one of section 338 of the Code of Civil Procedure, and that consequently the lien of the bonds was extinguished by section 2911 of the Civil Code which, prior to the 1945 amendment, provided as follows: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

Plaintiff admits there is no direct authority in California on the precise question confronting us. He seeks to reason, by way of analogy, from other cases in support of his theory that as the right to collect the

debt by court action is barred, the lien is satisfied.

He cites *City of San Diego v. Higgins*, 115 Cal. 170, 46 P. 923, which was an action to recover a judgment for the amount of a tax which had been levied, and to foreclose the tax lien. The court held the action barred, but was further of the opinion that the tax lien existed without provision for its enforcement.

Clark v. City of San Diego, 144 Cal. 361, 77 P. 973, is also cited. By analogy it supports the position of plaintiff. It was an action to quiet title against a tax lien. It holds that as the right of action was barred by lapse of time, the tax lien must be considered satisfied under section 2911, Civil Code. This conclusion was reached under authority of *City of San Diego v. Higgins*, supra, already considered, and *Dranga v. Rowe*, 127 Cal. 506, 59 P. 944. *Dranga v. Rowe*, supra, was expressly overruled, at least in part, in *Holland v. Hotchkiss*, 162 Cal. 366, 123 P. 258, L.R.A.1915C, 492, so *Clark v. City of San Diego* loses much of its compelling force as authority here.

In the case of *Woods v. Hyde*, 64 Cal. App. 433, 222 P. 168, 171, the plaintiff, the owner of an improvement bond issued under the State Improvement Act of 1893, Stats. 1893, p. 36, sought a writ of mandamus to compel the city treasurer of Visalia to sell the property subject to the assessment to satisfy the lien of the assessment. The act contained the provision that the "assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid." The trial court denied the writ, holding that the statute of limitations had barred the court action. The judgment was affirmed on appeal, the court summing up its reasons for its holding as follows:

"The transcript shows that more than six years elapsed after the maturity of the bond upon which this action is based and the date of making demand upon the treasurer of the city of Visalia for sale of the property upon which the bond constituted a lien and also before the beginning of this action. Under the authorities which we have cited, there is but one conclusion to be reached. The stat-

ute of limitations had run at the time of the institution of the plaintiff's action, and even though the lien for the amount of the bond may still exist upon the property the remedy by mandamus to enforce sale is now barred by the provisions of the Code to which we have referred."

Each party has filed a memorandum analyzing the case of *Raisch v. Myers*, 27 Cal.2d 773, 167 P.2d 198, 200, seeking support from that decision. This was an action to foreclose a street lien for work done under the San Francisco Street Improvement Ordinance of 1934. It was urged that the action was barred by the statute of limitations, and also that the lien of the assessment was released by the running of the statute under the provisions of section 2911 of the Civil Code. In deciding the second question the Supreme Court concluded that as the improvement of streets was a municipal affair, and as San Francisco was a chartered city, the provisions of the cited section were not controlling. In considering the question of the continuance of the lien after the action to foreclose was barred, the court said:

"Having determined that appellant's bond is valid but that appellant's remedy by way of an action for foreclosure is barred, two questions remain for consideration in the determination of this appeal: (1) Does the lien of the assessment continue to exist despite the fact that appellant's remedy by way of an action for foreclosure is barred? (2) If the lien of the assessment does continue to exist, is appellant entitled in this proceeding, in which foreclosure is ordered to satisfy the lien of a superior lien holder, to have an adjudication to that effect and to have a further adjudication that appellant is thereby entitled to the satisfaction of said lien out of the proceeds of the foreclosure sale before any of the proceeds may be paid to respondent Myers? In our opinion, both questions must be answered in the affirmative."

Plaintiff cites the case of *Faxon v. All Persons*, 166 Cal. 707, 137 P. 919, L.R.A. 1916B, 1209, which was an action to quiet plaintiff's title to real property in San Francisco. The Hibernia Savings & Loan Society appeared as a defendant and claimed

title to a portion of the property by conveyance from a purchaser at a foreclosure sale had on March 14, 1908, under a power of sale in a mortgage given on August 24, 1888. The Supreme Court held the lien of the mortgage extinguished by the lapse of time under the provisions of section 2911 of the Civil Code. There is no provision of law continuing the lien of a mortgage with a power of sale until the debt has been paid as is found in the Improvement Act of 1911 relating to street improvement liens, so the case does not decide the question of whether or not, under the cited Civil Code section, the lapse of time will extinguish the lien of a local improvement assessment levied under the Improvement Act of 1911.

It should be observed that the cases principally relied on by plaintiff involve actions in court, in one form or another, to enforce liens after the actions were barred by the statute of limitations. Those cases affect the existence of the remedy of an action in court and not the right, or, in other words, the continuation of the lien without a remedy of court action to enforce it. In the instant case we have no such action to enforce the lien so the question of existence of an available remedy by an action in court is not presented. The sole question here is the existence of the lien, or, in other words, the survival of the right, so that the question presented here is easily distinguished from those decided in the cited cases. This distinction was recognized in *Woods v. Hyde*, supra, where it was said:

"The rule established in this state, however, makes a distinction between the existence of a right and the exercise of a remedy. In other words, a person may be possessed of a right and by reason of inaction or failure to proceed lose his remedy. The provision of section 4 of the act referred to is very similar in purpose and expression to section 3716 of the Political Code relating to liens created by taxes. That section reads:

"'Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are

paid or the property sold for the payment thereof.'

"The right of a city or county or state to its taxes under this section would seem to be extinguishable only by actual payment, and such seems to be the rule. But the existence of the remedy has no such indefinite period of time and is not made to rest upon the fact of actual payment."

The real question before us is the apparent conflict between the provisions of section 2911 of the Civil Code providing generally that a lien is extinguished by sufficient lapse of time, and section 66 of the Improvement Act of 1911, which provides that the assessment shall be a lien upon the property assessed until it be paid. It must be admitted that section 2911 of the Civil Code is an act having general application while section 66 of the Improvement Act of 1911 is special and only affects assessments made and bonds issued under that act.

[2] The rule governing in such cases is stated in *Chilson v. Jerome*, 102 Cal.App. 635, 283 P. 862, 864, as follows:

"It is a general rule of construction that a statute having a special application controls a general one without regard to the dates of their passage and that an act general in its character will not annul the provisions or one covering a special subject, even though it seems to cover the same general ground. *People v. Pacific Implement Co.*, 130 Cal. 442, 62 P. 739; *McNeil v. Kingsbury*, 190 Cal. 406, 213 P. 50; *Riley v. Forbes*, 193 Cal. 740, 227 P. 768; *Bateman v. Colgan*, 111 Cal. 580, 44 P. 238; *Glassell Development Company v. Citizens' Nat. Bank*, supra, 191 Cal. 376, 216 P. 1012, 28 A.L.R. 1427."

[3] Having concluded that section 2911 of the Civil Code is a statute of general application, and that section 66 of the Improvement Act of 1911 is one having a special application affecting only liens created under that act, the latter must be held to be controlling here. It follows that the liens of the assessments still exist. This being the effect of the judgment before us, it cannot be reversed. This conclusion makes it unnecessary for us to consider in detail the other questions argued by counsel as they

cannot affect the ultimate decision of this case.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.



AYLWARD et al. v. STATE BOARD OF CHIROPRACTIC EXAMINERS et al.

Clv. 7219.

District Court of Appeal, Third District,
California.

Oct. 4, 1946.

Rehearing Denied Nov. 1, 1946.

Hearing Granted Dec. 2, 1946.

1. Physicians and surgeons ☞11(3)

The State Board of Chiropractic Examiners, having issued and signed licenses to practice chiropractic in due form, approved their issuance by resolution, and found, after full hearing and examination of papers six months thereafter, that there was no ground for canceling licenses, had no power to cancel licenses ten months later without notice, further charges, or evidence. Gen.Laws, Act 4811, §§ 4-6, 10.

2. Physicians and surgeons ☞11(3)

An administrative board, such as State Board of Chiropractic Examiners, which has once acted on a motion, has exhausted its power and may not thereafter reverse its previous decision. Gen.Laws, Act 4811.

3. Physicians and surgeons ☞11(3)

The provision of Chiropractic Law that State Board of Chiropractic Examiners, at any time after two years following revocation or cancellation of license to practice chiropractic may reissue it, does not distinguish between revocation and cancellation and thus authorize board to cancel license without notice and hearing required by statute before revocation of license especially since "cancel" means to revoke or recall. Gen.Laws, Act 4811, § 10(a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "Cancel".

4. Estoppel ⇨62(2)

A governmental agency, such as State Board of Chiropractic Examiners, may be estopped, as right and justice may require, by act or contract within its corporate powers, though method of exercising power is irregular or unauthorized. Gen.Laws, Act 4811.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by Alan J. Aylward and others for a writ of mandate commanding the State Board of Chiropractic Examiners to annul its order canceling petitioners' licenses to practice chiropractic and refrain from interfering with their practice thereof. From a judgment granting the writ, respondents appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment directing the issuance of a writ of mandate commanding the State Board of Chiropractic Examiners to annul its order canceling certain licenses which it had previously issued, and to refrain from interfering with petitioners' practice of chiropractic in this state.

The petition for the writ alleges in substance that petitioners—some twenty-five or more in number—were at all times mentioned therein chiropractors holding licenses issued by the State Board of Chiropractic Examiners which, at the time of the issuance of said licenses, consisted of five named persons; that on May 26, 1944, by which time its personnel had completely changed, the said Board adopted a resolution canceling the license of each of the designated persons and ordering that the secretary mail a copy of the resolution to each licensee, and that the investigator for the Board obtain the certificates of license and transmit them to the Board. That none of the petitioners was present at such meeting or had notice thereof or oppor-

tunity to be heard, and that no evidence was offered or received in support of said resolution. That matters and things stated in said resolution had theretofore and prior to July 16, 1943, been considered by the Board after written charges had been filed, at which time petitioners had been given notice, were present or represented by counsel; that evidence had then been presented, and it had been concluded by said Board that there was no ground for revocation of the licenses. Petitioners also alleged that in adopting the resolution of May 26, 1944, the Board acted arbitrarily, specially and capriciously and in violation of constitutional requirements, and in excess of its powers; that after the granting of licenses to them petitioners, at great expense, had opened offices, bought equipment, and given up other occupations in order to practice chiropractic, and that the Board was estopped from revoking their licenses. Also that the prior decision of the Board was *res judicata*.

In answer to the petition the Board admitted the issuance of the licenses to petitioners but alleged that they were issued illegally in that each petitioner took his examination from one member of the Board only, that none of the examinations was prepared, given or graded by the Board, but by an individual member; that none of the applicants was identified by number, and that most of their licenses were issued without an affirmative vote of three members of the Board in a meeting of the Board, and that the Board, as such, took no action authorizing the issuance of such licenses; and that, for the foregoing reasons, all of the licenses were void, as was the action of the Board in regard to the hearing in 1943.

At the trial of the *mandamus* proceeding petitioners introduced evidence in support of the allegations of their petition which included a showing that the purpose of the resolution of the Board of 1942 permitting examinations by one member was to give emergency examinations for those expecting to go into the armed services, by permitting them to take examinations under the authority of the member of the Board nearest their residences. The decision of the Board of July, 1943, and the

resolution of May 26, 1944, were introduced in evidence. Petitioners also showed that no notice of the proceedings had on the latter date was given to any of the licensees, and that action then taken was without the filing of any new charges and without the introduction of any evidence.

Appellants called but one witness, a member and the secretary of the Board in 1942. He testified that he gave an examination to two of the petitioners; that no other member of the Board participated in examining those two, or in preparing questions for them, or in grading the papers; that the papers were sent to the Sacramento office of the Board and he did not know whether other members reviewed them or not. He testified, however, that the questions asked were taken from those that had been approved by the Board for previous examinations; that in January, 1943, the Board approved the licenses issued, at which time they considered all of the examination papers; that he had signed some of the licenses at his home and some at a Board meeting. He gave no testimony as to how the other licensees were examined. Over the objection of petitioners respondents introduced a transcript of the hearing before the Board in July 1943, but no testimony was offered or received to support a recitation appearing in the May 26, 1944 resolution that certain of the applicants paid \$100 to the member of the Board from whom he took his examination, nor was there any as to the recitation of that resolution that the applications of some of the licensees showed on their faces that the applicants did not possess the educational qualifications required by section 5 of the Act regarding the completion of the requisite hours of study. Gen.Laws, Act 4811.

At the conclusion of the hearing the trial court made findings substantially as follows:

That on July 18, 1942, the Board of Chiropractic Examiners adopted a resolution authorizing the giving of special examinations for chiropractic licenses. That each of the petitioners was given an examination by a member of the Board and that each license was issued, approved and signed by more than a majority of the Board. That each of the petitioners held a license

signed and approved by at least four, and some by five of the members of the Board, including the secretary, and that each bore the official seal of the Board. That prior to the issuance of the licenses, the papers of each applicant were deposited with and became a part of the records of the Board. That the examination given to each of the petitioners was of the same type and character as used in previous regular examinations by the Board. That petitioners passed such examinations, and that the approval of such examinations was made by the entire Board. That on January 10, 1943, the Board at a meeting adopted a resolution approving special examinations and approving the issuance of said licenses. That in June, 1943, a complaint was sworn to by an investigator of the Board, and upon same an order to show cause was issued and served upon petitioners, directing each of them to appear before the Board on July 16, 1943, to show cause why his license should not be revoked. That a hearing was had by the Board on said date at which time petitioners were present in person and represented by counsel, and at which testimony was taken and stipulations were entered into between counsel for the licensees and a deputy attorney general representing the Board. That at the conclusion of the hearing the said Board made findings that none of the matters presented was ground for revocation of the licenses, that all were issued by the Board after a resolution had been duly and regularly passed by it authorizing the giving of special examinations; that each of such examinations was given by a member of the Board from questions of the same type as used in connection with previous examinations, that each of the persons examined passed by more than a passing grade, that there had been no complaints as to their ability, knowledge or skill, that the Board had authorized special examinations in the past for special purposes, and that after the examinations were held the papers in each case, together with the results, had been forwarded to Sacramento, after which the grades were duly entered, and licenses were issued and signed by four or five members of the Board in regular session; that although some applicants were given num-

bers, nearly all examinations were given to individuals at individual times and sittings, and it would have been an idle act to designate the person by number, and that this requirement had been waived by the Board's resolution pursuant to powers given by section 4 of the Act giving the Board power to adopt rules and regulations for the performance of its work; and that the Board deemed it proper and necessary to give these special examinations in the manner given.

The court further found that prior to the adoption of the resolution of May 26, 1944, no notice or citation was given to any of the licensees nor was any complaint filed against any of them, and that in adopting such resolution the Board "acted specially and arbitrarily without due or any notice to the petitioners or any of them, and without any hearing, and that the action of said Board was an arbitrary exercise of its powers, and without due process of law." That no grounds exist for the purported cancellation of petitioners' licenses; that each of them is duly licensed and entitled to carry on his profession without interference; that each of them acted in good faith in taking the examination and in procuring his license, and that none of them was guilty of any deception, unprofessional conduct or fraud in securing his said license.

As conclusions of law the court decided that each of the petitioners was duly licensed; that prior to May 26, 1944, the Board had fully investigated the matters and things embraced in the resolution of May 26, 1944, had acted upon them, and by its said action the said matters and things had been passed upon and adjudicated—that they were *res judicata*, and the Board on May 26, 1944, was without power or authority to inquire into them. That none of the petitioners had been charged with any grounds set forth in the Act for revocation of license nor had there been any evidence of any such grounds. That each of said petitioners was entitled to continue to practice his profession and to the continuation of his license and any annual renewals thereof; and that petitioners were entitled to the peremptory writ as prayed.

On this appeal the Board contends that the rule made by the Board in 1942 authorizing special examinations was void, that as given the special examinations were void, that the subsequent approval of the licenses by the Board in January, 1943, was void, and that the action of the Board after the hearing in July, 1943, was void; but that its action in May, 1944, canceling the licenses without hearing or notice is valid and expressly authorized by the Act, that the principles of *res judicata* do not apply, nor can estoppel be relied upon as against said Board. It also asserts that a case of extrinsic fraud was made out by the record—though of what it consisted we are not advised.

The Chiropractic Law (Deering's Gen. Laws, Act 4811) provides for a board of five members. Section 4 gives such board power to adopt such rules and regulations as it may deem proper and necessary for the performance of its work, and to examine applicants and to issue and revoke licenses to practice chiropractic as therein provided. Section 5 provides the prerequisites for applications for licenses, and the minimum educational requirements to enable one to practice chiropractic in this state. Section 6 provides that the board shall meet "as a board of examiners" on stated days in January and July, and at such other times and places as may be found necessary for performance of their duties; that each applicant shall be designated by a number instead of name so that his identity will not be disclosed to the examiners until the papers are graded, and that all examinations shall be in writing. Section 9 provides for the licensing of persons holding licenses in other states. Section 10 provides that the board may revoke a license, or may cause a licensee's name to be removed from all records of licensed practitioners of chiropractic in this state, upon the following grounds: For "the employment of fraud or deception in applying for a license or in passing an examination" as provided in this Act; for practicing under a false or assumed name; for the personation of another practitioner of like or a different name; for the conviction of a crime involving moral turpitude, for habitual intemperance and for

advertising in a proscribed manner. Said section further provides that any licentiate against whom any of the foregoing grounds for revoking a license is presented to the board with a view to revoking his license, shall be furnished with a copy of the complaint, and shall have a hearing before the Board in person or by an attorney.

Appellants' contention that all of the proceedings prior to May, 1944, were void is based upon the premise that under the Act examinations for licenses must be given by the Board sitting as such, that the giving of an examination by a single member is unauthorized, and that even though such examinations may have been taken and passed by the applicants and the licenses issued thereon signed and approved by the members, that nevertheless, since it does not appear that the Board sitting as such prepared the questions, or that the Board or a majority of its members were present when the examinations were given, or that the papers presented by the examinees were graded by the Board as such; and because it does appear that the said applicants were not designated by number but their identity was known at the time the examinations were given the licensees, even though the questions asked were those which had previously been prepared by the Board, and the applicants passed the examinations with satisfactory grades, and were themselves without fault, that nevertheless their licenses may be summarily canceled by the Board, without notice or hearing.

It is repeatedly asserted by appellants in their brief and recited in the resolution of May 26, 1944, that most of those taking the examination paid to the Board member giving same the sum of \$100 for his personal use, and that the applications filed by eleven of them showed that the applicants did not possess the educational requirements specified in section 5 of the Act. But there is no evidence in the record to support these assertions. No one so testified, and the applications are not a part of the record before us. Also it was not so alleged in appellants' answer to the petition and, though it is so recited in the resolution of May, 1944, such recitation is not evidence of the fact.

While appellants assert that "where a power is given to a board it may not be exercised by the individual members of the board but must be performed by the board in an appropriate meeting properly convened, in the absence of express statutory authority permitting action by other means," and they cite several cases as authority for this statement, none of the cases cited is directly in point or holds that because a statute provides, as does the one before us, that the board "shall have power: * * * (c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided," it necessarily follows that each and every step taken in the giving of examinations must be made by the Board at a regularly convened meeting. Though this Act does not provide for the giving of examinations by individual members, it does not expressly prohibit such action if authorized by the Board at a regularly convened meeting. Appellants cite *Brown v. Grenier*, 73 N.H. 426, 62 A. 590, as the case "nearest in point on the facts." That was an equity suit to cancel a license issued by a board of dentistry. The examination was given by one member of a three member board, who exacted from the applicant an unauthorized fee. But in that case the opinion recites that the license was issued without the knowledge and approval of the other members, and the license was one that had previously been signed in blank by them for the convenience of the secretary of the board. Also in that case it does not appear that a previous hearing had been held, at which the license had been approved. The case is, therefore, plainly distinguishable from the one before us, not only because, as we have hereinbefore stated, there is no evidence in this record that the applicants paid anything to the members giving the examinations, and because the licenses which the Board purported to cancel were approved and signed by four or five of the members of the Board, after the examinations had been given and the examination papers were on file with it; also the licenses were thereafter specifically approved by the Board, after it examined the examination papers on file.

[1,2] However, assuming that the action of the Board in 1942 authorizing the giving of special examinations in the manner provided for in its resolution of 1942 was unauthorized by the Act, and that the provisions of said Act require that examinations be given by the Board as a unit and may not be given by but one member, and that the provisions of the statute requiring that each applicant shall be designated by number instead of by name so that his identity will not be known to the examiners until the papers are graded, was not complied with, and that the Board members did not sign the licenses at a regular meeting, the crucial question to be decided is whether the Board, having issued and signed the licenses in due form, and having approved their issuance by a resolution adopted in January, 1943, and having found after a full hearing and an examination of the papers in July, 1943, that there was no ground for canceling said licenses, had the power, without notice and without further charges or evidence, to reverse its previous action and cancel said licenses in May, 1944.

We are of the opinion that the Board was without such power. It must be conceded that no such power is granted by the Act itself, and that the section providing for the revocation of licenses by the Board specifies the grounds for such revocation, and also requires notice and a hearing on such charges as constitute grounds for revocation. That there were no complaints based upon such specified grounds, upon which the Board acted in May, 1944, and that no notice was given and no hearing had, must likewise be conceded. Furthermore, it has been held in numerous cases in this state that where a board has once acted upon a motion it has exhausted its power and may not thereafter reverse the decision previously made.

In *Olive Proration, etc., Committee v. Agricultural Prorate Commission*, 17 Cal. 2d 204, 109 P.2d 918, 921, petitioner sought a writ of mandate directing the respondents to annul two orders which purported to terminate the proration program theretofore established. It appeared that a petition for termination of such program had once been filed and a hearing had thereon after which respondent commission made its findings and order denying the petition.

Subsequently, without any further hearing or request therefor and without notice to or consent of any of the interested parties, it made an order rescinding its previous order denying the petition to terminate, and granted it. The court said that while ordinarily the doctrine of *res judicata* may not appropriately be applied to the exercise of such powers by administrative bodies, that "Where orders which relate to what may be rather broadly defined as individual rights are concerned, the question whether the administrative agency may reverse a particular determination depends upon the kind of power exercised in making the order and the terms of the statute under which the power was exercised. As to the first factor, almost without exception, courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of facts, may not thereafter be altered or modified. *Muncy v. Hughes*, 265 Ky. 588, 97 S.W.2d 546; *Little v. Board of Adjustment*, 195 N.C. 793, 143 S.E. 827; *Lilienthal v. City of Wyandotte*, 286 Mich. 604, 282 N.W. 837. As concisely stated by the New York Court of Appeals, 'officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them.' *People ex rel. Chase v. Wemple*, 144 N.Y. 478, 39 N.E. 397, 398. But if it is clear that the legislature intended that the agency should exercise a continuing jurisdiction with power to modify or alter its orders to conform to changing conditions, the doctrine of *res judicata* is not applicable. The determination depends upon the provisions of the particular statute. The orders here challenged were made in a proceeding authorized by the Agricultural Proration Act, *supra*, as a means whereby persons in an industry may exercise the rights given to them, as a group, to control the proration of their products. The statute contains no provision in express terms giving the commission authority to change its considered determination, made after a full hearing, and the fact that any order made by it may be reviewed in a judicial proceeding to be commenced within 30 days after its effective date is some evidence of legislative intention to the contrary. And since all administrative action must be

grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right so to do."

The court there referred to and quoted from *Heap v. City of Los Angeles*, 6 Cal. 2d 405, 407, 57 P.2d 1323, 1324, in which case the Civil Service Commission of Los Angeles adopted a motion rescinding the action of its predecessor commission which had sustained the discharge of a civil service employee, and then adopted a second motion ordering said employee restored to duty. The court held that under the city charter the jurisdiction of the commission was special and limited; that having determined the appellant's discharge following the required procedure, it had no jurisdiction to retry the question and make a different finding at a later time; that the charter gave no such power and it could not be implied. It said: "If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure." Also see *Cook v. Civil Service Comm.*, 160 Cal. 598, 117 P.2d 662; *Proud v. McGregor*, 9 Cal.2d 178, 70 P.2d 194; *Hoertkorn v. Sullivan*, 67 Cal.App.2d 151, 153 P.2d 367; *Pacheco v. Clark*, 44 Cal.App.2d 147, 153, 154, 112 P.2d 67. Compare *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 176, 177, 13 S.Ct. 271, 37 L.Ed. 123, 127, 128; *United States v. Stone*, 69 U.S. 525, 537, 17 L.Ed. 765, 767; *Lane v. Watts*, 234 U.S. 525, 540, 34 S.Ct. 965, 58 L.Ed. 1440, 1456; *Garfield v. United States*, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168.

[3] Appellants attempt to justify their action by distinguishing between the re-

vocation of a license and its "cancellation," thus impliedly conceding that the Board had no power to "revoke" except for grounds stated in section 10(a) of the act and after notice and hearing as therein provided. They argue that they had the power to "cancel" petitioners' licenses as they did because section 10(b) provides that at any time after two years following the "revocation or cancellation" of a license the board may reissue same. But it is not reasonable to assume that the legislature, after particularly specifying the grounds upon which a license can be revoked, intended by such mere use of the words "revocation or cancellation" to distinguish between the two and thus authorize an evasion of the provisions of section 10(a) by designating the process of annulment of the rights of a licensee as cancellation rather than revocation, especially since "cancel" is defined by Webster as meaning "to revoke or recall."

[4] Appellants also urge that the judgment of the trial court should be reversed because the principle of estoppel is not applicable to the Board—that, though nominally against the Board, the action is in fact against the state, against which estoppel may not be invoked. While in view of the decisions in *Olive Proration*, etc., *Committee v. Agricultural Prorate Commission*, *Heap v. City of Los Angeles*, and similar cases hereinbefore cited, a determination of this precise question is not necessary to this decision, it may be noted in passing that, as said in the recent case of *County of San Diego v. California Water, etc., Co.*, — Cal.App.2d —, 171 P.2d 926, 932, a "governmental agency may be estopped as right and justice may require, where the act or contract relied on to create the estoppel was within its corporate powers, although the method of exercising the power was irregular or unauthorized. 31 C.J.S., Estoppel, § 144, p. 428, Note 78; *Miller v. McKinnon*, 20 Cal.2d 83, 91, 124 P.2d 34, 140 A.L.R. 570; *Greene County v. Tennessee Eastern Electric Co.*, 6 Cir., 40 F.2d 184; 7 Cal.Jur., p. 515, sec. 88."

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

76 Cal.App.2d 317

PEOPLE v. MARTIN.

Cr. 4006.

District Court of Appeal, Second District,

Division 2, California.

Oct. 2, 1946.

1. Poisons ⇐9

In prosecution for possessing marihuana, state was bound to prove, not only that defendant had at least constructive possession of narcotic, but that he knowingly possessed it. Health and Safety Code, § 11160.

2. Poisons ⇐4

To warrant conviction of possessing narcotic found in vehicle possessed and used by defendant, jury must be convinced that defendant knew of narcotic's presence therein. Health and Safety Code, § 11160.

3. Criminal law ⇐1173(2)

Refusal of defendant's requested instruction to find that he did not have possession of marihuana, as charged, if he did not know of its presence in his automobile, was prejudicial error, in absence of any instruction that jury must be satisfied of defendant's knowledge of marihuana's presence in automobile in order to convict. Health and Safety Code, § 11160.

4. Criminal Law ⇐1023(5)

An appeal from jury's verdict of conviction is unauthorized and must be dismissed. Penal Code, § 1237.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Walter I. Martin, Jr., was convicted of possessing a package of marihuana, and he appeals.

Reversed.

Richard C. Fildew, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant having been convicted of having in his possession a package of marihuana* (cannabis sativa) in violation of section 11160, Health and Safety Code, now demands a reversal of the judgment and the order denying his motion for a new trial on the grounds of (1) insufficiency of the evidence, (2) an erroneous instruction to the jury and (3) the rejection of proper instructions.

The evidence shows that appellant, an attorney of Bakersfield, accompanied by one Adaline Voss, departed in a blue sedan from that city on August 14, 1945, for San Diego which they reached on the same day. Having continued their sojourn there until August 20, during which they visited Tia Juana, they returned to Los Angeles on the latter date, arriving about 8 p.m. On the way they partook of alcoholic beverages and were engaged in a quarrel as they drove into the heart of the city. The woman became angry and asked leave to alight. Appellant vainly attempted to pacify her but immediately after he had parked the car she departed and he testified that he had never seen her again. After some further tippling at a bar east of Main street appellant returned to his sedan which stood near the curb at 1323 Channing street. He imbibed more tequilla as he waited and finally fell asleep. About 10 o'clock the witness Valdez, who resided nearby, with two companions observed appellant sitting on the right side slumped over a portable radio and other things on the driver's seat. Having returned about 10:30 from a bus station whence his friends had departed, Valdez attempted to awaken appellant who ordered him to leave. The latter registered at a hotel on West Fifth street about 2:30 o'clock the same night and there remained for four days.

At 3:00 a.m. of the 21st officers Splane and Muzak observed the blue sedan stand-

* For the several authorities for the various spellings of this word, see Peo-

ple v. Savage, 64 Cal.App.2d 314, 148 P. 2d 654.

ing at the Channing street address, examined its interior, noticed the suit cases, clothing, radio and wine bottle on the front seat, and after searching found and inspected a brown package containing a pound of marihuana on the floor under the right seat. After restoring the package to the place where they had found it the officers parked their own car about 400 feet up the street and watched the sedan and its contraband until 6 a.m. when Valdez, on his way to work, after observing appellant's absence from the open sedan, inspected its interior, discovered the brown package, and for their better protection, placed all the articles including the marihuana on the back seat. As he was about to raise the windows the police interrupted and impounded the car.

[1,2] At the trial appellant admitted ownership of the sedan and of many of the articles of personal property found therein but he denied all knowledge of the narcotic. Under the facts established and appellant's denial of knowledge of the marihuana, two issues were presented to the trial court. Not only was it incumbent upon respondent to prove that appellant had at least constructive possession of the narcotic but also that he knowingly possessed it. Whether the facts are sufficient to support a verdict of appellant's guilt under proper instructions, nothing herein contained is to be construed as an appraisal of the proof if complete, correct instructions as to the law had been read to the jury. It is sufficient here to record that when a crime is tried to a jury a plethora of evidence of the guilt of the accused could compensate for a want of proper guidance with respect to the substantive law. From the several decisions long followed (*People v. Sinclair*, 129 Cal.App. 320, 322, 19 P.2d 23; *People v. Belli*, 127 Cal.App. 269, 271, 15 P.2d 809; *People v. Randolph*, 133 Cal.App. 192, 196, 23 P.2d 777; *People v. Gallagher*, 12 Cal. App.2d 434, 436, 55 P.2d 889; *People v. Noland*, 61 Cal.App.2d 364, 366, 143 P.2d 86; *People v. Bassett*, 68 Cal.App.2d 241, 246, 156 P.2d 457), the Supreme Court has recently derived the rule that the jury must be convinced that one accused of possessing a narcotic found in a cache on his premises or within reach of his habitation must have

knowledge of the presence of such narcotic and that such knowledge is the essence of the crime of possession under the Narcotic Act. *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433. That the same rule should apply to the possessor and user of a vehicle is established by sound reason and by the recent decision of *People v. Bledsoe*, 75 Cal. App.2d 862, 171 P.2d 950.

[3] It was therefore incumbent upon the court below to advise the jury that they should determine whether appellant knowingly possessed the narcotic found in his automobile during his absence therefrom. This it failed to do despite appellant's request that the following instruction be read, to wit:

"You are instructed that one of the elements of possession is knowledge of the defendant of the presence of marihuana in his automobile. If you believe that the defendant did not know of the presence of marihuana in his automobile, then you must find that he did not have possession of it, as charged in the information."

There was no instruction given which contained a direction that the jury must be satisfied that defendant had knowledge of the presence of the marihuana in his automobile. It was therefore prejudicial to refuse an instruction which would have required the jury to find that the accused knew that the forbidden weed was in his car at the time he departed therefrom prior to 3 a. m. on August 21, 1945. The error becomes accentuated when it is recalled that appellant had transported a guest under whose portion of the front seat the marihuana was found, that the automobile was left standing open on a public street for sometime prior to its discovery by the officers and that appellant denied knowing of the existence of the narcotic. Under such circumstances the failure to instruct with reference to appellant's knowledge may have misled the jury to conclude that appellant's knowledge of the presence of the marihuana was not an essential factor to the proof of his guilt or that everything found in his car was conclusively presumed to have been there with appellant's knowledge. To require by instruction the triers of fact to determine as a preliminary to

finding his guilt that the accused *knowingly* possessed a narcotic does not mean that they must find that he had knowledge of the unlawfulness of his act, but such instruction is merely to induce a finding of "the element of knowledge in the sense of defendant's awareness of the presence of the marihuana" in the latter's automobile. *People v. Gory*, 28 Cal.2d at page 456, 170 P.2d at page 437.

[4] The appeal from the verdict being without authority (Penal Code, § 1237) is dismissed.

The judgment and the order denying defendant's motion for a new trial are reversed.

McCOMB and WILSON, JJ., concur.



76 Cal.App.2d 222

**LINCKE v. MUTUAL BENEFIT HEALTH
& ACCIDENT ASS'N.**

Civ. 3420.

District Court of Appeal, Fourth District,
California.

Sept. 24, 1946.

1. Insurance ⇨146(3)

A health and accident policy, presenting uncertainties as to amounts and due dates of premiums and dates to which payment thereof would extend insurance, should be liberally construed in insured's favor.

2. Insurance ⇨372

An insurer may waive terms inserted in policy for insurer's benefit.

3. Insurance ⇨665(8)

Evidence sustained finding that insurer waived strict compliance with terms of health and accident policy as to payment of premiums when due by accepting past due premiums over period of years and hence was estopped from asserting that policy lapsed because of non-payment of premium

on due date before insured's accidental death.

4. Insurance ⇨539(1)

Failure of beneficiary under accident policy to notify insurer of insured's accidental death until over two months thereafter did not bar beneficiary's claim under policy, in view of evidence that notice of death was given as soon as was reasonably possible, as authorized by policy.

5. Insurance ⇨559(2)

An insurer, denying all liability under accident policy, waived policy conditions as to time for notice of insured's death and proof of disability.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Jack R. Lincke against the Mutual Benefit Health & Accident Association on a health and accident insurance policy. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Edward Haley, of Los Angeles, for appellant.

George R. Maury, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal by defendant from a judgment in the sum of \$1661.59 on a health and accident policy of insurance issued to Mabel R. Medin, the mother of plaintiff. Plaintiff was named as the beneficiary in the policy.

Mrs. Medin was killed in an automobile accident on July 2, 1942. Defendant maintains that the policy lapsed on July 1, 1942, because of the nonpayment of the premium. Plaintiff argues that the insurer had waived strict compliance with the terms of the contract in respect to the payment of premiums when due (if a due date could be determined) by accepting the premiums after they were due over a period of years and therefore is estopped to assert that the policy had lapsed. The books of the insurer show only three premiums paid on time between the one due on February 1, 1939,

paid February 7, 1939, and the one due on April 1, 1942, and paid on that date. The other payments were made from three to 20 days late. Except in one instance no application for reinstatement of the policy was requested by the insurer prior to the death of the insured and no notice of forfeiture nor a requirement of prompt payment of premiums was given.

The policy was dated October 7, 1937, and an annual premium was paid for the first year. Thereafter premiums were paid for quarterly periods, except five made in 1940 on a monthly basis, in accordance with an option contained in a rider dated June 13, 1940. From the official receipts in the record we might assume the policy was delivered and went into effect on November 1, 1937, were it not for the finding "that at all times since that time (October 7, 1937) to and including the 2nd day of July, 1942, said policy of insurance has been in full force and effect", there being no evidence of the date of delivery other than the date of the policy. See Secs. 1627 and 1055, Civ.Code. In its opening brief appellant admits the policy "became effective October 7, 1937".

The premium for the first year was \$39.50. Under the heading in the policy, "Premium Reduction Feature", we find the following: "The Association will undertake to reduce the amount of the second and subsequent annual renewal premiums not to exceed the amount of \$10.50, at the time the annual renewal premium is due and paid."

Under the heading, "Additional Provisions", the following appears:

"(b) Strict compliance on the part of the Insured and beneficiary with all of the provisions and agreements of this policy, and the application signed by the Insured, is a condition precedent to recovery and any failure in this respect shall forfeit to the Association all right to any indemnity.

"(c) The term of this policy begins at 12 o'clock noon, Standard Time, on date of delivery to and acceptance by the Insured against accident and on the thirty-first day thereafter against disease and ends at 12 o'clock noon at date any renewal is due
* * *

"This policy may be renewed from term to term by the payment in advance, and acceptance by the Association, of the stipulated premium. The mailing of notice to the Insured at least fifteen days prior to the due date shall constitute legal notice of dues, and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for an additional premium."

In the "Standard Provisions" of the policy is the following:

"3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of the premium by the Association or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

We are pointed to no provision of the policy permitting payment of premiums quarterly, but as they were paid and accepted on that basis during the greater part of the life of the policy, we assume it was based on some mutual agreement as no question was raised by either party. Nor is there anything to indicate the amount of the quarterly premiums except the fact that \$7.75 was paid by the insured and accepted by the association each quarter, except during the time when the annual and monthly payments were made.

It appears that, except during the time that monthly payments were made, defendant regularly sent Mrs. Medin notices of the due date of the next premium as such date was construed by it. The first in point of time contains the number of the policy followed by the figures "7.75" and the name and address of the insured together with certain numbers. Then follows, "Notice of Premium Due Jan. 1, 1941. There is no grace period. Pay this premium to Mr. E. S. Hall, Res. Vice-President," followed by his address and instructions as to the method of payment. Other notices are in similar form, except as to dates.

The receipts for premiums paid are similar in form (except as to the different

dates) and contain the following: "Payment of this premium receipted for, if made on or before the date to which premiums have already been paid, keeps your policy in continuous effect, and if made after that date, reinstates the policy on date of this receipt, as provided in policy, until 12 o'clock noon, standard time, 11-1-38, at which time another premium will be due."

Defendant did not learn of the death of Mrs. Medin until early in September, 1942. Two letters from it were found among her effects. The first letter, dated July 17, 1942, contains the salutation, "Dear Policyholder" and the following: "Until you pay the premium that was due the first of this month, your policy with us cannot give you the protection you need, or provide an emergency income in case of disability. * * * Just sign the enclosed reinstatement slip and return it with the premium shown."

Attached to the letter was an application for reinstatement showing a premium due of \$7.75 and which contained the following: "Not having received your payment due July 1, 1942, as per our notice, your insurance is in suspension until your payment is received and accepted at the Association's office as provided by the policy. Kindly fill out the blank on the opposite side and return it with your payment at once when your reinstatement will have IMMEDIATE ATTENTION."

The second letter was dated July 31, 1942. It also contained the salutation, "Dear Policyholder" and urged Mrs. Medin to "complete and return the attached slip with your remittance today." The slip was a "Special Application for Reinstatement" and on the back, printed in bold type was the following: "Payment of Regular Premium Covers All Costs to December 1, 1942," thus apparently waiving payment of the premium for July and offering to extend the insurance for four months instead of the usual three if the \$7.75 was paid before September 12, 1942. Of course, as Mrs. Medin was dead she could not accept the offer.

It is clear from these letters that defendant did not regard the policy forfeited and cancelled and all rights under it termi-

nated by reason of the failure to pay the premium due on July 1, 1942. The salutation, "Dear Policyholder" is significant.

In *Page v. Washington Mutual Life Ass'n*, 20 Cal.2d 234, 125 P.2d 20, 23, the defendant maintained that the policy of life insurance had lapsed by reason of nonpayment of premiums when due. The court said:

"The court found that the policy had not lapsed and that strict performance with respect to time of payment of premiums had been waived. Appellant contends the policy lapsed for failure to pay premiums.

"The general principles with relation to forfeiture of the benefits under insurance policies have been recently stated by this court. Forfeitures, particularly in insurance contracts, are not favored. *Bittinger v. New York Life Ins. Co.*, 17 Cal.2d 834, 112 Pac.2d 621. And if reasonably possible in light of the circumstances, the courts will determine that a forfeiture has not occurred or that a waiver or estoppel exists. *Knarston v. Manhattan Life Ins. Co.*, 124 Cal. 74, 56 Pa. 773; *Huber v. New York Life Ins. Co.*, 18 Cal.App.2d 269, 63 P.2d 318.

"* * * It is clear that a past course of conduct or acceptance by the insurer of payments of premiums after the grace period may establish a waiver by the insurer of the right to declare a forfeiture for failure to pay premiums exactly at the stipulated time, or the insurer may be said to be estopped to assert the forfeiture where the insured may be said to have been reasonably led to believe that payments made within a reasonable time after the grace period would be acceptable. *Nelson v. National Guaranty Life Co.*, 131 Cal. App. 669, 21 P.2d 1022; *Vinther v. Sunset Mut. Life Ins. Co.*, 11 Cal.App.2d 118, 53 P.2d 182; *Turner v. Redwood Mutual Life Ass'n [of Fresno]*, 13 Cal.App.2d 573, 57 P.2d 222. * * *

The insurer sought to collect the premium after default. The court continued:

"That communication may fairly be said to have been the commencement of negotiations with reference to his policy and the payment of premiums. The rule is thus stated in *Spiegelman v. Metropolitan Life*

Ins. Co., 21 Cal.App.2d 299, 301, 68 P.2d 1006, 1007:

"Nevertheless, it is well settled that, when an insurance company, after knowledge of any default for which it might terminate a policy, enters into negotiations which recognize its continued validity, the right to claim a forfeiture for such default is waived; and a waiver may be implied from the acts of the parties. *Murray v. Home Ben. Life Ass'n*, 90 Cal. 402, 27 P. 302, 25 Am.St.Rep. 133; *Knarston v. Manhattan Life Ins. Co.*, 124 Cal. 74, 56 P. 773; *Faris v. American Nat. Assur. Co.*, 44 Cal. App. 48, 185 P. 1035." See, also, *Bryson v. National Travelers Casualty Co.*, 206 Cal. 475, 274 P. 957."

As we have observed, the trial court found the policy in full force and effect from its date to and including July 2, 1942. Defendant argues that this finding is contrary to the terms of the policy already quoted, which it maintains resulted in the policy lapsing and becoming ineffective during the period in which a premium remained unpaid. In speaking on a similar question in *Kennedy v. Occidental Life Ins. Co.*, 18 Cal.2d 627, 117 P.2d 3, 5, the Supreme Court held: "By the terms of the policy the insured is given a right to reinstatement after lapse upon compliance with certain conditions. During the period in which reinstatement is possible the policy is not void but merely suspended. The right to revive the policy by reinstatement is a valuable contractual right, the consideration for which is found in the premium paid and to be paid under the original policy, and the insurer has no arbitrary or discretionary right to refuse reinstatement if all the conditions therefor have been complied with."

The trial court found in detail the several dates on which premiums became due under the terms of the policy, commencing with February 1, 1939, and the exact dates on which payments had been made which, except in three instances, were made and were accepted without objection or comment after the due dates. It was further found: "That as a direct result, and by reason of such conduct and acquiescence in the late payment of said quarterly and

monthly premiums on the part of said defendant, said Mabel R. Medin and plaintiff and each of them relied thereon and were led to believe and did believe that strict compliance as to time of payment of premiums had been waived and payment of said quarterly and monthly premiums had been waived and payment of said quarterly and monthly premiums made within a reasonable time after the due date as fixed by said policy would be received in payment of said quarterly and monthly premiums and that said policy would remain in full force and effect until at least notice was given by defendant and received by said Mabel R. Medin and plaintiff requiring strict compliance with the terms of said policy of insurance. That no such notice requiring strict compliance as to time of premium payments was ever given by defendant or received by said insured or plaintiff."

The case of *Vinther v. Sunset Mutual Life Ins. Co.*, 11 Cal.App.2d 118, 53 P.2d 182, 183, involved liability under a health and accident policy which made no provision for a period of grace and under which payments of all premiums except the first had been made when overdue from four to forty-eight days. In holding the insurer liable on the policy it was said:

"The primary question involved is, whether the facts detailed establish a waiver by the insurer of that clause in its contract of insurance requiring prompt payment. *Nelson v. National Guaranty Life Co.*, 131 Cal.App. 669, 21 P.2d 1022 (hearing denied by Supreme Court), is directly in point. In the *Nelson* case, speaking with reference to similar facts, the court said, 131 Cal.App. 669 at page 672, 21 P.2d 1022, 1023: 'Had defendant, by its course of dealing as shown from the facts stated, waived the forfeiture? The test should be, whether by such conduct, the insured had been led to believe that payment made within a reasonable time after the 15th would be received in discharge of the installment and the policy would continue in force, and had acted accordingly, and that until some notice was given, other and different and more specific than those referred to, the forfeiture would not be insisted upon.

"The theory of defendant is that as a matter of law the lapse under the contract was brought about by default of payment, and that subsequent receipt of the payment worked a reinstatement. The notices to some extent were worded to create that impression. While the policy provided that, if a lapse occurred on the 15th the contract was ended and reinstatement could only be had as provided in the policy, as quoted above, yet in the many lapses no reinstatement had been made as required by the policy. Of course, all these provisions are for the benefit of the company and can be waived by it, and the fair inference was that, as proof of health had never been required, the payments were being accepted as continuation of the policy and not reinstatement. Such understanding by the insured operated as a waiver of all the provisions relating to forfeiture until specific notice should be given.

"The contract, if those forfeiture provisions were waived, was in that class where nonpayment of an installment would not work a forfeiture, and where the law permits payments to be made until definite notice is given that failure so to do will work a forfeiture. The result of this course of reasoning would seem to be that this contract was in force at the time of death, whether payment was in fact made or not." (See, also, Page v. Washington Mutual Life Ins. Co., supra; Turner v. Redwood Mutual Life Ass'n of Fresno, 13 Cal.App.2d 573, 57 P.2d 222; Gleed v. Lincoln National Life Ins. Co., 65 Cal.App.2d 213, 150 P.2d 484.)

Defendant cites and relies on the following authorities as supporting its contention that the policy had lapsed and had become ineffective under its terms by reason of the failure to pay the premium due on July 1, 1942: Goldstone v. Columbia Life & Trust Co., 33 Cal.App. 119, 164 P. 416; Boyer v. United States Fidelity & Guaranty Co., 206 Cal. 273, 274 P. 57; Methvin v. Fidelity Mutual Life Ass'n, 129 Cal. 251, 61 P. 1112; Blackburn v. Home Life Ins. Co. of New York, 19 Cal.2d 226, 120 P.2d 31; Jackson v. Washington Nat. Ins. Co., 13 Cal.App.2d 254, 56 P.2d 1264; Carabelli v. Mountain States Life Ins. Co., 8 Cal. App.2d 115, 46 P.2d 1004; Frysh v. Com-

mmercial Casualty Ins. Co., of Newark, N. J., 214 Wis. 453, 253 N.W. 184; Capehart v. Mutual Benefit Health & Accident Ass'n, 111 W.Va. 317, 161 S.E. 609; Smith v. Massachusetts Accident Co., 143 Misc. 227, 256 N.Y.S. 255; Richardson v. American Nat. Ins. Co., 18 La.App. 468, 137 So. 370; Denton v. Provident Life & Acc. Ins. Co., 238 Ky. 26, 36 S.W.2d 657.)

The majority of the California cases cited hold that the parties to an insurance policy may agree on the terms of their contract, subject to statutory limitations, and that the "contract is to be interpreted according to the intention of the parties as expressed in the instrument" (Blackburn v. Home Life Ins. Co. of New York, supra [19 Cal.2d 226, 120 P.2d 32]) and do not involve the question of waiver which confronts us here.

[1] Carabelli v. Mountain States Life Ins. Co., supra [8 Cal.App.2d 115, 46 P.2d 1006], is to the same effect and also holds that "the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity." The policy before us presents uncertainties. The amounts of the quarterly premiums and the dates to which payment of such premiums would extend the insurance cannot be determined from the policy. We have gleaned a majority of the facts we have stated on this subject from the notices and receipts found in the effects of the insured and not from the policy. Further, if, as admitted by defendant, the policy went into effect on October 7, 1937, then subsequent premiums fell due on the seventh and not on the first of succeeding months as was assumed by both the insurer and the insured. There are sufficient uncertainties in the contract to permit the application here of the rule of liberal construction in favor of the insured.

The Carabelli case involved an accident policy which was held to have lapsed because of nonpayment of a premium. A reading of that case demonstrates the differences in the two contracts of insurance so that it cannot be controlling here.

[2] There seems to be no need to extend this opinion by reviewing the cases cited from other jurisdictions as the rule that an

insurer may waive the terms of a policy inserted for its benefit seems to be established here.

[3] We have concluded that the finding of such waiver in the instant case is sustained by the record and is controlling.

[4, 5] Defendant points to a paragraph of the policy which requires immediate notice of the death of the insured and another which provides in part that "Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible." As the insurer did not receive notice of the death of the insured until more than two months had passed, it is argued that the claim of the beneficiary is barred.

There is evidence in the record upon which the trial judge found that the notice of death was given as soon as was reasonably possible. Further, as defendant denied all liability under the policy it "waived these conditions relating to time of notice and to proof of the disability. *Dietlin v. General American Life Ins. Co.*, 4 Cal.2d 336, 350, 49 P.2d 590." *Trousdell v. Equitable Life Assurance Society of the United States*, 55 Cal.App.2d 74, 130 P.2d 173, 179, 990.

The judgment is affirmed.

GRIFFIN, Acting P. J., concurs.



BOWMAN v. BOWMAN.
Civ. 15321.

District Court of Appeal, Second District,
Division 1, California.

Sept. 27, 1946.

Rehearing Denied Oct. 22, 1946.

Hearing Granted Nov. 25, 1946.

1. Divorce ⇨246

An interlocutory divorce judgment ordering that husband pay certain sums "for the benefit of plaintiff" wife was

properly stricken where complaint failed to ask any allowance for wife, and husband permitted a default to be entered, and at hearing of default divorce the wife specifically stated that she was not asking for alimony, and husband's motion to strike was timely filed within six months after entry of interlocutory judgment. Code Civ.Proc. §§ 473, 580.

2. Divorce ⇨243

Interlocutory and final divorce judgments should not provide for payments directly to third persons not parties to divorce action, notwithstanding that such payments were for benefit of wife. Civ. Code, § 137.5.

3. Divorce ⇨312

A decision of reviewing court directing that the phrase "for the benefit of plaintiff and said minor child", in connection with payments which defendant was ordered to make, should be stricken from interlocutory and final divorce judgments as not within complaint which did not demand alimony for wife, did not invade trial court's power to provide for support of the minor child. Code Civ.Proc. §§ 473, 580.

Appeals from Superior Court, Los Angeles County; John Beardsley, Judge.

Divorce action by Muriel G. Bowman against Harry P. Bowman. From an order attempting to restore certain provisions of an interlocutory judgment of divorce which had been previously stricken on defendant's motion and from a final judgment containing the provisions originally stricken from the interlocutory judgment, the defendant appeals.

Order and judgment reversed with directions.

Vincent Scott, of Los Angeles, for appellant.

Nicholas & Davis, of Los Angeles (Harry R. Roberts, of Los Angeles, of counsel), for respondent.

DORAN, Justice.

There are two appeals here involved, the first being an appeal from an order

attempting to restore certain provisions of an interlocutory judgment of divorce which had been previously stricken on appellant's motion; the second appeal being from a final judgment containing the provisions originally stricken from the interlocutory judgment. The action for divorce, commenced by respondent on April 13, 1944, was based on an allegation of cruelty set forth in general terms. The complaint contained no prayer for, nor allegation concerning alimony or support for the plaintiff wife, but did allege that there was a minor child in plaintiff's custody, and prayed that defendant "be ordered to pay for the support of said minor child, Donald Michael Bowman, the sum of \$60.00 per month." (*Italics added.*) The complaint further alleged that "the parties hereto are indebted to the Los Angeles Teachers Credit Union in the sum of \$694.16, being the balance due upon a loan, with monthly payments thereon at the rate of \$43.00 per month," and prayed that the defendant be ordered to pay this amount "to the Los Angeles Teachers Credit Union," together with a further sum of \$54.05 per month "to the Syndicate Mortgage Company," as mortgage payments on a house and lot previously held by the parties as joint tenants, and in which the appellant had conveyed his interest to the respondent. Community property, consisting of two automobiles, household furniture, and appellant's law library and furniture was alleged, with a prayer for the distribution thereof. Attorney fees and costs were also prayed for. Appellant was personally served with process, and default entered on May 17, 1944. Thereafter, on June 6, 1944, the cause came on to be heard as a default divorce and at such hearing the trial court inquired: "You are not asking for alimony for yourself?", to which the respondent replied, "No, sir." The interlocutory divorce then granted, provided for the distribution of the community property as prayed, awarded the residence to respondent as her separate property, granted custody of the child to respondent, and then ordered:

"3. That defendant pay to the Court Trustee, *for the benefit of plaintiff* and

said minor child, the following amounts each month, to wit:

"(a) The sum of \$50.00 payable \$25.00 on the first day of the month, and \$25.00 on the fifteenth day of the month, for the support of said minor child, Donald Michael Bowman;

"(b) The sum of \$54.05 on the first day of each month for payment to Syndicate Mortgage Company to be applied on the mortgage on the home place of the parties, until said Loan shall have been paid in full;

"(c) The sum of \$43.00 on the first day of each month for payment to Los Angeles Teachers Credit Union to be applied on the promissory note payable to said Teachers Credit Union until it has been paid in full." (*Italics added.*)

The appellant was served with notice of said interlocutory judgment on June 15, 1944, and on November 14, 1944, appellant filed a motion under Section 473 of the Code of Civil Procedure to "Open, vacate or modify" such judgment, upon the ground that it "was taken against said defendant through his mistake, inadvertence, surprise or excusable neglect; and further, that * * * (it) is erroneous to the extent of awarding plaintiff alimony for her benefit, maintenance and support not supported by appropriate allegations * * * and is also in excess thereof contrary to the provisions of Section 580 of the Code of Civil Procedure * * * relating to the entry of default judgments, so that this defendant was not warned of the risk in failing to answer the above entitled cause." This motion was granted on December 1, 1944, as follows: "The words 'for the benefit of plaintiff and said minor child' * * * are stricken. Motion is otherwise denied." No appeal was taken from this order. Appellant did not make the specified payments to the court trustee for the Syndicate Mortgage Company and the Los Angeles Teachers Credit Union, and on February 13, 1945 was cited for contempt, the following order being made: "This hearing is on contempt for non-payment by defendant of orders to pay to third parties who are not parties to the action. * * * The contempt is dismissed." No appeal was taken from this order.

On May 28, 1945, the respondent wife made a motion "To vacate and/or modify certain orders modifying the interlocutory judgment," and at the hearing thereof the decision was "that the order as originally set forth in the Interlocutory Decree of Divorce herein be restored as the order now in effect. Final Judgment of Divorce is signed and filed." The effect of this order, now appealed from, was that the words "for the benefit of plaintiff and said minor child" which on December 1, 1944, had been stricken from the interlocutory judgment, were restored, and that said provision was incorporated in the final judgment of divorce, from which final judgment the husband also appeals.

The first point presented by appellant's brief is that "The complaint containing no allegation supporting an award of alimony, and the prayer of the complaint not demanding that alimony be paid to respondent, the court was in error in awarding alimony in this default action." In this connection appellant cites Section 580 of the Code of Civil Procedure which provides that "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." The respondent's brief apparently does not take issue with this rule, but contends, first, that the relief granted did not exceed that prayed for in the complaint; second, that "even if the default interlocutory judgment contained an outright award of alimony, and no demand for alimony was made in the complaint, * * * such an award would not be void on its face, but merely voidable on direct attack on the judgment, and in the absence of an appeal, * * * became res adjudicata and immune from collateral attack," and third, that "where issues are tendered in the pleadings in a divorce action concerning the property rights of the parties and a prayer is made for an assignment of community property, a default interlocutory judgment adjudicating those property rights becomes final and res adjudicata in the same manner as an ordinary judgment."

It is impossible to agree with respondent's conclusion that "the interlocutory judgment as originally entered, did not

deviate from the demands made in the complaint." Not only did the complaint fail to ask any allowance for the wife or in any way mention such matter, but at the hearing of the default divorce complainant specifically stated that she was not asking for alimony. In this state of the record which placed the matter of a wife's allowance clearly outside the issues presented, and notwithstanding respondent's express disclaimer of any alimony, the trial court nevertheless made an order in favor of the wife, and adjudged that appellant should "pay to the Court Trustee, *for the benefit of plaintiff* and said minor child" (italics added) certain sums of money. Two of the specified sums, moreover, were to be paid to the Syndicate Mortgage Company and to the Los Angeles Teachers Credit Union, persons who were not parties to the divorce action. To uphold such a default judgment would be to sanction a direct violation of Section 580 of the Code of Civil Procedure which provides that where there is no answer, "The relief granted to the plaintiff * * * cannot exceed that which he shall have demanded in his complaint." The appellant husband had permitted a default to be entered under what was certainly a justifiable belief that he would not be ordered to pay any allowance to the respondent wife.

In respect to respondent's argument that the award in question was not "void on its face but merely voidable on direct attack on the judgment," it may be noted that the appellant did make such an attack by way of motion and the court struck out the odious words as requested. The present problem is in respect to a later order, entered by a different judge, which attempted to restore the objectionable phrase to the interlocutory and final judgments. No case presented by respondent furnishes any authority for such a contradictory and dangerous procedure, and no argument, specious or otherwise, should be permitted to prevail over the plain implications of such a situation. If a defendant in a default divorce case may not depend upon the precise allegations and statements of the plaintiff that no alimony is sought, then all security vanishes and a defendant can only secure adequate protection by filing an

answer and appearing in court. Such is obviously not the law, and Section 580 of the Code of Civil Procedure must be given its full effect in all cases. The respondent's contention that the original alimony award might be sustained on the theory that the trial court had authority to adjudicate community property rights of the parties is beside the point; the present controversy does not involve community property. As said in the case of *Peck v. Peck*, 52 Cal.App.2d 792, 793, 127 P.2d 94, 95, "There being no prayer for it in the cross-complaint, the trial court was without authority to grant any support money to the defendant and cross-complainant."

[1, 2] It is insisted in respondent's brief that the appellant's motion to vacate or modify the interlocutory judgment as to the alimony provisions was filed too late, since it was not made within six months of the entry of the *default* of the appellant. The record discloses, however, that the interlocutory divorce judgment was entered on June 7, 1944, and that appellant's motion was filed on November 24, 1944, thus complying with Section 473 of the Code of Civil Procedure which provides that the court may "relieve a party * * * from a judgment, order, or other proceeding," but specifies that application therefor "must be made within a reasonable time, in no case exceeding six months, *after such judgment, order or proceeding was taken.*" (*Italics added.*) In this case it was the interlocutory judgment, and not the mere default, from which the appellant sought relief, and the motion, made well within six months from the entry of the judgment, was timely. That the matter was properly presented by such a motion, was decided in *Parker v. Parker*, 203 Cal. 787, 792, 266 P. 283, 285, where the court said that the cases "uniformly hold that the granting of such excessive relief is erroneous, from which relief may be granted under section 473 of the Code of Civil Procedure or which may be corrected by appeal, either by a reversal or by a modification of the judgment." In the present case, the original order "for the benefit of plaintiff" should never have been made, considering the state of the

pleadings and respondent's waiver of alimony such provision was properly stricken, and another branch of the Superior Court had no authority to restore the objectionable phrase to the interlocutory and final judgments after it had previously been stricken. Furthermore, no order should have been made for the payment of sums of money to persons not parties to the action. Respondent's assertion that this defect is cured by the fact that the judgment runs "for the benefit of plaintiff and said minor child," is not persuasive. Without authority to grant alimony "for the benefit of plaintiff", as hereinbefore set forth, the trial court made a bad matter worse by ordering appellant to make payments to the court trustee "for payment to" the Syndicate Mortgage Company and the Los Angeles Teachers Credit Union. Previous to the adoption of Section 137.5 of the Civil Code in 1937, authorizing payment of attorney fees directly to the attorney, it was uniformly held that such an order could not be made (*Keck v. Keck*, 219 Cal. 316, 26 P.2d 300) for the reason that the "attorney was not a party to the action." So also in *Walters v. Superior Court*, 129 Cal.App. 19, 18 P.2d 343, it was held that the trial court did not have authority to direct a guardian to pay money to certain creditors who were not parties to the action which had been compromised by the guardian.

[3] For the reasons heretofore given, the order attempting to restore the phrase "for the benefit of plaintiff and said minor child," previously stricken from the interlocutory judgment, is reversed. The final judgment of divorce containing the same provisions, is likewise reversed with directions to enter a final judgment of divorce omitting such phrase. The judgment herein, however, is not to be understood as invading the power of the trial court to make provision in the judgment for the support of minors in a divorce action. That portion of the judgment is not intended to be affected.

YORK, P. J., and WHITE, J., concur.

Hearing granted; SCHAUER, J., not participating.

70 Cal.App.2d 432

STERNALL v. STRAND, Sheriff, et al.
Civ. 3605.

District Court of Appeal, Fourth District,
California.

Oct. 10, 1946.

Rehearing Denied Nov. 1, 1946.

Hearing Denied Dec. 5, 1946.

1. Municipal corporations Ⓒ592(1)

Where the state has not attempted to cover entire field by criminal statutes, local regulations in the form of additional requirements will be upheld if reasonable and not in conflict with the statutes.

2. Counties Ⓒ21½

County ordinance making unlawful the possession of any pinball or marble machine or device as defined in ordinance was not invalid on ground that it was a duplication of statutes forbidding only the operation or use of such machines or devices. Pen. Code, §§ 330a, 335a.

3. Counties Ⓒ21½

County ordinance forbidding and making illegal the mere possession of described coin-operated pinball and marble machines, or devices, was not an improper exercise of the police power on ground of unreasonableness, with respect to automatic pay-off machines, though the machines were partially dismantled.

4. Municipal corporations Ⓒ63(2)

A court will not hold an ordinance void as unreasonable where there is room for a fair difference of opinion on the question, since the question as to the reasonableness of the ordinance is primarily one for legislative authority.

5. Counties Ⓒ21½

County ordinance forbidding and making illegal the mere possession of described coin-operated pinball and marble machines, or devices, was not an improper exercise of the police power on ground of unreasonableness, with respect to pinball machines so constructed as to indicate automatically "free games" when certain scores were obtained or with respect to such machines which did not indicate free games.

172 P.2d—58½

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Claim and delivery action by Art Sternall against Bert Strand, Sheriff of San Diego County, State of California, John Doe and Richard Doe, to recover possession of twelve coin-operated pinball and slot machines that had been seized by the sheriff. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

G. A. Little, of Chula Vista, for appellant.

Thomas Whelan, Dist. Atty., and Carroll H. Smith, Chief Trial Deputy Dist. Atty., both of San Diego, for respondents.

BARNARD, Presiding Justice.

This is a claim and delivery action in which the plaintiff seeks to recover the possession of twelve coin-operated pinball and slot machines which had been seized by the defendant sheriff. Five of these machines had been seized under a search warrant issued in a criminal case charging the plaintiff with the crime of possession of such machines in violation of County Ordinance No. 278 (New Series). The other seven were seized under the confiscation and seizure provisions of the same ordinance. The answer of the defendant, in addition to allegations relating to the illegality of the machines, alleged that they were held for and intended to be used as evidence in the trial of the criminal action, which was still pending at the time of the trial of this action.

It appears that these machines were of three general types or kinds. In the first group there were four machines, each being so designed and constructed as to automatically pay off rewards in the form of slugs, tokens or money, and each being so constructed that it could not well be used in any other manner. At the time of seizure these machines were in a storeroom used in connection with a cafe operated by the plaintiff. At the time, they were not loaded with money or tokens and were partially dismantled and some were lacking in certain parts, which the plaintiff testified he had removed and used on some automatic

phonographs. He testified that two of these machines could be put in operating condition with three or four hours' work but that he could not obtain new parts for the other two. No reason appears, however, why the parts which had been removed could not be returned and replaced.

The second group consisted of six five-ball pinball machines which were so constructed as to automatically indicate "free games" when certain scores were obtained. The third group consisted of two machines, both of which were "score machines" and neither of which was so constructed as to indicate the allowance of free games. The machines in the second and third groups had no mechanism for the automatic paying of rewards in the form of slugs, checks or money but there was testimony that these machines, as well as those in the first group, were adaptable to paying off over the counter by arrangement between the owner or possessor and the player.

The court found that each of the machines in question is of the type and kind defined and described in County Ordinance No. 278 (New Series); that under the terms of said ordinance the ownership and possession of said machines and devices were and are unlawful; that the seizure and detention of said machines by the defendant were duly and properly made and done pursuant to the terms of this ordinance; that the terms and provisions of this ordinance are not unreasonable or discriminatory or duplicative of the penal laws of the state regarding gambling; and that the provisions of this ordinance are additional to, in aid of and supplemental to, the terms and provisions of the state penal laws and not inconsistent or in conflict therewith. Judgment was entered in favor of the defendant sheriff and the plaintiff has appealed.

The appellant first contends that this ordinance is a duplication of and in conflict with sections 330a and 335a of the Penal Code, and is therefore invalid. This ordinance differs materially from these provisions of the Penal Code in that it clearly and definitely makes unlawful the possession of any machine or device coming within its provisions, whereas the corres-

ponding provisions of the state law forbid only the operation or use of such a machine or device. Section 1 of this ordinance makes unlawful the possession of "any pinball or marble machine or device as hereinafter defined." It then provides that:

"Any machine, apparatus or device is a pinball or marble machine or device within the provisions of this section if it is one that is adapted, or may readily be converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object such machine or device is caused to operate or may be operated, and by reason of any element of chance or of other outcome of such operation unpredictable to him, the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance or thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device. * * *

Section 3 of this ordinance also provides that in addition to any other remedy any such machine or device may be seized and then may be destroyed if an action to recover possession is not brought within thirty days after the posting of notice of intention so to do.

[1, 2] It is well settled that in a case of this kind, where the state has not attempted to cover the entire field, local regulations in the form of additional requirements will be upheld where they are reasonable and are not in conflict with the provisions of the general law. *Pipoly v. Benson*, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515; *In re Portnoy*, 21 Cal.2d 237, 131 P.2d 1. In the instant case, the right to seize and hold these machines was, and is, based entirely upon the fact that they were found in the possession of the appellant. Insofar as material here, there is no duplication in this regard as between the provisions of the county ordinance and those of the state law. It follows that the ordinance is not invalid for this reason.

The most important question presented is whether the provisions of this ordinance, forbidding and making illegal the mere possession of coin-operated machines or devices of the kind here in question, are sufficiently reasonable to bring them within the proper exercise of the police power. The appellant argues that the provisions of the ordinance are unreasonable and beyond the scope of such police power: with respect to the four automatic pay-off machines, since they were in storage and partially dismantled; with respect to the six pin-ball machines which provide for "free games," since they are merely amusement machines and not necessarily or in themselves adapted to gambling; and with respect to the other two machines since they are merely amusement machines with not even any provision for the giving of free games.

[3] With respect to the four automatic pay-off machines in the first group this contention is clearly untenable. These machines were not only so constructed that they were adapted to gambling, but in such a manner that they could not well be used for any other purpose. The mere fact that they were partially dismantled could not be controlling. If it were, the way would be opened for a quick and easy evasion of the law, in the case of any such machine, by the speedy removal of some part thereof on the approach of an officer. If it be needed, ample authority exists for holding that the outlawing of the mere possession of machines or devices which can only be used for gambling is a reasonable exercise of the police power. In *re O'Shea*, 11 Cal.App. 568, 105 P. 776; *People v. Velarde*, 45 Cal.App. 520, 188 P. 59; *Ex parte Cheney*, 90 Cal. 617, 27 P. 436; *Matter of Yun Quong*, 159 Cal. 508, 114 P. 835, Ann.Cas.1912C, 969; *Murphy v. California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229, 41 L.R.A.,N.S., 153; In *re Hixson*, 61 Cal.App. 200, 214 P. 677; *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184.

A somewhat closer question is presented in this regard with respect to the application and effect of the provisions of this ordinance upon the other groups of machines here in question, the six pinball machines automatically providing for "free

games" and the other two machines with no such provision. Sections 11 and 12 of this ordinance state as the reason for its adoption that the two preceding grand juries had found as a fact, after a considerable investigation of the operation of pinball or marble machines and other similar devices, that in practically all parts of San Diego County machines of this type are operating in general violation of the gambling laws of the state; that without gambling, directly or indirectly, these machines cannot be financially successful; that with gambling profits from these machines are enormous; that as a practical matter it is beyond the power of the enforcement officers to control the operation of these machines and compel compliance with the laws against gambling; that the intake of huge sums by the operators of such machines places great power in their hands which they use in an attempt to secure immunity for themselves and for their unlawful operations; that the operation of these machines has become a racket and constitutes a menace to good government; and that as long as these machines continue in operation there can be no considerable improvement in the county with reference to proper enforcement of the laws and to good government. It is further stated that the last two grand juries had requested the adoption of such an ordinance.

[4] The general situation thus described is well known throughout this state. If it be assumed that we may not take judicial notice of these things and of the attendant evils which have given rise to a situation which is a serious reflection on the law, on public officers and on good government, there is nothing in the record before us which compels us to hold that the board of supervisors was not cognizant of conditions in San Diego County which reasonably called for action of this nature, or that the board acted beyond what was reasonable in view of conditions either known or believed by it to require action, even to the extent of prohibiting the mere possession of machines and devices which can, and are, so easily and frequently changed from an ostensibly innocent use to one which is not only evil in itself but which, as a practical matter, encourages

and leads to many other evils, against all of which the board was attempting to guard. It is the usual rule that a court will not hold an ordinance void as unreasonable where there is room for a fair difference of opinion on the question, and that the question as to the reasonableness of an ordinance is primarily one for the legislative authority. *McQuillin Mun. Corp.*, Vol. 2, Rev. Sec. 767; *In re Newell*, 2 Cal.App. 767, 84 P. 226; *In re Smith*, 143 Cal. 368, 77 P. 180.

[5] The question of fact, as to the reasonableness of this ordinance, has been passed upon by the board of supervisors and by the trial court. We find nothing in the ordinance itself or in the evidence which was received which makes it incumbent upon us to reverse the decision of fact so made. In view of the prevalence of these devices, past experience with the ingenuity of the makers and operators of such devices in adapting them to law evasion, their tendency and adaptability to developing and fostering the gambling instinct, and their well known temptation to school children and minors, it would be a perversion of justice and of the power of the courts to hold that such devices were merely laudable instruments of entertainment, and that an ordinance forbidding the possession of such machines is unreasonable, unconnected with any lawful purpose, and an arbitrary and unwarranted interference with legitimate and useful business and not within the broad scope of the police powers which, in so many other instances, have been invoked to regulate and prevent less widespread and less serious evils. What we have said applies to the two machines in the third group as well as to the six machines in the second group. Any difference between the two types of devices is one of degree only. The score indicated on the machine may well be taken as a token or memorandum which may be exchanged for something else. The possibility and probability of abuse and improper use is equally present in both instances.

The reasoning applied by the Supreme Court of Alabama in *State v. One 5¢ Fifth Inning Base Ball Machine*, 241 Ala. 455, 3 So.2d 27, is applicable here. The reasons for the adoption of the ordinance in this

form and the purposes sought to be accomplished thereby appear reasonable and sufficient, and it cannot be held, under the circumstances, that this ordinance is unconstitutional as being one not within the scope of the police powers.

Two other points raised by the appellant require no detailed consideration. One is entirely immaterial in this matter, and the other is not supported by the record and is obviously without merit.

The judgment is affirmed.

GRIFFIN, J., concurs.

Hearing denied; SCHAUER, J., dissenting.



76 Cal.App.2d 265

CHESTER v. CHESTER,

Civ. 15262.

District Court of Appeal, Second District,
Division 1, California.

Sept. 30, 1946.

1. Appeal and error ⇨113(1)

Defendant's appeal from superior court's contradictory minute order, clarified by nunc pro tunc order continuing defendant's motions to show cause re contempt and denying his motions to dismiss action and set aside certain orders and judgment, will not be dismissed on plaintiff's motion on grounds that court made no order other than to continue all matters before court and that defendant made no motion during hearing to vacate any order or judgment.

2. Courts ⇨116(1)

A court has inherent power to correct its records at any time so as to reflect truthfully what proceedings actually transpired.

3. Husband and wife ⇨288

Reconciliation, followed by cohabitation, of parties to wife's action for separate maintenance precludes final decree for either party as matter of right.

4. Husband and wife ⇐288

A husband's offer, accepted by wife without conditions, to return to her after their separation, formed express contract to condone husband's prior acts of cruelty, so as to bar recovery by wife in her pending action for separate maintenance. Civ. Code, §§ 115, 116, 118.

5. Husband and wife ⇐288

A wife's acceptance of husband's offer to return to her after their separation, so as to constitute condonation barring recovery by wife in her pending action for separate maintenance, may be manifested by words, acts or conduct. Civ. Code, §§ 115, 116, 118.

6. Husband and wife ⇐297

In wife's action for separate maintenance, her testimony and evidence of spouses' resumption of marital relations at their home after previous separation showed that wife regarded husband's return to her as reconciliation, amounting to condonation of husband's prior acts of cruelty, so as to preclude recovery by wife, though she did not express her condonation in words. Civ. Code, §§ 115, 116, 118.

7. Husband and wife ⇐297

Evidence showed sufficient change in spouses' relations after filing of wife's action for separate maintenance to justify dismissal of action or entry of order, discontinuing separate maintenance and counsel fees awarded for contemplated legal services not rendered, on grounds of reconciliation and condonation of husband's cruelty, though they continued for only three months. Civ. Code, §§ 115, 116, 118.

8. Husband and wife ⇐288

While a spouse's condonation of other spouse's matrimonial offense is conditional on conjugal kindness and is revoked when condonee is guilty of great conjugal unkindness, showing that conditions of condonation were not accepted in good faith or were not fulfilled, condonee's subsequent conduct does not affect his or her right to dismissal of condonor's action for separate maintenance, during pendency of which reconciliation was effected and condonation occurred. Civ. Code, §§ 115, 116, 118, 121.

9. Husband and wife ⇐288

A wife, resuming marital relations with husband and accepting support by him independently of court order granting her temporary maintenance and counsel fees in her separate maintenance action, cannot hold such action in abeyance and insist on compliance with such order months later on allegation of husband's conjugal unkindness. Civ. Code, § 121.

10. Husband and wife ⇐288

Spouses' reconciliation and wife's condonation of husband's cruelty after institution of her action for separate maintenance on such ground did not affect her right to bring another action based on subsequent acts of cruelty. Civ. Code, §§ 115, 116, 118, 121.

11. Husband and wife ⇐297

On hearing of husband's motion to dismiss wife's action for separate maintenance on grounds of parties' reconciliation and wife's condonation of husband's cruelty, burden was on wife to prove by competent evidence breach of condition of conjugal kindness, on which reconciliation and condonation were predicated. Civ. Code, §§ 115, 116, 118, 121.

12. Husband and wife ⇐298½

On husband's motion to dismiss wife's action for separate maintenance, court was bound to receive all relevant evidence on issue raised by such motion as to whether parties effected reconciliation and wife condoned husband's cruelty and to determine therefrom whether condonation took place, and court's refusal to find on such issues was erroneous. Civ. Code, §§ 115, 116, 118.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Edna Torrance Chester against her husband, Robert Chester, for separate maintenance. From an order denying defendant's motion to dismiss the action and to set aside certain orders and a judgment for plaintiff, defendant appeals.

Motion to dismiss appeal denied, order appealed from reversed, and cause remanded.

Pacht, Pelton, Warne, Ross & Bernhard, by Clore Warne, and Bernard Reich, all of Beverly Hills, for appellant.

Roger Marchetti, of Los Angeles, for respondent.

WHITE, Justice.

On January 4, 1944, plaintiff filed an action against her husband for separate maintenance. On April 7, 1944, after hearing upon an order to show cause, the court made an order awarding custody of the minor child of the parties to plaintiff; that defendant pay the sum of \$600 per month for the support of said plaintiff and minor child, payable on the 15th day of each month, commencing April 15, 1944. Defendant was further ordered to pay the sum of \$2,000 attorney's fees on account, payable in installments of \$500 on the 15th day of April, May, June and July, 1944—"with the understanding this is to be a default matter. In the event of contest, plaintiff may apply for additional attorney's fees at the time of trial * * *."

On June 9 defendant's default for failure to appear or answer was entered.

It further appears that on two occasions, June 29 and July 20, 1944, the cause was on calendar for hearing and each time was ordered "off calendar."

On April 10, 1945, upon affidavit, the court issued an order to show cause directing the defendant to appear in court on April 24, 1945, to show cause why he should not be adjudged guilty of contempt of court for wilfully disobeying the aforesaid order of April 7, 1944.

On April 23, 1945, defendant served upon plaintiff and filed a notice that on April 24 he would move the court to (1) dismiss the action instituted by plaintiff on the grounds that the parties subsequent to the commencement of said action "have reconciled, settled and abandoned the action and that the alleged misconduct set forth in the complaint has been condoned"; (2) to vacate and set aside upon the same ground the aforesaid order of April 7, 1944 awarding counsel fees, and upon the further ground that "the award of counsel fees contemplated future services which

cannot be rendered in this action; and (4) to deny, dismiss and quash the aforesaid order to show cause dated April 10, 1945 on the same grounds."

Said notice of motion also contained a notice that "in the alternative" defendant would move the court:

"1. To vacate and set aside the order of April 7, 1944, and to permit the defendant to be heard on plaintiff's original motion for temporary alimony and counsel fees, on the ground that defendant's failure to contest said motion in all its aspects was due to fraud and misrepresentation on the part of plaintiff, and on the further ground that defendant had good reason to believe that the motion and action had been abandoned and settled.

"2. To enjoin plaintiff from proceeding to judgment and to permit defendant to file an answer to the complaint herein, on the same grounds as above.

"3. To modify the order of April 7, 1944, to reflect the true ability of defendant to pay temporary alimony and counsel fees, on the ground that defendant's earnings had been misrepresented to the court, and on the further ground that since the order of April 7, 1944, there has been a change of circumstances in defendant's ability to pay temporary alimony and counsel fees."

The foregoing order to show cause in re contempt and defendant's aforesaid motion came on for hearing April 24, 1945, following which hearing the court made an order, but because of some confusion in the wording of said minute order and the reporter's transcript, the court on December 18, 1945, made an order amending its minute order of April 24 nunc pro tunc "so that said minute order shall read and be as follows:

"Orders (2) to show cause re contempt and motion of defendant to dismiss the action and to vacate and set aside certain orders and judgment are called for hearing; plaintiff present with her attorney, Roger Marchetti, and the defendant with his attorneys, Pacht, Pelton, Warne, Ross & Bernhard, by C. Warne. Edna Torrence Chester, Robert Chester and Craig Flana-

gan are sworn and testify. Motions (2) to show cause re contempt are continued to June 29, 1945, at 9:30 a. m. Defendant is ordered to keep up the payments heretofore ordered and is ordered to return on June 19, 1945, at 9:30 a. m. Defendant's motion is in all respects denied."

From the order of April 24, 1945, as reflected by the foregoing nunc pro tunc order, defendant prosecutes this appeal.

[1, 2] When the cause was on calendar in this court for argument, respondent, pursuant to notice appropriately given, moved this court to dismiss the appeal on the ground that on April 24, 1945, the court made no order other than to continue all matters then before the court until June 19, 1945, and "that at no time during said hearing did defendant or his counsel make a motion to vacate any order or judgment or make any other motion."

The motion to dismiss is without merit. Whatever ambiguities or contradictions appear in the reporter's and clerk's transcripts were clarified by the nunc pro tunc order entered December 18, 1945, as of April 24. It requires no citation of authority for the statement that a court has inherent power to correct its records at any time so that they may truthfully reflect what proceedings actually transpired. That appellant did make his motion and that the same was considered by the court is manifest from a mere reading of the foregoing order from which this appeal was taken.

[3] Appellant first contends that the trial court should have granted his motion to dismiss the action because a reconciliation had been effected and a condonation had taken place. It is undoubtedly the law that in divorce cases, when a reconciliation followed by cohabitation is effected neither party is entitled as a matter of right to have a final decree of divorce entered. *Peters v. Peters*, 16 Cal.App.2d 383, 386, 60 P.2d 313, and cases therein cited; *Hawkins v. Hawkins* 104 Cal.App. 608, 611, 286 P. 747; *Lane v. Superior Court*, 104 Cal.App. 340, 285 P. 860.

Condonation is the conditional forgiveness of a matrimonial offense constituting a clear cause of divorce. Civil Code, sec. 115.

The above rule is applicable to actions brought for separate maintenance. *Wade v. Wade*, 3 Cal.Unrep. 576, 31 P. 258.

The factual situation as reflected by the record in the instant case is that the parties were married October 15, 1939. There is one child, a girl aged 19 months, as the issue of said marriage. On January 4, 1944, as appellant was about to board a train at Los Angeles for Salt Lake City, Utah, to fulfill a professional engagement, he was served with a copy of the complaint and summons in the separate maintenance proceeding. According to appellant, he telephoned his wife immediately upon his arrival in Salt Lake City and "she promised she would do nothing until I had an opportunity to see her. Frankly, the promise was vague and so I retained N. Joseph Ross, Esquire, to keep matters in status quo until I could get back to Los Angeles." On January 18, 1944, appellant returned to Los Angeles where "upon my arrival my wife and I talked it out, made up and spent most of the night together. I flew back the next evening with the definite promise made by my wife that she would discontinue all proceedings." There is no conflict in the evidence of the fact that upon the completion of a professional tour appellant returned to Los Angeles in November, 1944, and resumed marital relations with respondent at the family home where he remained until February 1945, when following "some differences" respondent ordered her husband to leave the house. With reference to their agreement upon the resumption of marital relations respondent wife testified: "I said that I hoped we would not have to have a trial of this matter, to let us see what we could do at this time and we would seriously try to make a go of it, and I told him that I had made a serious and sincere effort to make my marriage a success." Asked directly by the court, "Why did you go back together again, to begin with?" respondent wife testified, "For the simple reason both of us were capable and we had a 19 month old baby and I was trying hard to make a success." With reference to their final separation in February, 1945, respondent wife testified, "I knew I couldn't make a success of it because of Mr. Ches-

ter's excessive drinking and constant running with Belita, writing letters to her, which were returned, that he wanted a divorce from me."

As much of the evidence as was received is clear and uncontradicted that from November, 1944, to February, 1945, the parties lived together as husband and wife in the same house and that during such time the wife and child were maintained and supported by the husband. Respondent wife also testified that while living at the family home in December, 1944, and January, 1945, appellant built a room onto the house at a cost of some \$1,200.

Section 116 of the Civil Code sets forth three elements as necessary to condonation:

1. The knowledge on the part of the condonor of the facts constituting the cause of divorce;

2. Reconciliation and remission of the offense by the injured party;

3. Restoration of the offending party to all material rights.

[4-6] Section 118 of the same code provides that cohabitation, passive endurance, or conjugal kindness shall not be evidence of condonation unless it is accompanied by an express agreement to condone. Respondent contends that there was no express agreement to condone appellant's prior acts of cruelty but that the agreement was a conditional one, dependent upon the future conduct of the appellant. But the record before us does not reveal that respondent wife exacted any conditions for the condonation. To us it appears that appellant desired and offered to return to respondent. If accepted, this offer then formed an express contract. Acceptance may be manifested by words, acts or conduct. To us it seems manifest that respondent regarded appellant's offer as one of condonation and by her conduct as well as her testimony the conclusion seems reasonable that respondent regarded appellant's return to her as a reconciliation, the legal effect of which amounted to a condonation. True, she did not express in words her forgiveness and condonation, but her conduct from November 1944 to February 1945 strongly indicates a con-

donation. *Lane v. Superior Court*, supra, 104 Cal.App. at pages 346, 347, 285 P. 850.

[7] That the court below was strongly of the opinion that the parties had become reconciled is attested by the following which occurred during examination of respondent:

"Q. Well, without trying to go further into it, you did become reconciled, did you not?"

"Mr. Marchetti (Respondent's counsel): Now, if the court please * * *.

"The Court: Well, they might have become reconciled, but reconciliation did not continue.

"Mr. Marchetti: That is right—and again:

"The Court: What are you going to offer?"

"Mr. Warne (one of appellant's counsel): In support of my motion?"

"The Court: Any evidence that tends to constitute reconciliation wouldn't make any difference here.

"Mr. Warne: I would like to discuss that matter with Your Honor.

"The Court: No, I think I know the law—unless you have something that comes down within the last two or three days. * * * The reconciliation that took place would be only for the trial court, as I see it, they only asked for the three months, according to the testimony, after they separated again.

"Mr. Warne: Again, may I say this: I think Your Honor is familiar with the laws of California, and they are specific to the effect that where there is a condonation—

"The Court: General condonation has got to be something that is actual and carried out in its entirety, not for just a part of the time.

"Mr. Warne: Well, the authorities appear to be otherwise, if I might suggest to Your Honor, and I would like to present these cases and argue the authorities on the subject.

"The Court: Well, Mr. Warne, you couldn't change the law, and it is pretty clear what happened here. I don't remember any such thing as condonation continuing after people have separated."

From the foregoing it would appear that while the court conceded that a reconciliation and condonation had taken place that because the same did not continue longer than three months it was of no moment on a motion to dismiss. We do not so understand the law. The evidence before the court indicated a condonation and a change in the relations of the parties subsequent to the filing of the complaint of sufficient character to justify the court in granting a dismissal of the action, or at least to enter an order discontinuing the separate maintenance and counsel fees for legal services contemplated but not rendered after reconciliation. In principle, if a reconciliation be effected and a condonation take place, no line should be drawn whether the period be three months, as in this case, or three years. Such is the holding in *Lane v. Superior Court*, supra, 104 Cal.App. at page 346, 285 P. at page 863, wherein it is said: "The duration of the cohabitation should be merely a circumstance to be considered by the trial judge in weighing the rights of the parties, and a measure to be applied in determining the effect of their acts and conduct."

[8] While condonation is always conditional on conjugal kindness and is revoked when among other things, the condonee is guilty of great conjugal unkindness showing that the conditions of condonation had not been accepted in good faith or were not fulfilled (Civil Code, sec. 121), we are impressed that subsequent conduct on the part of the condonee does not affect his or her rights to a dismissal of the action in which the reconciliation was effected and the condonation took place. The reason for this rule is thus stated in *Lane v. Superior Court*, supra, 104 Cal.App. at page 348, 285 P. at page 864: "For one spouse to know that a final and legal dissolution of the marriage relation lay within his or her grasp for the taking, would not tend to promote that feeling of forbearance, charity, and forgiveness necessary to the lasting success of any marriage."

[9] Respondent's position in the court below would seem to be that, having ob-

tained an order for temporary maintenance and counsel fees, she could resume the marital relationship with her husband, accept support and maintenance independent of the court order, hold the action in abeyance and then on an allegation of conjugal unkindness months later insist upon compliance with the original order. The vice of such a position, its repugnance to public policy and the sanctity of marriage is established by the cases of *Wade v. Wade*, supra, and *Lane v. Superior Court*, supra.

[10] Respondent's right to bring another action based upon alleged acts of cruelty which occurred subsequent to the time when a reconciliation was effected and a condonation took place was not affected. *Lane v. Superior Court*, supra, 104 Cal.App. at page 349, 285 P. 860. In this regard, the text statement in 17 Am.Jur. 250, par. 199, reads:

"(Condonation) When Made Pending Suit.—The views of authorities as to the effect of condonation made during the pendency of the divorce suit are not consistent. Some hold that condonation made at any stage of the divorce suit precludes the petitioner from proceeding further therein, unless the condition of the condonation has been broken, in which case, however, the plaintiff must file a supplemental bill. Citing 6 B.R.C. 639 which cites *Thelin v. Thelin*, 1881, 8 Ill.App. 421. On the other hand, it has been held that where a condonation during the pendency of a suit is followed by further misconduct, the plaintiff must begin de novo." Citing 6 B.R.C. 639 which cites *Jones v. Jones*, 1911, 59 Or. 308, 117 P. 414."

[11] Furthermore, even though it be held that reconciliation and condonation does not require a party to litigate de novo, the breach of the condition of conjugal kindness must be established by evidence in the face of a motion to dismiss. In the case at bar it is manifest that the court in denying appellant's motion to dismiss was under the mistaken belief that a sufficient answer to the motion was that the reconciliation had not continued. Once reconciliation was established, and this is not disputed by respondent, it was incumbent

upon her to produce proof by competent evidence that there had been a breach of the condition upon which the reconciliation and condonation were predicated. In the instant proceeding the court did not deem it necessary to take any evidence on such an issue.

[12] Appellant's motion raised the issue of whether a reconciliation was effected and a condonation took place. It was therefore incumbent upon the court to receive all material and relevant evidence upon that issue and therefrom determine whether a condonation took place. Should the court find that a condonation did take place, then we are persuaded that, under the authorities in this state, appellant is entitled to a dismissal of the action. The refusal of the court to find upon this issue as evidenced by the statement "any evidence that tends to constitute reconciliation wouldn't make any difference here" was erroneous.

The motion to dismiss the appeal is denied. The order of April 24, 1945, as amended nunc pro tunc, December 19, 1945, is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

YORK, P. J., and DORAN, J., concur.



VICE v. THACKER et al.
Civ. 15232.

District Court of Appeal, Second District,
Division 3, California.
Sept. 18, 1946.

Rehearing Denied Oct. 8, 1946.

Hearing Granted Nov. 14, 1946.

1. Sales ⇨324(3)

In claim and delivery action to recover shoe repair machinery, tools and store fixtures, evidence justified conclusion that bill of sale, prepared and presented by agent, employed by plaintiff to sell stock

in trade, with himself shown as buyer, was void for fraud in securing plaintiff's signature.

2. Principal and agent ⇨190(3)

Where seller desired to sell his stock in trade in shoe repair business and to store his machinery, tools and fixtures, evidence that his agent to effect such sale assumed a dual agency status by acting as agent for buyer justified conclusion that buyer by reason of the dual agency was chargeable with agent's fraud upon seller in securing seller's signature to a bill of sale which included machinery, tools and fixtures.

3. Appeal and error ⇨1011(1)

Where evidence is highly conflicting as to a particular issue the weight to be given thereto and inferences to be deduced therefrom are questions for trial judge, and, if there is any substantial evidence in record to support his findings, they must be upheld on appeal.

4. Sales ⇨221

One who acquires property from fraudulent vendee under such circumstances that he cannot be held to be a purchaser in good faith and for a valuable consideration is in no better position than fraudulent vendee and defrauded party has same remedies against him that he has against fraudulent vendee.

5. Principal and agent ⇨180

Agent was presumed to have communicated all facts in his possession to his principal so that latter was chargeable with all of the acts and knowledge of agent, even though agent may have had an opposing personal interest, so long as he was acting for principal in the transaction.

6. Principal and agent ⇨158

Where agent for ultimate buyer of stock in trade, machinery, tools and fixtures of shoe repair business also acted as agent for proprietor of such business for the sale of stock in trade and fraudulently induced proprietor to sign a bill of sale covering machinery, tools and fixtures, ultimate buyer, with knowledge he acquired from agent, was chargeable as a principal in the fraudulent dealings.

7. Sales ⇨327

Whether rescission by seller of sale for fraud was timely under all circumstances is a question primarily for trier of fact.

8. Judgment ⇨256(1)

Where court found that rescission of fraudulent sale of the shoe repair stock in trade, machinery, tools and fixtures was not accomplished for failure to give a timely notice of rescission, that part of judgment ordering that seller recover from ultimate buyer all of the involved property, awarding damages for loss of use and allowing credit to ultimate buyer for repairs which he made upon property was inconsistent with findings and erroneous.

9. Judgment ⇨256(1)

Where it was found that sale of shoe repair machinery, tools and fixtures to buyer was procured by fraud but that rescission was not effected for seller's failure to give timely notice thereof, judgment was consistent with findings insofar as it awarded damages for fraud in the purchase and sale of property.

10. Sales ⇨330

Where seller's complaint, by sufficient averments, sets out that he has been induced by fraud to enter into sales contract and has endeavored to rescind it because of such fraud and prays relief upon basis of a rescission, he may be accorded damages for such fraud even though evidence reveals circumstances whereby right of rescission has been lost.

11. Cancellation of Instruments ⇨58

In suit for rescission for fraud it is not essential to the allowance of damages that complaint ask for an award of damages and for such other and further relief as to the court may seem meet since, when equity has acquired jurisdiction for one purpose it will retain it for all purposes as respects cause of action presented.

12. Sales ⇨384(1)

Where court found that actual value of property with which plaintiff parted as the result of fraud of defendant's agent was \$1,242.50, order that defendant be given credit for \$1,000 which he actually

paid plaintiff for the property applied proper measure of damages, so that plaintiff was entitled to judgment against defendant for \$242.50 plus interest. Civ.Code, § 3343.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by A. D. Vice against W. N. Thacker, Harry Kurofsky, individually and doing business under the fictitious name of Dan Dee Factory Shoe Repair, to recover personal property after rescission and for claim and delivery. From an adverse judgment, Harry Kurofsky appeals.

Modified and affirmed.

Harvey L. Silbert, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

KINCAID, Justice pro tem.

The defendant, Harry Kurofsky, appeals herein from a judgment for plaintiff for the recovery of certain articles of personal property hereinafter described, or the value thereof in case delivery cannot be had and for damages. The court found in favor of the defendant Thacker and no appeal was taken by the plaintiff from the resulting judgment. The case went to trial on plaintiff's second amended complaint containing causes of action for recovery of personal property after rescission, and claim and delivery. The judgment was rendered in plaintiff's behalf, notwithstanding a finding by the court that the notice of rescission was not promptly nor timely made.

The findings are in general accordance with the allegations of such complaint and are, in effect, as follows: That plaintiff for many years has conducted a shoe repair shop in Los Angeles, and on August 9, 1943, had a stock of merchandise and supplies on hand consisting of leather, heels, and other articles necessary in the conduct of such a business, and various items of shoe repair machinery, tools and store fixtures, against which there were no liens or claims of any kind; that the defendant, Thacker, was the local repre-

sentative of The Landis Machine Company, a Missouri corporation, manufacturers of shoe making and repairing equipment, and maintained a branch office and store room in Los Angeles; that plaintiff had known Thacker for many years, reposed implicit confidence in him, and that a confidential relationship existed between them; that plaintiff was an elderly man, in poor health, and with the advice of Thacker decided to discontinue the operation of his business for a period of time and sell and dispose of his stock of merchandise and supplies, but to keep and store his machinery, tools and fixtures, without expense, at the place of business of The Landis Machine Company in Los Angeles, where Thacker represented that ample space could be provided. Thacker offered and agreed to act as plaintiff's agent to find a purchaser for plaintiff's said merchandise and supplies, which offer was accepted by plaintiff. They then boxed up all of such stock and Thacker stated that it should be delivered by plaintiff to any purchaser whom Thacker might find who would pay \$1,000 therefor. That through the efforts of Thacker, numerous people made offers to plaintiff for his stock of merchandise and supplies, until on August 9, 1943, Thacker, as agent for plaintiff, represented that he had a party who would purchase such stock, not including any machinery, tools, or fixtures, for the sum of \$1,000, to be paid as soon as such stock was delivered to Thacker's place of business. That on the same day, for and on behalf of defendant Kurofsky, and while also acting as agent for plaintiff, Thacker prepared in his office a bill of sale including all of the plaintiff's machinery, tools and fixtures, as well as the stock of merchandise and supplies, inserting his own name as buyer. That prior to the presentation of such bill of sale to plaintiff Thacker directed a woman who was employed by him in his office and who was a notary public, to affix her notarial acknowledgment to such instrument. Thacker thereupon proceeded to the place of business of plaintiff and while purporting to act as agent for plaintiff, and also acting for and on behalf of Kurofsky as his agent, presented said instrument to

plaintiff without disclosing to him its nature, contents or effect, and further informed him that such instrument included only the stock of merchandise and supplies and that it was not necessary for him to examine or read the same, all of which plaintiff believed, and in reliance thereon signed the instrument without reading or knowing its contents, and delivered the same to Thacker. That Kurofsky paid plaintiff, through Thacker, the sum of \$1,000 by delivering same to the latter as Kurofsky's agent, with directions to pay same to plaintiff, and on the same date, August 9, 1943, Thacker executed and delivered to Kurofsky a bill of sale covering all of the machinery, supplies and other property included in the other bill of sale from plaintiff to Thacker, and reciting the same consideration of \$1,000. That plaintiff had no knowledge of such latter transaction or that Thacker was acting as agent of Kurofsky, nor did such defendants disclose to plaintiff their relationship concerning such matters. That on said day, while Thacker was purporting to act as agent for plaintiff, the latter delivered to him the key to his shoe repair shop where the stock of merchandise and supplies, as well as the machinery, tools and fixtures, were then located, and plaintiff gave Thacker permission to remove the stock of merchandise and supplies for the purpose of delivering it to the buyer, but with the understanding, as previously agreed between them, that the machinery, tools and fixtures were to be delivered to and stored at Thacker's place of business. That Thacker then delivered the key to plaintiff's premises to Kurofsky and invited plaintiff to accompany him on a trip outside the state of California. That during plaintiff's absence on the trip, Kurofsky used the key, entered the premises, and removed therefrom the stock of merchandise and supplies, but did not then remove the machinery, tools and fixtures. That on or about September 6, 1943, Kurofsky and several workmen came to plaintiff's premises to remove those articles, and plaintiff thereupon telephoned Thacker and was advised by the latter that plaintiff should deliver the items mentioned to the men who came for them and that he would

take care of everything for plaintiff, and plaintiff, in the belief that his property was being removed to Thacker's place of business for storage, consented to its delivery and removal. That instead of taking the machinery, tools and fixtures to his place of business, Thacker and Kurofsky, in accordance with an agreement which they had entered into for the purpose of obtaining from plaintiff the possession of said property, and with full knowledge of the rights of plaintiff, took and delivered the same to the place of business of Kurofsky, whereupon the latter installed and put the same in use and operation and continued to use the same in his own business for a long time thereafter. That a few days later plaintiff went to Thacker's place of business for the purpose of inspecting his property which he believed to be stored there and for the first time learned that it had been delivered elsewhere, and then for the first time read and examined the bill of sale which he had signed in favor of Thacker, as buyer, and learned that it included not only the stock of merchandise and supplies, but also the machinery, tools and fixtures. On September 14, plaintiff retained an attorney but the latter failed to take any action in the matter so that, on October 27, plaintiff withdrew all papers which he had deposited with that attorney and retained new counsel. On or about November 1, 1943, plaintiff served on defendants a notice rescinding the purported sale of his property to Thacker but the rescission so attempted was not promptly nor timely made. The trial court found that the reasonable value of the stock of merchandise and supplies was the sum of \$350, and of said machinery, tools and fixtures the sum of \$892.50, or a total of \$1,242.50, and that at the time of the service of the notice of rescission, plaintiff offered to return to defendants everything of value that he obtained from them upon his being restored to the property with which he parted, or the reasonable value thereof. The court further found that all of the involved property is now in the possession of Kurofsky and that plaintiff is entitled to have it returned to him or in lieu thereof the sum of \$1,242.50, as its

reasonable value in case delivery is not made; also the sum of \$1,122 damages for loss of use thereof, conditioned upon defendant either paying to or crediting the defendant Kurofsky with the sum of \$1,000 which plaintiff has heretofore received from such defendant, and the additional sum of \$150 which Kurofsky paid out in making repairs on the property, or a total of \$1,150. Judgment followed accordingly, as against Kurofsky.

[1] He concedes on this appeal that the record amply supports the court's finding that in all dealings between himself and Thacker concerning the sale and purchase of the involved personal property, the latter was plaintiff's agent. The evidence is also sufficient to show the existence of a confidential relationship between plaintiff as principal, and Thacker as his agent, and a reliance thereupon by plaintiff in the transactions here in question. This being the case, and in the light of the evidence taken as a whole, the trial court was justified in concluding that the bill of sale, prepared and presented by Thacker with himself shown as buyer, fraudulently included the plaintiff's machinery, tools and fixtures, and was presented to plaintiff for his signature without disclosing such deceit; that in reliance upon the representations of such agent as to the contents of the instrument, and that he need not read the same, the signature of plaintiff was fraudulently obtained thereto without his having read the document or knowing that it included the additional property therein.

[2,3] It is argued in behalf of Kurofsky that even though it be established that Thacker was the agent of plaintiff and fraudulently breached their confidential relationship by procuring a bill of sale from plaintiff to Thacker in which the machinery, tools and fixtures were wrongfully included, there is no evidence to show any knowledge upon the part of such appellant of any such fraud or that Thacker was also acting as agent for appellant in such dealings. Under the court's findings Kurofsky is charged with knowledge of Thacker's acts and representation by reason of the latter's double agency status,

rather than by any evidence of direct knowledge on the part of appellant. While the evidence as to Thacker's agency on the part of Kurofsky is highly conflicting, and other conclusions might reasonably have been drawn therefrom, the weight to be given thereto, as well as the inferences to be deduced therefrom, were questions for the trial judge and, if there is any substantial evidence in the record to support his findings as to such agency, they must be upheld on appeal. In support of such findings the record disclosed that Thacker had known Kurofsky for some time and the latter had asked him to arrange to find and get for him, at the best possible price, equipment of the general kind later obtained from plaintiff; that Thacker agreed to try to find it for him and told him about plaintiff's property; that appellant went to see it at plaintiff's shop and met Thacker there. On his return from inspecting the property he told Thacker he wanted it and instructed him to buy it; that Thacker then bought it for Kurofsky after having first obtained the money from him with which to purchase it, which money was paid over to plaintiff; that Thacker had the property sold to himself because plaintiff said he wouldn't trust anybody else and he wanted Thacker to do the business for him, which facts were known to appellant. Kurofsky then accepted a bill of sale from Thacker, executed and delivered by the latter as seller, on the same day and covering the same property as mentioned in plaintiff's bill of sale to Thacker. Upon receiving the key to plaintiff's shop where all the property was located, Kurofsky, in plaintiff's absence, removed therefrom only the stock of merchandise and supplies. Some four weeks later he and two workmen came to plaintiff's store to take the remaining property, consisting of the machinery, tools and fixtures. Instead of hauling the property to be stored at Thacker's office, he took it to his own place of business, where Thacker helped him install it. Such evidence substantially supports the court's finding that Thacker was also acting as agent for appellant during all of the dealings and transactions in question.

[4-6] "One who acquires the property from the fraudulent vendee under such circumstances that he cannot be held to be a purchaser in good faith and for a valuable consideration is in no better position than the fraudulent vendee, and the defrauded party has the same remedies against him that he had against such fraudulent vendee. See *Sargent v. Sturm*, 23 Cal. 359, 83 Am.Dec. 118. * * *"
Wendling, etc., Co. v. Glenwood, etc., Co., 1908, 153 Cal. 411, 414, 95 P. 1029, 1030. Knowledge on the part of Kurofsky's agent, Thacker, was knowledge in Kurofsky. Under the circumstances here existing the law will presume in favor of plaintiff that his agent communicated all the facts in his possession to his principal, Kurofsky, and the latter is chargeable with all of the acts and knowledge of his agent (*Verder v. American Loan Society*, 1934, 1 Cal.2d 17, 27, 32 P.2d 1081; *McKenney v. Ellsworth*, 1913, 165 Cal. 326, 329, 132 P. 75), and this is true even though such agent may have an opposing personal interest, so long as he is acting for his principal in the transaction. *McKenney v. Ellsworth*, supra, 165 Cal. at page 329, 132 P. 75; *Frankish v. Federal Mortgage Co.*, 1939, 30 Cal.App.2d 700, 721, 87 P.2d 90; *Honan v. National Thrift Corp.*, 1936, 14 Cal.App.2d 458, 462, 57 P.2d 967. With knowledge so acquired by appellant, he is a principal in the fraudulent dealings here involved, and not only cannot be held to be a purchaser in good faith and for value, but in fact is in no better position, so far as the right of plaintiff to recover directly from him is concerned, than was Thacker, his fraudulent vendor.

[7, 8] The judgment herein is, however, materially inconsistent with the court's findings. The attempted rescission by the plaintiff of the fraudulent sale of his property was specifically found by the court to be ineffective due to its lack of promptness and timeliness. While the evidence would have supported a contrary finding, the question whether a party has acted promptly depends upon the circumstances of the particular case and is one primarily for the trial judge. 25 Cal.Jur. 725; *Carpenter v. First Trust, etc., Bank*, 1936, 11 Cal.App.2d 668, 674, 54 P.2d 495. It hav-

ing been resolved by him adversely to the contention of plaintiff, and being based upon conflicting but material evidence we are bound thereby. With no rescission of the fraudulent transaction having been accomplished, that part of the judgment wherein it is ordered that plaintiff do have and recover from Kurofsky all of the involved personal property is inconsistent and erroneous, as are also those portions awarding damages for its loss of use in the amount of \$1,122 and allowing credit to such defendant for repairs which he made upon the property in the sum of \$150.

[9-11] The judgment is consistent with the findings as to the fixation and allowance of damages for fraud in the purchase and sale of such property in the sum of \$1,242.50. When a plaintiff files a complaint which, by proper and sufficient averments, sets out that he has been induced by fraud to enter into a contract and has endeavored to rescind it because of such fraud, and prays relief upon the basis of a rescission, he may be accorded damages for such fraud even though the evidence reveals circumstances whereby the right of rescission has been lost. *Bancroft v. Woodward*, 1920, 183 Cal. 99, 102, 190 P. 445; *Brunswig Drug Co. v. Springer*, 1942, 55 Cal.App.2d 444, 451, 130 P.2d 758; *Hjorth v. Bernstein*, 1941, 44 Cal.App.2d 561, 565, 112 P.2d 643. These averments are included in the complaint herein and, in addition to other relief asked, a request for damages in the sum of \$3,500 and for such other and further relief as to the court may seem meet is contained in the prayer. It is not essential however to the allowance of damages that the complaint in an action for rescission ask for such relief. *Murphy v. Sheftel*, 1932, 121 Cal.App. 533, 541, 9 P.2d 568. See also *Waters v. Woods*, 1935, 5 Cal.App.2d 483, 487, 488, 42 P.2d 1072; *MacIsaac v. Pozzo*, 1945, 26 Cal. 2d 809, 815, 161 P.2d 449. "Where equity has acquired jurisdiction for one purpose,

it will retain it to the final adjustment of all differences between the parties arising from the cause of action presented, it being the duty of a court of equity, where all the parties to a controversy are before it, to adjust the rights of all and leave nothing for further litigation." *Murphy v. Sheftel*, supra, 121 Cal.App. at page 541, 9 P.2d at page 571. See also *Sonnicksen v. Sonnicksen*, 1941, 45 Cal.App.2d 46, 52, 113 P.2d 495.

[12] To the extent that the court made its finding that all of the involved personal property with which plaintiff parted was of the actual value at that time of \$1,242.50 and ordered that defendant be given credit for the amount of \$1,000 which he actually paid plaintiff for it, the proper measure of damages was applied. *Civ.Code*, sec. 3343; *Rothstein v. Janss Invest. Corp.*, 1941, 45 Cal.App.2d 64, 73, 113 P.2d 465; *Jacobs v. Levin*, 1943, 58 Cal.App.2d Supp. 913, 137 P.2d 500. This leaves the sum of \$242.50 due plaintiff by defendant as damages for the fraud. Interest at the legal rate on this sum should be added from August 9, 1943. *Taylor v. Wright*, 1945, 69 Cal.App.2d 371, 384, 159 P.2d 980.

The judgment is hereby modified by striking therefrom all of paragraphs 1, 2, 3 and 4 and by substituting in their place the following: "Wherefore it is ordered, adjudged and decreed that plaintiff do have and recover from the defendant Harry Kurofsky the sum of \$242.50 as damages together with a sum equal to 7% interest thereon from August 9, 1943 to date of judgment May 10, 1945." The trial court is hereby ordered to amend the conclusions and judgment in accordance herewith. As so modified the judgment is hereby affirmed, appellant to be allowed his costs on appeal.

DESMOND, P. J., and SHINN, J., concur.

76 Cal.App.2d 316

LOWE et al. v. PIERCE.

Civ. 15512.

District Court of Appeal, Second District,
Division 2, California.

Oct. 2, 1946.

Appeal and error ⇨ 1071(6)**Trial** ⇨ 397(1)

In action for personal injuries sustained when struck by defendant's automobile, where there was evidence which, if believed, would support a finding of contributory negligence, court's failure to make a finding on such special defense was reversible error.

Appeal from Superior Court, Los Angeles County; Elmer D. Doyle, Judge pro tem.

Action by Emma M. Lowe and another against C. H. Pierce to recover for personal injuries sustained by plaintiffs when struck by an automobile driven by defendant. Judgment for plaintiffs, and defendant appeals.

Reversed.

Walter Gould Lincoln, of Los Angeles, for appellant.

Sidney A. Cherniss, of Los Angeles, and Robert A. Rohe, of Beverly Hills, for respondents.

WILSON, Justice.

This action was brought by plaintiffs to recover damages for personal injuries suffered by them resulting from having been struck by an automobile driven by defendant. In his answer to the complaint defendant pleaded affirmatively that the accident was proximately caused by the negligence of plaintiffs. From a judgment in their favor defendant appeals.

The only point necessary to be considered is the failure of the court to make a finding on said special defense.* There is evidence in the record which, if be-

lieved by the trial judge, would support a finding of contributory negligence on the part of plaintiffs. The plea of that defense in a personal injury action, with evidence tending to support it, presents an issue upon which the court is required to make a finding, and its failure so to do is reversible error. *Linde v. Emmick*, 16 Cal.App.2d 676, 682, 61 P.2d 338; *Hall v. Kaufman*, 30 Cal.App.2d 283, 285, 86 P.2d 151; *Tucker v. United Railroads*, 171 Cal. 702, 704, 154 P. 835; *Maxwell v. Western Auto Stage Co., Inc.*, 46 Cal.App. 548, 550, 189 P. 710; *Huntington v. Vavra*, 36 Cal.App. 352, 354, 172 P. 166; *Blaylock v. Jensen*, 44 Cal.App.2d 850, 852, 113 P.2d 256; *Woodworth v. Morgan*, 4 Cal.App.2d 488, 490, 41 P.2d 186.

The court having failed to find upon the issue of contributory negligence, the judgment must be and it is reversed.

MOORE, P. J., and McCOMB, J., concur.



76 Cal.App.2d 344

BOLE v. BOLE.

Civ. 15396.

District Court of Appeal, Second District,
Division 2, California.

Oct. 3, 1946.

Rehearing Denied Oct. 21, 1946.

1. Evidence ⇨ 99, 143, 148

A party is entitled to admission and trial court's consideration of all competent, material, and relevant evidence, tending to prove or disprove any material issue raised by pleadings, before fact findings are made.

2. Divorce ⇨ 116

In wife's suit for divorce on ground of mental cruelty, excluded testimony of spouses' nine-year-old son that defendant was not drunk, as claimed by plaintiff, at time of party at spouses' home, was compe-

* Appellant has tendered this as one of the grounds for reversal of the judgment but has not provided us with any

authorities relating to the question. Respondent has presented neither brief nor oral argument.

tent to corroborate defendant's testimony that he was not intoxicated at such time.

3. Divorce ⇐116

In wife's divorce suit, excluded evidence that plaintiff's mother was woman of immoral character and unfit to associate with spouses' children was admissible to show sufficient justification for defendant's alleged mental cruelty in refusing to permit his mother-in-law to come to his home.

4. Divorce ⇐184(12)

In wife's suit for divorce on ground of husband's mental cruelty in being drunk at time of party at spouses' home and refusing to permit his mother-in-law to come to their home, erroneous exclusion of testimony of spouses' nine-year-old son that defendant was not drunk at such time and evidence that his mother-in-law was woman of immoral character and unfit to associate with children was prejudicial to defendant.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Mercedes J. Bole against Robert B. Bole for divorce. Judgment for plaintiff, and defendant appeals.

Reversed.

James M. Gammon, of Los Angeles, for appellant.

William J. Clark, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action for divorce predicated on the ground of mental cruelty, defendant appeals.*

The essential facts are these:

Plaintiff filed an action for divorce predicated upon the ground of mental cruelty. The principal testimony at the trial concerned what occurred at a party on April 9, 1944, at the home of plaintiff and defendant. Plaintiff introduced evidence tending to prove that defendant was drunk and quarrelsome on that occasion. Defendant denied the accusations and subpoenaed his

nine year old son who was present at the party. Plaintiff who had the custody of the boy refused to produce him in court and the trial judge refused to require the boy to appear; whereupon defendant offered to prove by the testimony of his son that defendant was not drunk at the time claimed by plaintiff and that others at the party struck defendant. The trial judge in spite of this offer of proof refused to require the boy to attend the trial and testify.

Plaintiff also in support of her allegations of mental cruelty offered testimony tending to prove that defendant refused to permit his mother-in-law to come to their home. Defendant admitted that he objected to his wife's mother coming to their home and gave as his reason that she was a woman of immoral character given to telling dirty stories and was not fit morally to associate with children. The trial court refused defendant's offer of evidence tending to prove that plaintiff's mother was not a proper person to associate with children.

This is the sole question necessary for us to determine:

Did the trial court commit prejudicial error in refusing to (1) require plaintiff to bring her son into court as a witness for defendant pursuant to the subpoena served upon the boy and (2) admit evidence offered by defendant tending to show the character of his mother-in-law?

[1] This question must be answered in the affirmative. A party is entitled to have received in evidence and considered by the court, before findings of fact are made, all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleadings. (*Mashbir v. Mashbir*, 29 Cal.App.2d 733, 735, 85 P.2d 482; *West Coast L. Ins. Co. v. Crawford*, 58 Cal.App.2d 771, 774, 138 P.2d 384. See also 64 C.J. [1933] Trial sec. 113, p. 110.)

[2] In the instant case the evidence excluded by the trial court was competent, relevant and material.

1) The testimony of the son as indicated

* It should be noted that plaintiff has not favored this court with a brief or oral argument.

by the offer of proof would have corroborated defendant's testimony that he was not intoxicated as was to be inferred by the testimony of plaintiff and her mother.

[3] 2) The offered testimony relative to the character of plaintiff's mother, if believed by the trial judge, would have been a sufficient justification for the alleged mental cruelty inflicted upon plaintiff by defendant in refusing to permit the mother-in-law to come to his home.

[4] Refusal of the trial court to receive the evidence offered by defendant was obviously prejudicial to defendant's case.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and WILSON, J., concur.



76 Cal.App 2d 231

DEW'S, Inc., et al. v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al. (SCREEN EXTRAS GUILD, Intervener).

Civ. 15271.

District Court of Appeal, Second District,
Division 3, California.

Sept. 25, 1946.

Rehearing Denied Oct. 22, 1946.

Hearing Denied Nov. 21, 1946.

1. Master and servant ⇨78

The burden was upon unemployment compensation claimant to prove that she was available for work during the weeks she sought unemployment insurance benefits. Gen.Laws, Act 8780d, § 57.

2. Master and servant ⇨78

Mere fact that an unemployment compensation claimant, at time of filing her application for unemployment insurance benefits, seeks work only in her usual occupation, does not of itself establish that she is not "available for work" within Unemployment Insurance Act. Gen.Laws, Act 8780d, § 57.

See Words and Phrases, Permanent Edition, for all other definitions of "Available for Work".

3. Master and servant ⇨78

A claimant, who has had full time employment in an occupation in which he is particularly trained and skilled, but who is unemployed at time of filing his claim through no fault of his own, is "available for work", within Unemployment Insurance Act, even if at time of filing his claim he refused to accept employment in any other trade than that which is his usual occupation, provided it is established that good prospects exist for obtaining employment in usual occupation on a full time basis within a reasonable time. Gen.Laws, Act 8780d, § 57.

4. Master and servant ⇨78

An unemployment compensation claimant who, at time of filing her application, was seeking work only in her usual occupation as a motion picture extra player was not "available for work", within meaning of Unemployment Insurance Act, so as to be entitled to benefits, where it did not appear that she had good prospects of obtaining regular employment as an extra player, and her claim that she was not physically able to do any other work than that of an extra player was refuted by her own testimony. Gen.Laws, Act 8780d, § 57.

5. Master and servant ⇨78

Where work as motion picture extra player was the same whether the rate of pay was \$5.50 or \$10.50 per day under union contract with studios, the determining factor being whether extra was to appear in group of 30 or more extras on a particular day, work as an extra at \$5.50 per day rate was "suitable work", which would render compensation claimant ineligible for benefits if she refused to accept notwithstanding her claim that acceptance of work at lower figure would disqualify her from accepting work at the higher figure and that her costumes and her experience entitled her to the higher pay. Gen.Laws, Act 8780d, §§ 13, 56.

See Words and Phrases, Permanent Edition, for all other definitions of "Suitable Work".

6. Master and servant ⇐78

Where unemployment compensation claimant sought to show that work as a motion picture extra at the rate of \$5.50 per day would not be "suitable work", rendering her ineligible for benefits if she refused to accept, because work at such rate would not give wages equal to amount of weekly benefits, burden of proof was on claimant. Gen.Laws, Act 8780d, § 13(a).

7. Master and servant ⇐78

Where work as a motion picture extra player was the same whether the rate of pay was \$5.50 or \$10.50 per day, the determining factor being whether extra was to appear in group of 30 or more extras on a particular day, extra players who openly stated that they would not accept work at the \$5.50 per day rate could not thereafter assert that there had been no definite refusal of any specific offer of employment at the \$5.50 rate, and therefore they were "available for work" and were entitled to be paid from unemployment insurance fund. Gen.Laws, Act 8780d, §§ 13, 56.

8. Master and servant ⇐78

Where facts were undisputed in regard to claims of certain motion picture extra players for unemployment insurance benefits, the questions as to availability of claimants for work and suitability of work offered them were questions of law which were properly before District Court of Appeal for determination when reviewing order of unemployment insurance appeals board, as against contention that such matters were exclusively for determination of the administrative board. Gen.Laws, Act 8780d, §§ 13, 56, 57.

accounts of the petitioners for any such benefits to them.

Writ issued.

Loeb & Loeb and Herman F. Selvin, all of Los Angeles, and Adrian A. Kragen, of San Francisco, for petitioners.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondents.

Henry B. Ely and Newmark & Hamblin, by Norman Newmark, all of Los Angeles, for intervener Screen Extras Guild, etc.

WOOD, Justice.

In this proceeding nine companies which are engaged in the production of motion pictures in California seek a writ of mandate to compel the California Employment Commission to vacate its decisions granting unemployment insurance benefits to eleven motion picture extra players, to deny payments of such benefits to those players, and to permit no charges against the accounts of said companies for any such benefits to them.

The petitioners are Loew's Incorporated, Twentieth Century-Fox Film Corp., Paramount Pictures, Inc., Samuel Goldwyn Studios, Republic Productions, Inc., Universal Pictures Company, Inc., Columbia Pictures Corporation, R K O Radio Pictures, Inc., and Warner Bros. Pictures, Inc. The names of the claimants are: Lyle Tayo, Ann Beeler, Margaret Donna, Perseus Ruth, Pearl Rowan, Agnes Steele, Edith A. Green, Sybil I. Bacon, Edna G. Healy, Rose C. Breacher, and Violette V. Mansfield.

The petitioners, acting jointly through the Central Casting Corporation, their authorized agent, protested the application of each claimant for unemployment insurance benefits. There are, therefore, eleven separate cases for consideration herein. Since the legal questions presented are the same in each case, and since the facts in each case are undisputed and substantially the same, the cases will be considered together.

The initial determinations as to the claims, by various unemployment insurance

Original proceeding by Loew's, Incorporated, and others, against California Employment Stabilization Commission and others for a writ of mandate to compel respondent commission to vacate its decisions granting unemployment insurance benefits to 11 motion picture extra players, to deny payments of such benefits to those players, to permit no charges against the

representatives of the department of employment, were that insurance benefits should be allowed in all the cases, except those of Tayo and Beeler. Thereafter, upon separate hearings before various referees of the department, it was held that the benefits should be allowed in all the cases, except those of Rowan and Healy. In those cases wherein a referee allowed benefits, the petitioners herein appealed to the unemployment insurance appeals board. In those cases wherein the benefits were not allowed, the claimants therein appealed to that board. The appeals board allowed the benefits to all the claimants—two members deciding that the benefits should be allowed, and one member, the chairman, dissenting.

The claimants are known as "extra players," and are members of a union known as the Screen Actors' Guild. Each of the petitioners had executed a contract with the union, under which petitioners agreed that all persons employed by them as extra players must be "B" members in good standing in the union, and that members only should be employed as extra players by petitioners, except on occasions when there are not enough members available to fill a particular requirement and the union, for that reason, grants a waiver of said provision. All the claimants herein were such members of the union. The average number of years each has been employed intermittently as an extra player is approximately 23. The amounts received by each during the base period of her claim (twelve months) ranged from \$343 to \$768.14, and the average amount received by each for such period was approximately \$500, or approximately \$42 per month, or \$10 per week. The amounts of the weekly benefits allowed by the commission are not shown as to all the claimants, but from a consideration of the amounts of their earnings and the benefits which are shown it would seem that the weekly benefits ranged from \$10 to \$16 per week.

The Central Casting Corporation has an agreement with all the major studios, including petitioners, whereby it hires extra

players for them. It employs about 96% of all the extras used by major studios in this locality, and it is paid for its services by those studios. It does not employ the players who are known as "stars." Under the contract, the studios themselves may employ some of the extras. The casting corporation is a central employment agency created for the convenience of the studios and the extra players. It provides a single place where the extras may seek employment, and thus eliminates the former requirement that they should go to the various studios to apply for work.

Under the central agency plan, the studios notify the casting agency of their needs as to extra players, and the casting directors at the agency, who have information as to the qualifications of the extra players, make the selections of the extras for the various scenes required. Usually such notification is given on the day preceding the day when the extras are needed, and most of those notifications are received after 3 p. m. A part of the method of employing an extra player through the central agency is that the applicant, in order to let it be known that he or she is available for selection on a particular day, is required to telephone the agency about every hour of that day from 9 a. m. to 3 p. m., and about every fifteen minutes from 3 p. m. to 7 p. m. If the applicant is seeking work for which \$10.50 or more per day is paid, a certain telephone number is called, and if it is work for which \$5.50 is paid, another telephone number is called. The applicant is also required to appear at the agency about every six months for an interview. There is no requirement, however, under such plan, that extra players let it be known that they are available for selection, but it is entirely optional with them as to whether they seek employment.

Under the agreement with the Screen Actors' Guild, extra players receive a minimum daily rate of \$10.50, except that if they are called in groups of 30 or more for a single photoplay on the same day the rate is \$5.50. No maximum amount is stated, and if an extra is selected for a special part in a picture, before or after

arriving at the scene, the amount paid therefor may be any amount agreed upon. Under such circumstances some extras receive \$35 or more per day. Some of the claimants herein have received at various times \$25 or \$35 or more per day.

The most frequent calls are for extras at \$5.50 and \$10.50 per day. The \$5.50 calls are for "atmosphere and crowd persons" without special skill or talent. On such a call, the extra may wear the kind of clothes he or she desires. On the \$10.50 calls the extra is required to wear the type of clothing specified, except formal dress. In other words, an extra player called individually, without special requirement as to costume, would receive a minimum of \$10.50, except that if the extra player were called for the same work in a group of 30 or more such extra would receive \$5.50.

The claimants complied with the requirements as to telephoning, except that they did not use the telephone number designated for use in seeking the work for which \$5.50 per day was paid. Each claimant testified that she would not accept the employment for which \$5.50 per day was paid.

As above indicated, there are eleven reporters' transcripts herein. It has been stated in the briefs herein and in the arguments before the court that the case of Lyle Tayo is typical and representative of the evidence in all the cases. The issues herein as to all the cases have been presented and submitted upon the theory that the determination as to the Lyle Tayo case should also be the determination in the other cases.

Lyle Tayo, 56 years of age, has been employed intermittently as an extra player for approximately 25 years, principally as a dancer. Her dancing included old-fashioned and modern dancing, and jitterbugging. She has the costumes required for her work as an extra player. According to the records of the department of employment, her earnings during the base period of her claim for benefits, being the year 1943, amounted to \$479.88. During the first ten months of 1944 she received

\$672.15. She filed her claim for unemployment insurance benefits with the department of employment on May 15, 1944, and on that date she registered with the public employment office in her district for work as an extra player. She did not receive any work through the public employment office, but, from the time of filing her claim to October 31, 1944, she obtained, through her own efforts, 35 days of work as an extra player and received earnings in the sum of \$436.82. During the weeks of unemployment in that period she received unemployment benefits at the rate of \$13 per week.

At the time of registering for employment and applying for unemployment insurance benefits, she stated in her application that she would not accept any kind of employment other than that of extra player at \$10.50 or more per day. She said at the hearing before the referee that she would not accept work as an extra player at \$5.50 per day. She said that her experience and ability "calls for at least \$10.50," and that she could not "get the better work," if she accepted the \$5.50 work. In other words she has restricted acceptable employment to work in motion pictures as an extra player at a minimum wage of \$10.50 per day.

During the year and a half preceding her application for unemployment insurance benefits she accepted only employment as an extra for which she would be paid a minimum of \$10.50 per day, but on many occasions during several years prior thereto she accepted employment at the \$5.50 rate. She said at the hearing before the referee that she could not work as a salesclerk in a store, because she is nervous and not too strong; that she would not accept work that is confining; that work "in the studio is so much different, because one day it is one thing, and the other day it is something else," and she "is not tied right down to something confining." She also said that she was physically able to work continuously as an extra player. She said further that she would accept work other than in motion pictures if the amount to be paid therefor was \$10.50 per day.

The facts are undisputed.

Petitioners assert that the board acted arbitrarily and capriciously, and contrary to the undisputed evidence.

Section 57 of the Unemployment Insurance Act, Deering's Gen. Laws, Act 8780d, as amended in 1939, provides in part: "An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:

* * * (c) He is able to work and available for work." Section 56 of said act provides in part: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: * * * (b) If without good cause he has refused to accept suitable employment when offered to him * * *." Section 13 of said act provides in part: "(a) Definition. 'Suitable employment' means work in the individual's usual occupation or for which he is reasonably fitted. * * *"

[1-4] One of the questions here is whether the claimant was available for work. The burden was upon her to prove that she was available for work during the weeks she sought unemployment insurance benefits. In construing a statute similar to the one herein, it was said in the case of *Haynes v. Unemployment Compensation Commission*, 353 Mo. 540, 183 S.W.2d 77, at page 80, that "* * * the burden of proof to establish a claimant's right to benefits under the Unemployment Compensation Law rests upon the claimant." The mere fact that a claimant, at the time of filing his application, seeks work only in his usual occupation does not of itself establish that he is not available for work. A claimant, who had had full time employment in an occupation in which he is particularly trained and skilled, but who was unemployed at the time of filing his claim through no fault of his own, may be held to be available for work even if at the time of filing his claim he refuses to accept employment in any other trade than that which is his usual occupation, provided it is established that good prospects exist for obtaining

employment in his usual occupation on a full time basis within a reasonable time. See *Berthiaume v. Christgau*, 218 Minn. 48, 15 N.W.2d 115. The claimant Tayo had not been steadily and regularly employed as an extra or at all for at least 25 years. During that period of time she sought only one kind of work, and that was in an industry which by its nature could offer only intermittent and casual employment—employment which is not alone controlled by the volume of production but by the need existing for her particular talents. Her employment was only for a few days at a time. She was not required to report regularly for work, but it was entirely optional with her as to when, if at all, she should apply for work. There was no assurance of employment even if she reported regularly for work. The extras were not selected in rotation or in any manner by which it could be determined with reasonable certainty when an extra who applied for work would be employed. There is no evidence herein indicating that the claimant had any prospect of regular employment in the kind of work she had been doing intermittently for many years. If she had any prospect of re-employment as an extra player, it is reasonable to assume, by reason of the nature of the work and her previous employment record, that such employment would be intermittent and of a few days duration only. She has restricted acceptable employment not only as to the kind of work she would be willing to do, that is, intermittent work as an extra player, but has placed a further restriction on that kind of work as to the amount of compensation which would be acceptable to her, by declaring that she would not be willing to do even that acceptable kind of work unless she would be paid at least \$10.50 per day. She sought only work that she wanted to do, work that was not confining, that had different entertainment aspects from day to day, that was casual and sporadic. It cannot be held that she had good prospects of obtaining regular employment as an extra at \$10.50 per day within a reasonable time or at all, at the time when she refused to accept any other

kind of employment or to accept the same kind of employment at \$5.50 per day. Her claim to the effect that she was not strong enough and not physically able to do any other work than that of extra player is refuted by her testimony that she does strenuous dancing. Her objection to work that is confining appears to be a matter of personal preference rather than a necessary restriction in the interests of her health. She was not available for work within the meaning of the statute.

[5] Another question is whether the work for which \$5.50 per day was paid was suitable work. "Suitable work," according to the statute above quoted, means work in the individual's usual occupation or for which he is reasonably fitted. The claimants concede that intermittent work as an extra at the rate of \$10.50 per day was suitable work. The work as an extra for which \$5.50 per day was paid is the same work as that for which \$10.50 per day was paid, except that as to the \$10.50 work there were occasions when a designated kind of clothing, usually the kind appropriate for a certain season of the year, was required. Although the work as an extra was the same whether the rate of pay was \$5.50 or \$10.50 per day, the determination as to which of those amounts should be paid for the work depended, under the claimants' union agreement with the studios, on whether the extra was to appear in a group of thirty or more extras on a particular day. As above stated, under the union agreement, if the extra was to appear individually or in a group fewer in number than thirty then the amount to be paid would be \$10.50 per day, but if the appearance was to be in a group of thirty or more then the amount would be \$5.50 per day. Therefore, irrespective of which amount was paid, it appears that the work itself was the usual kind of work that claimants had been doing for years, and the kind for which they were reasonably fitted. It therefore appears also that the work as an extra at the rate of \$5.50 per day, insofar as the physical ability, health, skill, and training of the extra were concerned, was suitable work.

Claimants assert, however, that work as an extra at the rate of \$5.50 per day was not suitable work for the reason that if they accepted the work at that rate they could not thereafter obtain work at the rate of \$10.50 per day. The testimony of the manager of the casting agency was that the acceptance of work at the \$5.50 rate did not affect the extra's opportunities of obtaining work at the \$10.50 rate. Not only is such contention of claimants disputed by the casting agency, but the facts are that the claimants did accept the work at the \$5.50 rate for many years, until about a year before they applied for unemployment insurance benefits, and that during those many years they also obtained the work at the \$10.50 rate, and that now irrespective of their long continued acceptance of the \$5.50 work they are able to obtain work at the higher rate. Claimants' contention that the work at the \$5.50 rate was not suitable work, because their acceptance of it would deprive them of opportunities to obtain work at the higher rate, is not sustained.

Claimants assert further that the \$5.50 work was not suitable work because their ability and experience entitled them to at least \$10.50 per day. Of course, in their capacities other than as applicants for unemployment insurance benefits, they were not required to do any particular kind of work or any work at all, and were not required to accept any particular amount of compensation for their services. They were free to work or not to work, and were free to fix the amount of compensation for which they would be willing to work. In order to be eligible, however, for unemployment insurance benefits, they were required to comply with the provisions of the unemployment insurance act, and were not free to act independently of those provisions. They were required to be genuinely available for suitable work. They were not justified in refusing to work merely because the compensation to be paid was less than their self-appraised value of their work. Their argument indicates that they regard the unemployment insurance benefits in the nature of a pension which must be paid to them when they refuse to work be-

cause the proffered compensation does not meet the arbitrary standard of compensation set by themselves. In this connection it is to be remembered that the compensation at the \$5.50 rate was an amount negotiated for, and agreed upon, by and between the claimants' union and the studios as a suitable amount to be paid. This contention of claimants is not sustained.

[6] Another argument of claimants is that there was no evidence that \$5.50 per day would be as much as the weekly benefits, and therefore under the statute it cannot be held that the work at such rate was suitable. (Section 13, subdivision (a), of the act, states that suitable work should give wages at least equal to the amount of the weekly benefits.) The claimants are the ones who demanded payments under the statute, and the burden of proof was upon them. In any event, the claimants stated in effect that they would not accept the \$5.50 work even if it were for five days per week. It must be presumed, therefore, that they would not have accepted five days of such work during a week. The weekly benefits herein ranged from \$11.00 to \$14.00 per week.

They assert also that the \$5.50 work was not suitable because they possessed necessary costumes or wardrobe for work at the higher rate. The claimants were not justified in refusing to work for a livelihood at the lower rate, and in demanding unemployment insurance benefits, merely because they were fortunate enough to possess clothing that they might use occasionally if they were employed at the higher rate. Their contention cannot be upheld.

[7] Claimants contend further that there was no definite refusal of any specific offer of employment at the \$5.50 rate, and therefore that they were available for work and were entitled to be paid from the unemployment insurance fund while they were not working. They had stated unequivocally in their applications for the unemployment insurance benefits, and in their testimony before the referees, that they would not accept work at the \$5.50 rate. They refused to call the telephone

number which they knew should be called in order to obtain such work. They knew that number had been provided by the studios for claimants' convenience in obtaining the work. They had called that number many times in many previous years and as a result thereof had obtained a great deal of such employment. The effect of their argument is that their emphatic answers that they would not accept such work were of no importance, were immaterial, and should be ignored; that the negative answers really were affirmative answers; that even though they said they would not accept the work, the representatives of the department and the studio representatives should not have relied on their statements but should have presented evidence of specific offers of such work. The point relative to making a specific offer of such work was not raised at the hearings before the referees. Those negative answers of the claimants undoubtedly lulled the representatives of the department and the studios into a belief that the matter of actually making a specific offer of employment would not be raised as a point in the cases. By reason of such negative answers, it would seem that it would have been a futile act to present evidence of a specific offer of employment, and that such answers would have been a waiver of the requirement that a specific offer be made. At the oral argument, however, before the court it was stated in behalf of the claimants that the usual and general rules that futile acts are not required, and that a waiver results when it is stated that a requirement need not be fulfilled have no application to an unemployment insurance case. It does not appear clearly why such a case is an exception to those general rules, but it seems, according to the argument, that the reason is that an unemployed person has such an absolute and fundamental right to refuse to work and to receive unemployment insurance payments, that unless the employers and the public employment officers comply strictly with all technical rules in testing the unemployed person's alleged willingness to work, he is entitled to be maintained at the expense of the unemployment insurance fund. The

BROCK v. FOUCHY et al.

Civ. 13076.

District Court of Appeal, First District,
Division 1, California.

Oct. 7, 1946.

Hearing Denied Dec. 5, 1946.

claimants were bound by their answers that they would not accept the \$5.50 work, and all persons concerned were entitled to believe that the claimants meant precisely what they said. They are to be regarded as being in the same position they would have been in if specific offers of employment had been made and they had rejected them. Under the circumstances, the representatives of the department and the studio representatives were not required to do the futile act of making a specific offer of employment. The matter of obtaining work for claimants did not rest solely upon the public employment officers, but the claimants were required to be genuinely diligent in trying to obtain work. It is reasonably certain, based upon claimants' years of experience in obtaining the \$5.50 work, that they could have obtained the \$5.50 work if they had called the telephone number provided for that purpose. Their contention is not sustained.

[8] The further contention of claimants that this matter was exclusively for the determination of the administrative board is not sustained. The facts being undisputed, the questions as to availability for work and suitability of the work are questions of law which are properly before the court for determination.

The claimants have unreasonably restricted their availability for work as to kind of work and amount of compensation; they have restricted their availability for work to that of a casual or part time occupation; have refused to accept suitable work; have shown that they were not genuinely in the labor market; and have shown a preference to be unemployed, receiving unemployment insurance benefits, rather than to earn a livelihood by doing suitable work for which they were reasonably fitted. We, therefore, agree with the conclusion of Chairman McGettigan of the unemployment appeals board, stated in his dissenting opinions, that the claimants were not eligible for unemployment insurance benefits.

It is ordered that the writ of mandate issue.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; CARTER, J., dissenting.

1. Evidence ⇨43(2)

Judicial notice was taken of a photostatic copy of "register of actions" marked as an exhibit which contained the nature and number of the action with the date of filing of various documents in the case, where the photostatic copy appeared in the record, notwithstanding exhibit was marked subsequent to trial court's decision on motion to dismiss action and quash service of summons. Code Civ.Proc. § 1875, subd. 3.

2. Appeal and error ⇨927(2)

On appeal from dismissal on ground that summons was not issued within a year from commencement of action, appellate court assumed that trial court considered the indorsement as it appeared on the face of the complaint in the clerk's transcript that no summons had issued, the affidavit requesting an alias summons which did not aver that a previous summons had ever issued, the register of actions, and all other facts from which a reasonable inference could be drawn that no summons had issued within the statutory time.

3. Evidence ⇨1

Appellate court could consider photostatic copy of register of actions upon the theory that evidence which may be judicially noticed by the court of original jurisdiction may be considered on appeal.

4. Process ⇨45

A prerequisite of an "alias summons" is the issuance of an original summons.

See Words and Phrases, Permanent Edition, for all other definitions of "Alias Summons".

5. Process ⇨45

Affidavit for issuance of an alias summons filed more than one year after commencement of action, alleging merely that affiant could not find the original summons

paper for the case and not alleging that original summons had been lost, was insufficient and order for issuance of such alias summons was void where record did not set forth that original summons was ever issued. Code Civ.Proc. § 581a.

6. Appeal and error ⚭1008(1)

When questions of fact presented on conflicting records and affidavits are determined adversely to appellant in a motion under the statute requiring dismissal of action upon motion of court or of any interested party unless summons was issued within one year or served and return made within three years after commencement of action, trial court's conclusions are binding upon an appellate court. Code Civ.Proc. § 581a.

7. Appearance ⚭9(3)

Order, extending time to defendants to plead if defendants' motion to dismiss on ground that summons had not been issued within a year and alias summons was denied, did not negative defendants' contention that only a special appearance was made where motion showed that it was a special appearance and that the order of extension was a provisional order which did not indicate a voluntary appearance. Code Civ.Proc. § 581a.

8. Appearance ⚭9(1)

In determining whether an appearance is a general or special, the test is did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party, if so, the appearance is "special", if however party appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case, it is a "general appearance".

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance" and "Special Appearance".

9. Appearance ⚭9(1)

The rule with respect to whether an appearance is general or special may be decided when the filed documents are analyzed to determine if any affirmative relief

could be granted on the merits as distinguished from a mere request for a dismissal based on a statutory provision, and it is not the appellation given the appearance, but the substance of the filed document, which is determinative.

10. Appeal and error ⚭767(2)

Affidavit in appellant's reply brief on appeal relative to the merits of appellees' motion in trial court to dismiss was required to be stricken from the files.

11. Appeal and error ⚭760(1)

References in brief to facts which were not substantiated in the record on appeal could not be considered on appeal.

12. Dismissal and nonsuit ⚭81(7)

Appellant's affidavits explaining erasure of notation of issuance of summons on register of actions although sufficient explanation were not admissible on motion to correct judgment dismissing action because summons was not issued within one year from commencement of action, where the affidavits were filed several years after the erasure and subsequent to entry of the judgment. Code Civ.Proc. § 581a.

13. Appeal and error ⚭931(6)

Where there is competent evidence to support the judgment, it may be assumed on appeal that inadmissible evidence was ignored by the trial court in its final decision.

14. Appearance ⚭3

Appearance of one defendant by filing a demurrer was not a "general appearance" on behalf of any other defendant.

15. Dismissal and nonsuit ⚭65

The statutory provision that all actions commenced without the issuance of a summons for one year must be dismissed by the court on its own motion or of any interested party authorizes a court, upon application of one defendant, appearing specially, to dismiss the action against all defendants against whom a summons has not been issued within one year. Code Civ.Proc. § 581a.

16. Appeal and error ⚭544(1)

Appellate court could not pass upon merits of claimed errors in the absence of a clerk's transcript or bill of exceptions.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Bert Brock against A. O. Fouchy, 175 Sixth Street, San Francisco, and 32 John Does. From a judgment of dismissal in favor of defendant Southern Pacific Company, sued as one of 32 John Does, plaintiff appeals.

Judgment affirmed.

Bert Brock, of San Francisco, in pro. per.

A. B. Dunne and Dunne & Dunne, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal by plaintiff in propria persona from a judgment of dismissal in favor of defendant Southern Pacific Company, sued as one of thirty-two John Does. The judgment is in conformity with the provisions of section 581a of the Code of Civil Procedure. The appeal does not embrace that part of the judgment relative to defendant A. O. Fouchy, against whom the action is still pending. For the purpose of considering the present appeal it may be assumed, though not decided, that the complaint is in the nature of an action for personal injuries based upon certain claims of false imprisonment, malpractice, fraud and assault and battery.

The question on appeal concerns the applicability to the facts of a portion of sec. 581a of the Code of Civil Procedure. The pertinent parts thereof read: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced *must be dismissed by the court* in which the same shall have been commenced, *on its own motion*, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within

said three years in the same manner as if summons had been issued and served." (Italics added.)

The complaint was filed July 12, 1941. On the first page thereof, as it appears in the clerk's transcript, is endorsed "No Summons Issued." About three years later on July 3, 1944, ex parte, the court ordered the issuance of an alias summons based upon an affidavit filed by plaintiff. The affidavit does not aver that a summons was issued on July 12, 1941 or at any time thereafter, though the affidavit sets forth that plaintiff could not "find the Summons papers for Case No. 303503," the matter involved on appeal. The alias summons was served prior to July 11, 1944 on A. O. Fouchy, who was specifically named as a defendant, and on Southern Pacific Company, one of the original John Does. On July 13, 1944, the Southern Pacific Company specially "(and not otherwise)" appeared and gave notice of its intention to move to dismiss the action and quash service of summons on the grounds that summons had not issued within one year from the commencement of the action and that "Southern Pacific Company has not appeared in said action by demurrer, answer, or otherwise, and has not entered into any stipulation in writing with the plaintiff in respect to issuance or service of summons or appearance therein." That an alias summons purported to issue; that the respondents did not appear by demurrer or answer, and that no stipulation of any kind or character has ever been signed by the parties hereto, are undenied. The court ordered a stay of proceedings until the motion could be heard, and extended the time to appear other than specially until ten days after the determination of the motion in the event that it should be denied.

In the clerk's transcript on appeal the following instruments appear as filed prior to August 17, 1944, the date of the hearing of the motion to dismiss the action and to quash the service of summons, and prior to the entry of judgment on August 19, 1944: The original complaint, the affidavit requesting an alias summons, the order for the issuance of the alias summons, the alias summons, the affidavits of the sheriff that the summons was served on A. O. Fouchy

and the assistant secretary of the Southern Pacific Company, the special appearance of the Southern Pacific Company to question the jurisdiction over the parties and the subject matter of the action, the order staying proceedings until the determination of the motion. There also appears an affidavit of service of summons on the City and County of San Francisco which need not be considered herein. All the rest of the above designated documents may be considered in addition to the records of the case made or filed up to the date of the minute order.

[1] There appears in the record, marked as an exhibit, a photostatic copy of "Register of Actions" containing the nature and number of the action with the date of filing of the various documents in this case. It is true that this exhibit was marked subsequent to the decision on the motion, but courts take judicial notice of their own record pending in the same court. Code Civ.Proc. § 1875, subd. 3; *Mason v. Drug, Inc.*, 31 Cal.App.2d 697, 88 P.2d 929; *Hammell v. Britton*, 19 Cal.2d 72, 119 P.2d 333; *Willson v. Security-First Nat. Bank of Los Angeles*, 21 Cal.2d 705, 134 P.2d 800; *Driver v. International Air Race Ass'n*, 54 Cal.App.2d 614, 129 P.2d 771; *Schomer v. R.L. Craig Co.*, 137 Cal.App. 620, 31 P.2d 396. The photostatic exhibit shows plainly that a notation of the issuance of summons was made and then "partly" erased—that is, from the incomplete erasure letters of the words can be easily deciphered indicating that an entry of the issuance of summons had been made. Evidently the trial court did not conclude that someone had sought, by an attempt at erasure, to falsify the record in order to assist the defendant. The execution is crude. The court must have concluded that someone merely attempted to correct an erroneous entry. Some other method, such as applying to the court for an order to make the change, would have been preferable, but we are not interested in that phase of the question at this time.

[2] The trial court could have considered, and on appeal we will assume that it did, the endorsement, as it appears on the face of the complaint in the clerk's trans-

cript, that no summons had issued; the affidavit requesting an alias summons which did not aver that a previous summons had ever issued; the register of actions and all other facts and circumstances from which a reasonable inference could be drawn that no summons had issued within the statutory time.

The judgment of dismissal recites that "none of the defendants named in said action with the exception of defendant A. O. Fouchy has appeared in said action within three years after the commencement of said action." The judgment also reads: "* * * and the court having examined all of the records on file in the above entitled cause, and having been fully advised in the premises, and having found that due notice of said motion was served upon the plaintiff and that summons in said action was not issued within one year after the commencement of said action, * * * and good cause appearing therefor," the motion to dismiss is granted in said action "as to all defendants named therein, except defendant A. O. Fouchy."

[3] If the statement in the judgment of dismissal—that the court "examined all the records on file"—is incorrect, and that he did not examine the register of actions prior to the minute order directing judgment for defendant, there is still evidence, without the photostatic exhibit, to uphold the judgment of dismissal. However, whether actually noticed or not the document will be deemed to have been considered. 10 Cal.Jur., sec. 26, p. 699. The "Photographic Copy of Clerk's Record of Actions" (the exhibit in question) is one of the designated records in the notice to prepare the transcript on appeal. The exhibit is before this court upon the request of appellant. This court may consider the photostatic exhibit upon the theory that evidence which may be judicially noticed by the court of original jurisdiction may be considered on appeal. *Varcoe v. Lee*, 180 Cal. 338, 181 P. 223; *Greif v. Dullea*, 66 Cal.App.2d 986, 153 P.2d 581; *People v. Sanchez*, 21 Cal.2d 466, 132 P.2d 810; *Sewell v. Johnson*, 165 Cal. 762, 134 P. 704, Ann.Cas.1915B, 645. It is not necessary

to resort to any of the judicial council's Rules on Appeal to present this exhibit to this court.

The alias summons in this case should not have been issued. There is no proof that the original summons was returned without service on any or all of the designated defendants, and no proof of its loss. Code Civ.Proc. § 408. It is impossible to lose a summons that has never been issued. In *Kelly v. Ferbrache*, 119 Cal.App. 529, 533, 534, 6 P.2d 987, 988, this court said: "Section 408, Code of Civil Procedure, merely provides that an *alias* summons may, in either of the two events therein specified, issue 'within such time as the original might have been served,' and that period of time by the express limitations of section 581a of the Code of Civil Procedure is fixed as three years. But this does not mean, as appellant contends, that a plaintiff will still have three years from the date of issuance of *alias* summons in which to secure service and return of process, because *all* actions are barred and the court is without jurisdiction under the express provisions of said section 581a, Code of Civil Procedure, 'unless the summons shall be served and return thereon made within three years *after the commencement of said action.*' (Italics ours.)" The court further said (119 Cal.App. p. 533, 6 P.2d 988): "The duplication of previously issued process, whose issuance is provided for by section 408 of our Code of Civil Procedure, is to be had only in the event the original summons has been 'returned without being served on any or all of the defendants, or if it has been lost.'" In *Cook v. Justice's Court of San Diego Tp.*, 16 Cal.App.2d 745, 747, 748, 61 P.2d 357, 359, the court said: "It will be noted that section 581a of the Code of Civil Procedure provides three contingencies for the dismissal of actions and that such actions must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein: (1) Unless summons is issued within one year; (2) unless return of service of summons is made within three years; (3) if summons has been served and no answer has been filed, if

plaintiff fails or has failed to have judgment entered within three years after service of summons."

[4-6] The vital question in this case is the first contingency; that is, the issuance of the summons. If the summons had been issued and returned without service, or had been lost, an alias summons might have been issued. A prerequisite of an alias summons is the issuance of an original summons. The affidavit upon which the summons was issued in 1944 merely sets forth that plaintiff affiant cannot find the summons papers for case number 303503. The record does not set forth that an original summons was ever issued. The affidavit filed for the issuance of an alias summons was insufficient and hence the order for the issuance of such summons was void. "The duplication of previously issued process, whose issuance is provided for by section 408 of our Code of Civil Procedure, is to be had only in the event the original summons has been 'returned without being served on any or all of the defendants, or if it has been lost.'" *Kelly v. Ferbrache*, supra, 119 Cal.App. p. 533, 6 P.2d 988. When questions of fact presented on conflicting records and affidavits are determined adversely to appellant in a motion under section 581a, the trial court's conclusions are binding upon an appellate court. *Kelly v. Ferbrache*, supra. The rule with respect to the issuance of summons is that the trial court *must on its own motion or on the motion of any party interested therein*, whether named in the complaint as a party or not, dismiss the action. In brief, the summons must be issued within one year and served within three years after the commencement of the action or it is subject to dismissal under the heretofore cited provisions of the code. *Kelly v. Ferbrache*, supra; *Cook v. Justice's Court of San Diego Tp.*, supra; *Gonsalves v. Bank of America Nat. Trust & Savings Ass'n*, 16 Cal.2d 169, 105 P.2d 118; *People v. Southern Pacific R. R. Co.*, 17 Cal.App. 2d 257, 61 P.2d 1184; *Schultz v. Schultz*, 70 Cal.App.2d 293, 161 P.2d 36; *Lynch v. Bencini*, 17 Cal.2d 521, 110 P.2d 662; 9 Cal.Jur., p. 533, secs. 23, et seq. The foregoing citations deal primarily with the issu-

ance of summons returned without service on any defendant, but it is made plain that such cases decide directly or indirectly that when no summons has been issued within a year the action must be dismissed, except against those defendants who voluntarily appeared.

[7,8] Appellant contends that the order extending time to respondents to plead if the motion to dismiss should be denied, negatives respondents' contention that only a special appearance was made. The motion shows that it is merely a special appearance and that the order of extension was a provisional order which did not indicate a voluntary appearance. *Sharpstein v. Eells*, 132 Cal. 507, 64 P. 1080; *Goland v. Peter Nolan & Co.*, 15 Cal.App.2d 696, 60 P.2d 183; *People v. Southern R. R. Co.*, supra. "The test is—Did the party appear and object only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant or party? If so, then the appearance is special. If, however, he appears and asks for any relief which could be given only to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance regardless of how adroitly, carefully or directly the appearance may be denominated or characterized as special." *Judson v. Superior Court of Los Angeles County* 21 Cal.2d 11, 129 P.2d 361, 362.

[9] The rule with respect to appearance, whether general or special, may be decided when the filed documents are analyzed to determine if any affirmative relief may be granted on the merits as distinguished from a mere request for a dismissal based on a statutory provision. It is not the appellation given the appearance but the substance of the filed document. 3 Cal.Jur., p. 8, secs. 6, et seq. In the present case the motion to dismiss and to quash service of summons is based solely upon sec. 581a without reference to additional relief on the merits. The order extending the time to appear generally, bestows the right to a hearing on the merits conditionally, that is, only in the event that the motion specially filed should be denied.

[10,11] There was filed in this court "Appellant's Reply Brief" containing an affidavit relative to the merits of the motion. Necessarily the affidavit must be stricken from the file. The brief also contains a recitation of some facts which are not substantiated in the record on appeal. Such references may not be considered. All other points of the brief have been considered. Respondents sought to file "Respondents' Memorandum in Opposition and Objection to Appellant's Reply and Affidavit Contained Therein." It is a reply to appellant's reply brief. There is no rule providing for the filing of such a document without permission of the court. Permission was withheld pending a hearing of the case. The court indicated its attitude at the time of oral argument. The clerk of the court is directed not to file the document and its contents are ignored.

[12,13] Upon the presentation of the photostatic exhibit after the minute order, and after the filing of the judgment of dismissal, respondents filed three affidavits by the county clerk and two of his deputies explaining the erasure on the register of actions. The explanation was sufficient and the trial court could have accepted it as a complete answer to appellant's contention that a summons was issued, if the affidavits were admissible. When examined, however, and the date of filing considered, which was several years after the erasure and subsequent to the entry of judgment, it must be declared that the affidavits are not part of the record on appeal and are stricken from the file. Such evidence on a motion to correct the record was inadmissible. It may be assumed that where there is competent evidence to support the judgment, that inadmissible evidence was ignored by the trial court in its final decision. *Cordi v. Garcia*, 56 Cal. App.2d 584, 132 P.2d 887; *Watt v. Copeland*, 92 Cal.App. 161, 267 P. 928; *Ford v. Lou Kum Shu*, 26 Cal.App. 203, 146 P. 199; *Bisno v. Herzberg*, 75 Cal.App.2d 235, 170 P.2d 973.

On oral argument appellant submitted a number of cases on various points—most of them from other states. An examination of the citations indicates that they are

not in point or, if seemingly in point, could be differentiated. As the courts of California have sufficiently defined and construed sec. 581a it is not necessary to elaborate on the additional citations. Attention is also called to rule 8 of the Rules on Appeal by the judicial council. It does not appear that there has been any violation of that rule by respondents.

[14,15] The appearance of Fouchy by the filing of a demurrer was not a general appearance on behalf of any other defendant. *Goland v. Peter Nolan & Co.*, supra. The provision of section 581a that all actions commenced without the issuance of a summons for one year "must be dismissed by the court * * * on its own motion," is the authority of a court, upon application of one defendant, appearing specially, to dismiss the action against all defendants against whom a summons has not been issued "within one year."

[16] There is no reporter's transcript on appeal and it is admitted that a court reporter was not in attendance at the hearing. Appellant enumerates other errors. In the absence of a clerk's transcript or bill of exceptions, however, this court is unable to pass upon the merits of the claimed errors. As an example appellant charges that his attorneys failed to properly represent him and that he was thereby deprived of an opportunity to present certain evidence. Appellant is bound by any act or omission of his attorney in the absence of fraud. 3 Cal.Jur. 654. Assuming that damage results, an attorney is liable for negligence in his conduct of a case. 3 Cal. Jur. 670. In the opening brief appellant asserts that the Southern Pacific Company intended to wreck him in health and financially and that with this purpose, and to prevent his further proceeding with this suit, they caused his imprisonment between September 17, 1941 and October 17, 1941. These statements appear in the opening brief, but there is no document in the "Clerk's Transcript on Appeal," filed prior to the determination of the motion, to support such charges.

There is an amended complaint in the record, filed after the minute order, but the amendment could be of no benefit to ap-

pellant on this proceeding as regards dates of imprisonment, as the amended complaint fixed such dates of hospital imprisonment from July 14, 1940 to August 29, 1940, a period almost a year prior to filing the original complaint. In appellant's brief it is stated, however, that appellant was kidnapped "on September 17, 1941 on charges of mental illness insanity * * * and imprisoned in the county hospital."

With or without the photostatic copy this court is forced to approve the order of dismissal made by the trial court on the ground that "all actions * * * commenced must be dismissed by the court * * * on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, *unless summons shall have issued within one year*"; when no appearance has been made by the defendant or defendants "within three years after the commencement of said action." (Italics added.) Sec. 581a, Code Civ.Proc.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



76 Cal.App.2d 295

MACCO CONST. CO. v. FICKERT et al.
Civ. 15315.

District Court of Appeal, Second District,
Division 2, California.

Oct. 2, 1946.

Hearing Denied Nov. 25, 1946.

I. Mines and minerals ¶59

In action to recover back the amount of consideration paid for community oil and gas lease, on ground of fraudulent representations, evidence that well had been abandoned and that lease had expired prior to assignment sustained finding that vendors had knowingly and falsely represented and warranted that equipment and movable property were free of liens as well as finding that lease had ceased to exist.

2. Fraud ⇨28

A single misrepresentation by vendor of a material fact in a transaction is sufficient to support a judgment for fraud.

3. Vendor and purchaser ⇨35

A seller must make full disclosure as to any claims made in good faith against the property he offers to sell and may not permit his confiding purchaser to continue to believe in assertions of a merchantable title.

4. Vendor and purchaser ⇨33

A vendor may not be under an obligation to speak concerning the thing he would sell, yet if he undertakes to do so he must not only speak the truth in all he says, but must tell every material fact within his knowledge which might materially qualify such statements as he may have made.

5. Vendor and purchaser ⇨33

A representation might be literally true yet be actionable if used to create an impression substantially false, and vendor cannot escape liability because purchaser might have ascertained the whole truth by making inquiry.

6. Husband and wife ⇨25(6)

Where wife admitted by answer that her husband had represented and warranted that they were owners of community oil and gas lease and of personal property situated on lot, and admitted that such representation failed to disclose true status of the title, and wife made no reply after having been served with notice of rescission which declared that both husband and wife had jointly perpetrated the deceit, finding that husband was wife's agent in making the representations and warranties was justified.

7. Husband and wife ⇨25(1)

The agency of husband for his wife at time of making representations which failed to disclose true status of title to leasehold conveyed by them rendered wife equally liable with husband.

8. Mines and minerals ⇨75

Under oil and gas lease permitting lessee at expiration thereof to retain and operate all wells then producing oil in paying quantities and authorizing lessee to sus-

pend operations at any time that price of oil of a specified gravity should fall below 50 cents a barrel, where well was producing nothing on expiration date of lease and was in an abandoned state, the right of lessees to produce from the well terminated on expiration date notwithstanding that on that date the price of oil of the specified gravity was below 50 cents a barrel.

9. Mines and minerals ⇨75

An option to suspend pumping under oil and gas lease if price of oil dropped below a certain price per barrel was operative during term of lease and not after its expiration, and lessee seeking to take advantage of provision permitting retention of wells producing oil in paying quantities at expiration of lease was required to continue production from well in order to extend the lease though continued operations might be carried on at a loss to the lessee.

10. Mines and minerals ⇨73½

The term of oil and gas lease having expired without presence of conditions specified in the lease as prerequisite to an extension thereof, the rights of lessees ceased on expiration date without formality of a notice, and gratuitous notice of one of lessors did not prevent termination of lease in accordance with its terms because notice lacked signatures of co-lessors.

11. Mines and minerals ⇨75

A provision in an oil and gas lease that premises must be producing oil or gas in paying quantities at expiration of specified term in order to extend lease does not involve a forfeiture, but is rather conditional limitation requiring production as a condition precedent to extension, and unless it be established that well was producing on expiration date or that a condition excusing such production obtained, the lessee has no valid claim to possessory and exploratory or operative rights.

12. Mines and minerals ⇨73½

Where the term of an oil and gas lease expires without a prior fulfillment of specified condition precedent to extension that premises be producing oil or gas in paying quantities, the leasehold is at an end and no notice to lessee is necessary in order to maintain an action in ejectment

13. Costs ⇐ 172

A successful litigant cannot recover counsel fees except upon promise of opposing party to pay the same or by force of a statute. Code Civ.Proc. § 1021.

14. Costs ⇐ 172

In action for rescission of oil and gas lease and recovery back of purchase price, recovery by plaintiff of an amount as compensation for attorneys was improper, in absence of agreement or statutory authority. Code Civ.Proc. § 1021.

Appeal from Superior Court, Los Angeles County; Frank N. Smith, Judge.

Action by the Macco Construction Company against Charles Fickert and another to recover back the purchase price of a community oil and gas lease, to recover sums expended in work upon the lease, and a further sum as compensation for services rendered by attorneys. Judgment for plaintiff, and defendants appeal.

Judgment revised by striking amount awarded as compensation for services rendered by attorneys.

Wm. H. Cree, of Long Beach, for appellants.

Schell & Delamer, of Los Angeles, for respondent.

MOORE, Presiding Justice.

In reliance upon certain representations and guarantees of appellants on April 26, 1944, respondent purchased from the former a community oil and gas lease on three lots of 5 acres each in the Torrance-Redondo oil field in Los Angeles county and certain movable property situate thereon. The consideration paid was \$8,000, for which appellants assigned the lease and executed a bill of sale purporting to convey the movables. Having found that such representation and guarantees were fraudulent and that respondent had promptly served notice of rescission upon discovery of such fraud, the court awarded judgment for the purchase price of \$8,000, for sums expended in work upon the lease in the sum of \$3,855.15 and for \$1,000 as compensation for services

rendered by attorneys employed to protect respondent's interest and to maintain this action.

The primary question posed by this appeal is whether respondent was induced to make its purchase by concealments, false statements and guarantees.

The lease was dated September 1, 1921, to run for twenty years. Appellants acquired it by assignment November 23, 1938, from the original corporate lessee. One of the lots was purchased August 23, 1940, by Parker and Opal Wood, hereinafter referred to as Wood. The well on the Wood lot produced 200 barrels per month prior to January, 1941, when a fire destroyed the derrick and production ceased. The well remained as an abandoned enterprise: no operations, no repairs during the seven months preceding August 31, 1941. The rehabilitation of the well was completed some time in 1942 when production was resumed. No oil having been produced it was time for Wood to pursue appellants and induce them to accept an extension of the lease or to treat the lease as terminated. Two days later, September 2, he served appellants with notice that the lease was terminated as to his lot as of the date of its expiration. After three months none of the personal property which had been placed on the lot by appellants and their predecessors had been removed. Thereupon Wood asserted ownership of the movables and thereafter declined to recognize appellants as lessees or to accept their payments of royalties.

The Fraudulent Representations.

[1] The court found that appellants knowingly and falsely represented and warranted that the equipment and movable property on the Wood lot were free of liens and claims and that respondent on acquiring the lease would have the right to remove such movables; that respondent believed in and relied upon such representations and warranties at the time of paying its money to appellants. The court further found that on April 26, 1944, the lease had ceased to exist by reason of the lessees' default and of the exercise by lessor Wood of his right to declare the lease termi-

nated; that the lessees were in default and respondent did not have the right to continue production or to do any work on the Wood well; that the equipment and movables were subject to the claims of Wood and could not be removed by respondent. Each of such findings is supported by substantial evidence and thus the respondent was entitled to rescission.

[2,3] A single misrepresentation of a material fact in a transaction is sufficient to support a judgment for fraud. *Duttweiler v. Washburn*, 19 Cal.App.2d 701, 66 P.2d 219; *Neff v. Engler*, 205 Cal. 484, 490, 271 P. 744; *Boas v. Bank of America*, 51 Cal.App.2d 592, 598, 125 P.2d 620. Common honesty requires a seller to make full disclosure as to any claims made in good faith against the property he offers to sell and not to permit his confiding purchaser to continue to believe in assertions of a merchantable title. *Wolfe v. Severns*, 109 Cal.App. 476, 293 P. 156. In the instant case it was found that appellants guaranteed the title to the leasehold and to the movables at the time of the assignment and conveyance thereof and that the consideration to respondent failed in a material respect.

Fraudulent Concealment.

[4,5] The court found upon uncontradicted evidence (1) that the lease was by its terms to expire on August 31, 1941, except as to *wells then* producing, and that within ninety days after such date appellants might remove their equipment; (2) that the Wood well was not producing at the expiration date; (3) that Wood had promptly served notice of such expiration; (4) that within 90 days appellants did not remove any part of the equipment or movables; (5) that after the well had been again placed on production Wood declined ever to accept proffered royalty payments. Despite their knowledge of such facts appellants not only declared the lease was in good standing and that their title to the movables was clear, but they did not disclose that the well was not on production on the date of the expiration of the lease or that Wood had notified them of his position that the lease had terminated or that he had refused to accept royalty pay-

ments. By virtue of such concealments respondent made the purchase under the belief that it was about to gain ownership of the movables with the right to continue the operation of the three wells, whereas it made the purchase of the leasehold on two lots and a lawsuit against Wood. Such a suppression of material facts concerning the lease and the chattels nullified the sale. Although a vendor may be under no obligation to speak concerning the thing he would sell, yet if he undertakes to do so he is bound not only to speak the truth in all he says but is equally obliged to tell every material fact within his knowledge which might materially qualify such statements as he may have made. *Rogers v. Warden*, 20 Cal.2d 286, 289, 125 P.2d 7; *American Trust Co. v. California Western States Life Insurance*, 15 Cal.2d 42, 65, 98 P.2d 497. Although a representation might be literally true, yet it is actionable if used to create an impression substantially false, and the vendor cannot escape liability by reason of the fact that the purchaser might have ascertained the whole truth by making inquiry. *Sullivan v. Helbing*, 66 Cal.App. 478, 483, 226 P. 803.

Appellants' attempt to justify their conduct by asserting that their attorney "was of the opinion that this lease was not terminated as to the Wood lot" is without merit. No showing was made that their counsel had knowledge of all the representations and concealments made by appellants. It is unbelievable that had he possessed such knowledge he would have entertained such opinion as that imputed to him.

From the foregoing it must follow that the judgment of rescission was a proper award unless other contentions of appellants prevail.

Mrs. Fickert Is Chargeable.

[6,7] It was admitted by the answer of Mrs. Fickert that her husband represented and warranted that they were owners of the community lease and of the personal property situate on the Wood lot. She also admitted that such representation failed to disclose the true status of the title to the leasehold, and after she had been served with notice of rescission which de-

clared that the two had jointly perpetrated the deceit and made the warranties of valid titles she made no reply thereto. In view of both her expressed and implied admissions and of her execution of the assignment of the lease, the finding of the trial court that her husband was her agent in making the representations and warranties with reference to the lease and the movables was not an arbitrary conclusion but was a reasonable deduction from the admissions and the other established facts. The agency of Mr. Fickert for his wife at the time of making the representations renders her equally liable with him. *Hargrove v. Henderson*, 108 Cal.App. 667, 683, 292 P. 148.

The Lease Had Expired as to the Wood Lot.

[8] Appellants' inability to overcome the finding that their statements, guarantees and concealments vitiated the sale of the leasehold and of the movable property on the Wood lot does not leave them without a contention for reversal. They contend that the language of two provisions of the lease establishes their good faith and the correctness of their representations. Such provisions are as follows:

"* * * Provided that at the expiration of twenty (20) years from September 1, 1921, that is to say on the 31st day of August 1941, the said right to explore and drill for oil and other hydrocarbon substances shall terminate, but the Lessee may thereafter retain and operate all wells then producing oil in paying quantities on the same terms as to royalty and other conditions as are herein specified, and maintain and use such structures and equipment as may be necessary in the operation of such wells as long as such wells shall continue to produce in paying quantities; and the Lessors hereby agree that they will not drill any well, nor cause, nor permit any well to be drilled upon any of said land surrendered by the Lessee at the termination of Lessee's right to explore and drill within three hundred and fifty (350) feet of any producing well thereafter operated by the Lessee on any of said land hereby leased. A well shall not be deemed to be producing oil or other substances in paying quantities, within the

meaning of this paragraph unless such well shall yield at least an average return per month of one hundred and fifty (150) barrels of oil.

"(B) The Lessee shall pump all producing wells with due diligence, provided, however, that if at any time the price of oil of a gravity of 14 degrees Baumé, or of any higher gravity, at 60 degrees Fahrenheit should fall below fifty (50) cents a barrel at the wells, Lessee may cease pumping oil or drilling wells upon the demised premises for and during the time that the said price of oil shall remain below fifty (50) cents a barrel at the wells, and the cessation of such pumping or drilling during such time, shall not have the effect of terminating this lease, or any of the rights herein granted to the Lessee."

In view of such provisions appellants make three arguments in support of their contention that Wood's notice did not effect a termination of the lease, namely: (1) The meaning of the quoted language is that at the expiration date of the term of the lease the lessee is granted the right to retain and operate all wells capable of producing oil or gas in paying quantities. (2) The notice of termination was ineffectual because of Wood's failure to serve a 60-day cautionary notice. (3) The notice served was an idle act because the other lessor signatories to the lease did not join in the notice.

No Suspension of Lease Requirements on Account of Low Market Values Unless Diligent Production Is in Progress.

Appellants base their first argument upon certain portions of paragraphs B while ignoring other provisions of the lease. They argue that inasmuch as on August 31, 1941, the price of oil of 14 degrees Baumé was below 50 cents a barrel lessees had the right to be relieved of the duty of operating the Wood well, and that their leasehold could not be forfeited because of the fact that the well was not then producing "an average return of 150 barrels per month." It is true that the price of the oil theretofore produced by the Wood well was below 50 cents a barrel and had been for some time prior to the expiration date. Such fact, however, did not vest in ap-

pellants the right to leave the well continuously for seven months without a pump or even a derrick. By paragraph B they were obliged to "pump all producing wells with due diligence." The well was not producing 150 barrels monthly or in any amount but was in an abandoned state. Had it been a producer in paying quantities on August 31, 1941, or at some time prior thereto, they might at such time have ceased operations without the consequence of a termination of the lease. Since it was producing nothing and was incapable of producing anything on the expiration date of the lease by reason of the failure on the part of appellants to maintain a pumping equipment, the rights of the lessees thereafter to produce from the well terminated on the expiration date.

[9] It has been held in the case of a lease requiring drilling to commence within a specified period that the obligation to commence drilling is wholly independent of any consideration based upon the price of oil, and that the provision that a lessee has the privilege of ceasing production or drilling is not operative until operations actually commence. *McComber v. Kellerman*, 162 Cal. 749, 753, 124 P. 431; *John v. Elberta Oil Co.*, 124 Cal.App. 744, 747, 13 P. 2d 538. By parity of reasoning the termination of the lease by expiration of its term is utterly independent of the right of the lessee to suspend pumping. Such option was operative during the term of the lease and not after its expiration. If a lessee may be required to commence drilling a well when the price of oil will not justify the venture and where the lease provides for a cessation of drilling after the price of oil has declined to an unprofitable price, then surely a lessee under a similar provision should be required to continue production from a well in order to extend his lease, notwithstanding the continued operations might be carried on at a loss to the lessee.

No proof was received herein that the operation of the Wood well in 1941 would have operated at a loss but on the contrary, for two years prior to the fire which enforced suspension of production the price

of oil had been below 50 cents a barrel and appellants had never suspended pumping by reason thereof. *Stimson v. Tarrant*, 9 Cir., 132 F.2d 363, is cited by appellants in support of their contention that they should have been permitted to allow the well to stand seven months without pump or derrick because of the unprofitable price of oil. But notwithstanding the laches of lessor *Stimson* in permitting the defendant to continue operation long after the market for oil had disappeared and for 14 months while the lessee stored the oil and for 11 months after production had been resumed, judgment for the lessee was affirmed on the principle which prevails in Montana that where a well is actually producing until there is an entire absence of a market for its oil such production is deemed to continue during the non-existence of a market. In the instant case appellants continued operations on the Wood well from the date they acquired it in 1938 to the time of the fire in January 1941. While they received only fifty cents a barrel they did not cease operations on that account. Presumably they operated at a profit and despite such market they let the well stand idle for seven months without making the slightest effort to resume operations until after Wood had served his notice promptly upon the expiration of the term of the lease, a quite different procedure from the delays of the plaintiff in the cited case.

Wood Only Signatory to the Notice.

[10-12] The confusion of appellants with reference to the absence of the signatures of Wood's co-lessors from the notice is distressing. Had the purpose been to declare a forfeiture for non-performance of the lessees' obligations of course not only would a cautionary notice have been necessary but also the signatures of all the lessors on writings designed to terminate the lease would have been indispensable. But such was not the nature of the document served. Wood's co-lessors had no further interest in his land after the termination of the lease. They alone had no power to extend the life of the Wood lease without their joining in such extension as was required by the instrument itself. Inasmuch as

the Wood well was producing no oil on August 31, 1941, the term of the lease as to his lot could not have been extended beyond that date without a specific grant in writing by Wood. Instead of such extension Wood took the unnecessary pains to advise appellants that their rights were at an end. The fact that he did so is not conclusive that the notice was ineffective for want of other signatures. The term of the lease having expired without the presence of conditions specified in the lease as prerequisite to an extension thereof, the rights of the lessees ceased on the date named for the expiration of the instrument without the formality of a notice. A forfeiture is not involved where an oil lease provides that the premises must be producing oil or gas in paying quantities at the expiration of the term specified. Such a provision is a conditional limitation. Production is specified as a condition precedent to an extension, and unless it be established that the well was producing on the expiration date or that a condition excusing such production obtained the lessee fails to present a valid claim to possessory and exploratory or operative rights. *Moon v. Marker*, 26 Cal.App.2d 33, 36, 41, 78 P.2d 460; *Caswell v. Gardner*, 12 Cal.App.2d 597, 600, 55 P.2d 1222. From this it must be the rule that where the term of a lease expires without a prior fulfillment of the specified condition precedent, the leasehold is at an end and no notice to the lessee is necessary in order to maintain an action in ejectment. It follows that since the Wood lot had been off production and its derrick and pumping equipment in disrepair for seven months prior to August 31, 1941, the rights of appellants in such lot ceased on that day.

As to Attorneys' Fees.

[13, 14] Three sums comprise the amount of the judgment, namely: \$8,000, the amount paid by respondent to appellants; \$3,855.15, the sum expended by respondent in erecting upon and removing its equipment from the Wood lot; \$1,000 as compensation for attorneys whom respondent "has been compelled to and has employed to protect its interest and to bring and maintain this action." As to the propriety of the first two items appellants make no objection other than their general assignment of error in awarding any judgment in favor of respondent. As to the \$1,000 awarded as an item of damage the contention of appellants is justified. There is no basis for the recovery of counsel fees except (1) upon the promise of the defendant to pay the same or (2) by force of a statute. Sec. 1021, Code Civil Procedure; *Bank of America v. Moore*, 18 Cal.App.2d 522, 64 P.2d 460. Since neither condition obtains here there is no basis for such award. Many attempts have been made in a wide variety of cases to collect counsel fees without an agreement therefor, but without avail. *Bank of America v. Moore*, supra; *Los Angeles Trust & Savings Bank v. Ward*, 197 Cal. 103, 239 P. 847; *Miller v. Kehoe*, 107 Cal. 340, 40 P. 485; *Hansen v. Covell*, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670; *City Investment Co. v. Pringle*, 49 Cal.App. 353, 193 P. 504.

It is therefore ordered that the judgment be revised by striking therefrom item 3 awarding \$1,000, and as so amended it is affirmed.

McCOMB and WILSON, JJ., concur.





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